

# Art Antiquity and Law

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# ART ANTIQUITY AND LAW

*Art Antiquity and Law* is a quarterly journal, now in its 28th year, published by the Institute of Art and Law. Each issue contains a range of articles which provide insight and information on various aspects of the law relating to art and antiquities.

It is designed to be read by people who work in areas other than law, as well as by legal practitioners, including museum officials, collectors, archaeologists, art historians, tax advisers, owners of historic properties and cultural policy advisers. Digital and hard copy subscriptions are available from:

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## THE FINE ART OF ACQUIRING AUTHENTIC ARTWORKS

Gemma Broughall,\* Natalia Faekova,§ Ilana Granditer,† Laurence Lieberman‡

*In the decade and a half that I was with the Metropolitan Museum of Art I must have examined fifty thousand works in all fields. Fully 40 percent were either phonies or so hypocritically restored or so misattributed that they were just the same as forgeries. Since then I am sure that that percentage has risen.<sup>1</sup>*

The above comment was made by the late Thomas Hoving, Director of the Metropolitan Museum of Art from 1967 to 1977 and is food for thought. Following its biggest recession for ten years, the global art market rebounded strongly to reach sales of \$67.8 billion in 2022.<sup>2</sup> If Mr Hoving's appraisal is anything to go by, that equates potentially to a lot of unwisely spent money.

Of course, fakes and forgeries<sup>3</sup> in the art world are not new. Indeed, imitation, as the saying goes, is the sincerest form of flattery. The art of forgery, for instance, has been around since ancient times when Roman sculptors used to produce copies of their Ancient Greek predecessors' sculptures. However, unlike today's art buyers, the Romans would have likely known that they were not buying genuine works of art.

The art world has been described as one of the largest unregulated markets in the world, a place where privacy reigns and confidentiality is king. In view of this and given the rapid expansion of the art market in recent years, not least in terms of the volume and value of transactions, now, more than ever, collectors need to be vigilant and discerning when it comes to doing their due diligence on art acquisitions.

So how does a buyer contemplating an acquisition of an artwork know that they are getting what they thought they were paying for?

In this article we will examine the various investigative steps that can be taken pre-purchase to minimise the chances of buying a fake or forgery. We also give some practical guidance to buyers as to how to protect themselves upon acquisition, and, lastly, we discuss possible routes to resolution for buyers who believe they may not have acquired the real deal.

### VENI, VIDI, VINCI? VERIFY BEFORE YOU BUY

The esoteric world of art depends on opinion, scholarship and highly specialised expertise. Yet, deals in the art world are still often done on a handshake and a promise,

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1 Thomas Hoving, *False Impressions: The Hunt for Big-Time Art Fakes* (Simon & Schuster, 1996), para. 17.

2 Clare McAndrew, 'The Art Market Report 2023', An Art Basel & UBS Report.

3 A fake is a copy, replica or misattributed artwork. In contrast, a forgery is a counterfeit or reproduction of an original artwork produced with the intent to deceive others into believing it is something it is not.

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\* Senior Associate, Taylor Wessing LLP.

§ Senior Associate, Taylor Wessing LLP.

† Associate, Taylor Wessing LLP.

‡ Partner, Taylor Wessing LLP.

without much due diligence and expert input. It appears that many view such prosaic concerns as spoiling the romance of the art purchase. However, in reality, thorough due diligence and expert advice can be key to a long-lasting relationship with a work of art. In this section we discuss three ways to minimise your risk when buying an artwork – seeking advice on authenticity, condition and valuation. The extent of due diligence will, of course, need to be balanced against the value of the artwork, but for the most valuable pieces all three areas of research should be considered.

### Authenticity

How does a buyer know they are purchasing the genuine article? How do you distinguish a Vermeer from a van Meegeren? A Monet from a Myatt? A Braque from a Beltracchi?

Walter Benjamin, the German philosopher and art critic, in his essay *The Work of Art in the Age of Mechanical Reproduction* (1936),<sup>4</sup> uses the word ‘authentic’ to refer to an original work of art as having a unique existence in the place and time it happens to be in. Most importantly, a work of art’s unique aesthetic authority is intrinsic to its value.

Buyers should be aware of the varying terminology used to describe the attribution of artworks for sale. To the uninitiated this terminology can appear confusing given the plethora of terms commonly used. Helpfully, auction houses, such as Sotheby’s and Christie’s, have collated a glossary of such terms to explain the nuances and prospective buyers are advised to carefully review the descriptions of artworks alongside these terms to be clear on exactly what they are purchasing.<sup>5</sup> We set out some examples below:

- “By”: the work is made by the hand of the artist (and the price will reflect that).
- “Attributed to”: the painting is probably by the artist.
- “Studio of”/“Workshop of”: a work executed in the studio or workshop of the artist, possibly under his supervision.
- “Follower of”: a work executed in the artist’s style but not necessarily by a pupil, or anyone who worked directly with the artist.
- “Circle of”: by someone from the same period of the artist and shows his or her influence.
- “Manner of”: a work done in the style of the artist but at a later date.
- “After”: a copy of a work by the artist.
- “School of”: a work by a pupil or follower of the artist.

Establishing authenticity is both an art and a science. It involves a thorough investigative exercise on the part of the buyer (much like when buying a house) particularly in circumstances where the artist has been dead for centuries.

There are broadly three ways to authenticate a work of art. Depending on the value of the artwork, a combination of all three may be used.

