Modern Claims against Auction Houses: ***Sotheby's v Mark Weiss Ltd and Ors*** **[2020] EWCA Civ 1570, Noted and Analysed**

Edward Mordaunt

Edward Mordaunt is a BCL candidate at St Cross College, University of Oxford, and visiting lecturer at City, University of London. In 2021 he will begin pupillage at Essex Court Chambers in London.

Introduction

Frans Hals was a mildly successful seventeenth-century Dutch old master who specialised in portraits. Few of his works have persisted in popular cultural consciousness in the intervening 400 years. One exception is the *Laughing Cavalier,* painted in 1624, which remains on display in the Wallace Collection in London. The *Laughing Cavalier* was once described by the Harvard art historian Seymour Slive as 'one of the most brilliant of all Baroque portraits'.[1] But interest in Hals' work since has been limited mostly to fine art specialists and investors.[2] This year saw the fruits of that interest in a claim against the auction house Sotheby's. The subject matter was Hals' *Portrait of a Gentleman, half-length, wearing Black*, believed to have been painted around 1650. It is a rather boring work. The subject matter is a grim, wealthy Dutch aristocrat, whose only redeeming aesthetic quality seems to be the fine robe he can afford. Beyond that there is little to spark one's interest. But luckily the artwork has generated an interesting case, engaging, in an art law context, principles of agency, partnership, witnesses of fact, and contractual construction of state of scholarship clauses. The case also provides a key moment to re-evaluate whether there are any unique or common principles which animate this area of the law. I argue that there are such principles in the final section. First, however, it is necessary to begin with the historical context of *Mark Weiss* and auction house claims more broadly.

Historic auction house claims

The vast majority of claims before English courts against auction houses have taken place in the last 30 years.[3] This has corresponded with the growing commercialisation of the fine art market internationally. In the 1990s there was a movement from the culture of gentlemanly handshakes to one of increasing legal formalisation. Martin Wilson, previously Co-Head of Legal and Compliance at Christie's, noted that in 1998 Christie's had only three people working in its legal department. 'By the time I left Christie's in 2017', he recently wrote, 'the legal department numbered 40 employees'.[4]

Since the mid-1990s, claims against auction houses have involved mixed allegations of breach of contract and tort.[5] A useful mixed example is the 1995 case of *De Balkany v Christie Manson and Woods*.[6] This case was about a work by Egon Schiele, an Austrian Expressionist protégé of Gustav Klimt, purchased in 1987 for the reserve sale price of £500,000 plus the hammer price and buyer's premium. By 1991 the buyer believed that it was a forgery, and contacted Christie's requesting a refund. Christie's' terms and conditions generally excluded liability. There was only a limited right to obtain a refund if the item was a forgery, defined with the classic term of being a piece created with an 'intention to deceive as to authorship, origin, date, age, period, culture, or source'. But that

1 Seymour Slive, *Dutch Painting: 1600–1800* (Yale University Press 1995) 38.

2 One anonymous member of the art world, after reading this, commented that this aesthetic view is rather heretical. Only such a claim could have come from someone with that professional background.

3 The earliest recorded cases stem from the mid-nineteenth to early twentieth centuries: *Saxon v Blake* [1861] 29 Beav 438; *Benton v Campbell Parker and Co* [1925] 2 KB 410; *McManus v Fortescue* [1907] 2 KB 1.

4 Martin Wilson, *Art Law and the Business of Art* (Elgar Practical Guides 2019) xvii.

5 A further distinction between claims concerning public auctions and private sales of art can be made, but for a comprehensive view here I do not do so.

6 Wilson (n 4) 98–100. The description of the case here is indebted to Wilson. The case is reported at [1997] 16 Tr LR 163. See also Norman Palmer, 'Misattribution and the Meaning of Forgery: the De Balkany Litigation' (1996) 1(1) Art, Antiquity and Law 49.

right was further limited by the requirement that, if the sale had been in line with general scholarship at the time of sale, no refund would be possible. Christie's argued that there had not been an intention to deceive, nor was it contrary to the state of scholarship when sold.

The judge disagreed. He found that 94% of the painting had been overlaid by someone other than Schiele, with 'E' and 'S' initials being added ex post as part of that conservation. He rejected Christie's' argument that no amount of overpainting could turn it into a forgery, and held that whoever had overpainted clearly intended to deceive, otherwise they would not have added the monogram. The judge also held that irrespective of the state of scholarship, the detrimental overpainting and intended forgery of Schiele's signature would have been clear to Christie's on inspection, hence the 'state of scholarship' clause could not prevent liability from attaching. Beyond just these contractual provisions, in tort, the judge went on to apply *Hedley Byrne v Heller*[7] to find that there had been an assumption of responsibility from the catalogue preparations by Christie's. In effect, Christie's comprehensively lost in both contract and tort.

Subsequent challenges on grounds of the auction house's liability in tort have, however, had muted success. In *Avrora*,[8] concerning Boris Kustodiev's *Odalisque* (a rather sumptuous Russian nude painting), the negligence claim was unsuccessful. But in *Thomson,*[9] Christie's' 'technical advisory service' to high-net-worth buyers was said to have given a general duty to bidders using their catalogues. *Thomson* concerned two potentially fake urns auctioned by Christie's as 'a pair of Louis XV porphyry and gilt-bronze two-handled vases'. Two final cases on tort claims bear mentioning. First, *Coleridge v Sotheby's*[10] concerned a valuation and private sale of a gold Tudor judicial collar. Originally the collar was sold to a private buyer for £35,000. The buyers then re-sold shortly thereafter at a Christie's auction for £260,000.[11] Pelling HHJ QC (sitting as a High Court judge) held that an assumption of responsibility had been made, but the real issue was whether the valuation had breached that duty. On the facts no breach of duty was found. Secondly, in *Thwaytes v Sotheby's*[12] a 'sleeper' Caravaggio was sold as a copy at auction for £42,000 following an expert review by Sotheby's. It then was re-sold and announced by the buyer to be an original replica of *The Cardsharps*. In a claim against Sotheby's for negligence, Rose J held that she was bound by a prior Court of Appeal decision where the standard of care was that of a competent valuer. This was analogous to the distinction between a medical GP and a specialist consultant in *Bolam*:[13] a higher standard was expected of Sotheby's as an international auction house. The outcome in *Thwaytes* was the claim's dismissal because Sotheby's had discharged its duty of skill and care, thus had not been negligent. The general academic consensus is now that *The Cardsharps* was a copy after Caravaggio, not an original.

On the whole, claims in contract against auction houses have fared differently. As early as 1950, attempts to rescind a contract under the law of mistake were held by Denning LJ (as he then was) in *Leaf v International Galleries*[14] to be precluded for forgeries. Rescission was not an available remedy because the mistake was one of *quality*, not related to the underlying *article.* The dispute in *Leaf* was over a purported piece by John Constable, titled *Cathedral of Salisbury.*[15] Moreover, terms implied by law, such as the correspondence with description by the Sale of Goods Act 1979 s 13(1), have been held to require specific reliance to be engaged: *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd.*[16] In *Harlingdon*, because the buyer of a Münter painting had not relied on the description of the artwork as an issue of fact, he was not entitled to rely on these provisions to reject the painting as a forgery subsequently. Similarly, in *Drake v Thos Agnew and Sons Ltd*,[17] Buckley J held that statements made by London's Agnews Gallery, which specialises in Old Masters, in the context of uncertainty caused by divided scholars' opinions, meant that a sale of a purported £2m Anthony van Dyke, *James Stuart, 4th Duke of Lennox*, did not amount to a sale by description under the 1979 Act. These implied terms would powerfully give rise to a right to rescission, if effective, but are frequently contracted out of now.

There is also some security in the form of the 'reasonableness' test of exclusion clauses in the Unfair Contract Terms Act 1977 s 2. It was held in *Avrora* by Newey J that these statutory strictures did indeed apply, but that, on the facts, the contractual terms were reasonable.[18] *Avrora* also concerned a claim of breach of warranty, and a misrepresentation claim under the Misrepresentation Act 1967. Whether the warranty clause was engaged required resolving if the *Odalisque* by Kustodiev was in fact authentic. Newey J placed reliance on the technical evidence about records kept of Kustodiev's oeuvre by two contemporaneous academics, Vsevolod Voinov and Fedor Notgaft, and concluded that Kustodiev did not paint the artwork. It followed that the claim under the warranty succeeded, letting the buyer cancel the purchase and receive their money back. Conversely, for the misrepresentation claim, the 1967 Act s 2(1) would give rise to damages equivalent to fraud where a misrepresentation was made to party *A* by party *B*. Newey J gave the example of warranting that it would snow next Christmas: that required no subjective belief, and instead represented 'a bet'.[19] He found Christie's had made such representations in the case, but the prior holding of the UCTA being reasonable barred the misrepresentation claim succeeding.[20] Similarly, there was a misrepresentation claim in *Drake v Thos Agnew* over the purported van Dyke. Here, however, Buckley J was not even prepared to find that there had been a misrepresentation because the appropriate context for communications passing between the seller and buyer, regarding letters sent to the latter saying he had received 'all information', had to be construed before the background of differing scholarly opinion over authenticity.

All these claims have undoubtedly provided valuable experience for the major auction houses, honing and delineating the amount of acceptable risk where the attribution of an artwork is called into question. Militating against that is the continued pressure to perform in outstanding works, as internationalism makes the market more competitive, and also more lucrative.[21]

7 [1964] AC 465 (HL).
8 *Avrora Fine Arts Investment Ltd v Christie Manson & Woods Ltd* [2012] EWHC 2198 (Ch).
9 *Thomson v Christie Manson & Woods Ltd* [2005] EWCA Civ 555.
10 *William Duke Coleridge, 5th Baron Coleridge of Ottery St Mary v Sotheby's* [2012] EWHC 370 (Ch).
11 See Paul Stevenson, 'The Mystery of the Coleridge Collar William Duke Coleridge, 5th Baron Coleridge of Ottery St Mary v Sotheby's' (2013) 18 Art Antiquity and Law 77.
12 [2016] 1 All ER 423.
13 [1957] 1 WLR 582.
14 [1950] 2 KB 86.
15 Wilson (n 4) 158.
16 [1990] 1 All ER 737.
17 [2002] EWHC 294 (QB).
18 *Avrora* (n 8) [152].
19 ibid [133].
20 See also *Spriggs v Sotheby's Parke Bernet and Co* (1968) 1 Lloyd's Rep 487 (diamonds valued at £22,000 were stolen during Sotheby's pre-sale viewing. Held: actioner owed duty of care as bailee, but contractual exclusion clauses precluded the claim).
21 The intersection between art and the conflict of laws is also beyond

Underlying facts in *Sotheby's v Mark Weiss*

The events of the case took place over a five-year period. There was an initially successful sale of Frans Hals' painting in 2011 by two corporate sellers: Mark Weiss Ltd ('MWL') and Fairlight. As is usual with auction house sales, Sotheby's facilitated the matter as the seller's agent via a private treaty to the buyer at a sale price of $10.75m plus buyer's premium. However, in 2016 the attribution of the piece was called into question. Sotheby's made a formal determination, after a number of expert reports, that the painting was a forgery. The buyer, another corporate entity called Nevada, exercised its right of rescission under an authenticity guarantee and Sotheby's returned the sale price to it. Thereafter, Sotheby's sought to reclaim the sum lost against the original sellers. Unsurprisingly, the sellers decided to vigorously defend the matter. MWL settled shortly before trial for $4.2m, but Fairlight pressed its defence. In resolving the question of liability, several interlocking contracts and agreements, with common terms used in the art world, had to be determined.

High Court judgment

The trial was heard by Knowles J in late December 2019.[22] The dispute really fell into two halves. The first half concerned attempts by Fairlight, one of the sellers, to establish that it was not bound by any of the contracts agreed. It ran an argument that there was no privity of contract because Sotheby's was only sub-agent to MWL, so there was no authority to enter agreements on Fairlight's behalf. Further, Fairlight argued that there was no partnership with MWL, so the latter had no authority to enter an agreement on Fairlight's behalf. In essence, it had never been party to the sale.

The second half of the dispute concerned Sotheby's' interaction with the buyer. Here the arguments run by Fairlight and MWL were that Sotheby's had acted in breach of an implied term of reasonableness in making its determination of authenticity, did not have a factual basis for doing so with the view of general scholarship, and also breached its fiduciary duties.

Knowles J made short work of both halves. As to the first point on agency, the copious authorities on sub-agency were not engaged as the facts did not give rise to any serious argument that Sotheby's was the sub-agent to MWL. Fairlight had consented to the sale of the painting jointly. In response, Fairlight tried to rely on an internal Sotheby's email where employees referred to a singular seller, suggesting MWL. But the judge stated clearly that the email was not a document to which legal incidence would attach. Equally, it did not matter that Fairlight had not seen, in advance, the text of the primary contract. That was its choice not to do so.

Next the judge determined the issue of partnership between the sellers. Sotheby's argument that there was a partnership succeeded. This was because the language of 'partner' had been used by the sellers in the evidence. Moreover, a draft contractual agreement which explicitly stated that there was *not* a partnership between the sellers had never been signed.

the ambit of this paper. However, the two leading cases regarding rules on choice of law characterisation are *Winkworth v Christie, Manson and Woods* [1980] 1 Ch 496, and *City of Gotha v Sotheby's* (The Times, 9 September 1998); [1997] EWCA Civ 1897.

22 [2019] EWHC 3146 (Comm). The judge distinguished between the consignment agreement, which he called 'Contract A', and the purchase agreement, 'Contract B'. For simplicity of analysis, I have not followed that distinction.

The judge then turned to the determination by Sotheby's. The auction house agreed that it had to be a rational and reasonable conclusion. On the facts the judge found it was so: there were numerous sources it had used to reach the view. The judge was particularly impressed with the evidence of Mr. James Martin, who had found particles of phthalocyanine blue on the ground layer of the painting which dated from well after Frans Hals' death. Michael Goss, Sotheby's' CFO, and the person with whom the final determination rested, had been honest about the fact that Sotheby's lost its commission and made the decision against its own financial interests. Therefore, there was also no implied term by reason of business efficacy: the parties had produced an elaborate contractual structure to resolve disputes.

Further, the contractual term giving the buyer a remedy of rescission had stated: 'This offer to rescind does not apply if, at the date of this Agreement, the Property *description* in this Agreement accords with *generally accepted views of scholars and experts* or indicates that there is a divergence of such views' (emphasis added). That was the general scholarship clause. Fairlight noted that two scholars, Professor Slive and Dr Pieter Biesboer had attributed the painting to Frans Hals; Professor Claus Grimm dissented from that view. Fairlight thus contended for a majoritarian view to the words 'generally accepted'. The vote had been 2–1. The judge rejected that contention: a more detailed analysis was required, and he noted how neither Slive nor Grimm had seen the painting in person. But the judge was persuaded by Professor Grimm's evidence in chief.

Finally, Knowles J was unconvinced that there was a duty of care at common law. Nor had Sotheby's breached any duty of care to Fairlight: the judge did not think Sotheby's repayment of $10.75m of the purchase price and buyer's premium was extra-contractually done for business reasons. In any event no fiduciary duty arose because (i) Sotheby's was evenly placed between the seller and the buyer in making a determination, and (ii) the contractual arrangements, containing specific penalties and reputational consequences, were comprehensive. In short, Fairlight lost on every point.

Court of Appeal judgment

Before the Court of Appeal (Carr, Henderson, and Peter Jackson LJJ),[23] Fairlight advanced its central attack on the law applied by the judge on sub-agency and partnership. Carr LJ gave the only reasoned judgment. She agreed with the judge that the fact Fairlight had not been named in the contract of sale did not matter: it is often the case 'particularly in the art world, that parties are keen to remain anonymous'.[24] Thus Fairlight's attempt to characterise one of the contracts as the 'main agency agreement' was considered by Carr LJ to be 'an ... artificial construct'. And even if Sotheby's had been Fairlight's sub-agent, because Fairlight and MWL were co-owners of the painting, each had to be privy to the contract with Sotheby's. As to the partnership point, Carr LJ noted that she was less certain than the judge that a partnership existed. In particular, the statutory requirement by the Partnership Act 1890 s 1 of a 'business in common' between the parties was doubtful, in her view, on the evidence. But this did not amount to a demonstrable misdirection on law which it would be right for an appellate court to disturb.

Next, Carr LJ also rejected Fairlight's proposed 'majority' test of scholarly views to give rise to the buyer's right to rescind. The wording of the clause required a more penetrating analysis: the

23 [2020] EWCA Civ 1570.

24 ibid [79].

strength and precision of the expert's view, the scholar's status, and the contextual background for the view given, were all more important. An exercise of judgment could not be reduced to the 'mechanical process' Fairlight argued for.[25] Hence the appeal was comprehensively dismissed.

Discussion

There are five points which should be made about the *Mark Weiss* litigation.

The first is the regrettable observation that neither the High Court nor the Court of Appeal was required to determine the authenticity of the painting in this case. At first instance Knowles J said '[i]t is positively desirable that I do not [reach a view on the question of authenticity] where to do so is not necessary, as that could have collateral impact on the value of the Painting'.[26] In this respect *Mark Weiss* avoided the attribution arguments run in both *Avrora* and *Drake,* which the misrepresentation claims necessitated. But there is little doubt given Knowles J's acceptance of particular forms of scholarly evidence, that the only reasonable conclusion one could draw is that the artwork was incorrectly attributed.[27]

The second point is broader. The purpose of the rather elaborate contractual scheme in this case has a single aim: that the buyer and seller do not know the identity of one another via the sale medium alone.[28] The protracted nature of the litigation in this case thus shows how expensive that decision is. But it surely must be a premium Sotheby's is willing to facilitate.

Third, Sotheby's comes off well for its professionalism in both judgments. There was, however, an odd point that it alone commissioned the first report by Mr Martin, its expert witness at trial, which it then passed on to the buyer. The risk is that Sotheby's might be seen to be jumping the gun in raising doubts about an artwork the sale of which it had facilitated. Knowles J held that because there was no limitation on the origin of this written evidence, what mattered was the subordinate clause where authenticity doubts arose.[29] That purposive interpretation, in my view, is incorrect. The object of the provision is clearly that the buyer is to initiate such doubts in writing. There is not to be a safeguard or mutual checking by both the auction house and the buyer. Literally, too, 'to provide' means as a transitive verb '[t]o supply (something) for use; to make available; to yield, afford'.[30] Sotheby's was not being supplied Mr Martin's report for its use; it already had it.

Related to this is a fourth point about fiduciary duties. As might have been inferred from Section 2 above, fiduciary duty arguments have seldom historically been run in claims against auction houses. This is not surprising. The general position is likely because the unique remedies against a fiduciary, including no unauthorised profit and no secret commissions/bribes, will not frequently be in issue for large international auction houses. A recorded example of where a smaller auctioneer was found to have breached his fiduciary duty is *Hippisley v Knee Bros.*[31] Here an auctioneer pocketed a 10% discount offered by the printer of the sale catalogue, whilst charging the buyer at full rate. It was held that the auctioneer had to repay the secret profit. Similarly, in the context of an agent, *Accidia Foundation v Simon C Dickinson Ltd*[32] concerned whether an art dealer who arranged the sale of Leonardo da Vinci's drawing *Madonna and Child with St Anne and a Lamb* could retain a $1m commission. That commission had been the difference between an amount agreed by the buyer and the amount the seller unknowingly expected to be paid. Vos J (as he then was) found no difficulty holding that the commission could be disgorged.

Therefore, in *Mark Weiss* it was surprising how little consideration of the duty of utmost good faith owed by an agent to his principal[33] was given by both the High Court and the Court of Appeal. That is likely to be a function of the narrowing issues between the parties as they argued the case in court. Indeed, the lengthy contractual documentation will be given preference to narrow the issues over a more open-textured analysis in equity. That is especially so in the context of private sales of art. But given that it was Sotheby's which initiated the correspondence leading to the buyer exercising its right of termination, it is in my view at least questionable whether doing so was in the sellers' best interests at that time (ie before the buyer had independently become aware).

Fifth, and finally, it is surprising that permission to appeal was given (although it is unclear by which court) in this case. But, now it has been given, it is appropriate to analyse whether *Mark Weiss* sits in a body of legal principles which applies commonly in these auction house cases over the last 30 years. The authorities, in my view, can be said to throw up the following propositions:

a. There is a presumption that auction houses are experts on attribution: *Thwaytes.*[34] A higher duty of care is thus expected of large international auction houses. This presumption does not however mean that internal correspondence (including emails) displaces the contractual agreed terms: *Mark Weiss.*

b. In the context of an elaborate and professional relationship in public auctions and private sales, claims in contract and tort are generally given greater attention by the court than that of fiduciary duties: *De Balkany.* General 'best interests' claims are seldom entertained when the auction house is agent: *Mark Weiss;* cf *Accidia.* The usual legal principles and objective analysis a court is required to undertake of the meaning of a contract apply.

c. 'State of scholarship' clauses will not be resolved on a 'majority' basis but require a more penetrating analysis by the judge, involving issues of weight and balance: *Mark Weiss.* The conclusion which the judge draws must be afforded due weight itself based on the principle (e) below.

d. Misrepresentation claims should be run as a last resort. They risk both requiring the judge to decide the issue of authenticity, *Drake,* and might end up being barred by a reasonable exclusion clause in the contract, *Avrora.* Mistake claims in contract are generally futile: *Leaf.*

25 ibid [102].
26 *Mark Weiss* (n 22) [41].
27 It must be recalled, of course, that this conclusion was reached on the civil standard of proof: the balance of the probabilities, which de facto attribution cannot rely on.
28 *Mark Weiss* (n 22) [14].
29 ibid.
30 'provide, v.' (*Oxford English Dictionary Online*) <www.oed.com/view/Entry/153448> accessed 4 June 2021.
31 [1905] 1 KB 1.
32 [2010] EWHC 3058 (Ch); Wilson (n 4) 198–99.
33 *Parker v McKenna* [1874–75] LR 10 Ch App 96.
34 (n 12). Here the auction house relied on its own expertise of the Caravaggio and it was found that nothing could have counteracted the view reached by Sotheby's. See also Wilson (n 4) 103.

e. However, a significant degree of deference will be given to the first instance judge required to resolve a claim against an auction house. An appellate court will hesitate to intervene: *Mark Weiss; Simonis*.[35] Attribution disputes are frequently mixed issues of fact and law. The appropriate weight of expert evidence thus remains paramount, even where the court is not required to resolve the ultimate question of authenticity.

Conclusion

'Beauty is as summer fruits, which are easy to corrupt and cannot last', wrote Francis Bacon in his 1612 essay 'Of Beauty'.[36] English law will continue to both shine and blush as it grapples with the intricate problems thrown up by sales of art, corrupting the beauty that others would have seen once before. But that the courts have developed a body of law (however small) relating to auction house claims, and art law more broadly, is now shown by *Mark Weiss* and its forebears beyond doubt.

35 *R (Simonis) v Arts Council England (Rev 2)* [2020] EWCA Civ 37. This case was a judicial review of an export licence decision by Arts Council England. The underlying piece was Giotto's *Madonna con Bambino*, worth c £10m. Carr LJ's reasoning mirrored this outcome.

36 Francis Bacon, *Essays* (first published 1597; Oliphant Smeaton ed, Everyman's Library 1943) 130.