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4 An English translation of Walter Benjamin’s essay by A.J. Underwood has been published by Penguin Books (1<sup>st</sup> edn, 7 Aug. 2008)

5 For example, see London Conditions of Sale Buying at Christie’s (standard) at: <[https://www.christies.com/buying-services/buying-guide/conditions-of-sale?sc\\_lang=en&lid=1](https://www.christies.com/buying-services/buying-guide/conditions-of-sale?sc_lang=en&lid=1)>.

### ***Presence of Genuine Documentation (Provenance)***

Provenance comes from the French word *provenir* meaning ‘to originate’, which, in turn, is derived from the Latin *provenire*. The provenance of an artwork refers to both its historical ownership and chain of custody. Provenance is critical to determining both the authenticity and value of an artwork.

Buyers should never purchase an artwork without examining the provenance first and there are many resources to assist with this. Ideally, the seller should volunteer all the necessary information and documentation before purchase but if they do not, buyers should ask questions. Buyers should also be wary of sellers who are reluctant to show evidence of provenance, for example, citing confidentiality or privacy of previous owners, since this may be evidence of questionable (or at worst, complete lack of) provenance. If buyers have any concerns as to an artwork’s provenance it would be prudent to contact an independent expert, consultant or dealer before buying.

Unfortunately, authenticity cannot be demonstrated by one single, official, globally recognised document and therefore an authenticity *dossier* can end up being quite voluminous.

A good starting point to research the provenance of a prospective purchase is the International Foundation for Art Research (IFAR),<sup>6</sup> which includes links to important archives, image databases, dealer and sales records and other references. IFAR’s provenance guide<sup>7</sup> contains links to important resources such as INTERPOL’s database of stolen artworks and the Art Loss Register. Notably, the guide also contains links to databases administered by the German Lost Art Foundation, which lists works of art looted by the Nazi regime during the Second World War. A cautionary tale on provenance is the US case of *Brooks v. Sotheby’s*,<sup>8</sup> in which Mr Brooks sued Sotheby’s for failing to disclose that the painting he had bought had once been in the possession of Hermann Göring, which effectively rendered it worthless.<sup>9</sup>

Buyers should also be alert to the fact that forgery of provenance information has become a crucial aspect of art forgery, as was the case with Subhash Kapoor, an Indian-American antiquities dealer who was convicted in 2022 of trafficking \$145m in antiquities.<sup>10</sup> Mr Kapoor used false and fabricated provenances to create the illusion of authenticity before selling the artefacts through his art gallery (‘Art of the Past’) to museums, galleries and private collectors.<sup>11</sup>

Another critical resource for buyers to consult is the *catalogue raisonné*, a descriptive catalogue listing all of the known artworks by an artist (either in a particular medium or all media) with explanations and scholarly comments. Again, many are accessible digitally through, for example, IFAR’s website.

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6 <<https://ifar.org/>>.

7 <[https://ifar.org/Provenance\\_Guide.pdf](https://ifar.org/Provenance_Guide.pdf)>.

8 No. 13-cv-02183 RS (N. D. Cal 2013).

9 See Laura Gilbert, ‘Collector Steven Brooks Says Sotheby’s Sold Him Nazi Art’, *Art Newspaper*, 1 May 2013.

10 See Tessa Solomon, ‘Antiquities Dealer Subhash Kapoor Sentenced to 10 Years in Prison by Indian Court’, *ARTnews*, 2 Nov. 2022.

11 See Julianne Schmidt, ‘Subhash Kapoor: A Decade in Review’, *Center for Art Law*, 13 July 2021.

Buyers should always request to see a certificate of authenticity before purchase. Certificates of authenticity are formal documents accompanying a work of art, which attest to the authenticity of the work. They can be signed by the artists themselves (if living or recently deceased) or by a recognised authority or expert on the artist.

There is debate within the art world as to whether certificates of authenticity are actually worth the paper they are written on given they are of little actual worth on their own. For example, they do not carry any particular legal status in the UK since there is no legislation that specifically determines which subjects are entitled to issue the certificate of authenticity (unlike in, say, Italy<sup>12</sup>).

Certificates can also be open to challenge on grounds either of the authenticity of the certificate itself or the underlying opinion expressed within the certificate. Therefore, buyers should scrutinise a certificate to ensure: (i) it is original, (ii) it is issued by a widely respected and recognised authority or expert on the artist, (iii) it relates to the artwork in question and (iv) the opinion is not expressed in unqualified terms.<sup>13</sup>

Other pieces of information/documentation that will assist a buyer to establish provenance include:

1. An original invoice or bill of sale as proof of purchase/evidence that the seller is the legal owner of the item being sold.
2. An appraisal from a recognised authority or expert on the artist (see further below).
3. An exhibition or gallery sticker attached to the art.
4. Letters from recognised experts or authorities discussing the art.
5. Newspaper, journal or magazine articles mentioning or illustrating the art, or a mention or illustration of the art in a book or exhibit catalogue.
6. A signed receipt, statement or certificate directly from the artist that specifically describes the work.
7. A film or recording or photograph of the artist talking about the art or pictured with the art.
8. Documented materials or information about the art related by someone familiar with the art or who personally knows the artist and who is qualified to speak authoritatively about the art.

Collectors should make sure to keep all documents associated with the artwork to tell its story in the future.

12 In Italy, anyone who sells art professionally is obliged to provide the buyer with “*la documentazione attestante l'autenticità o almeno la probabile attribuzione e la provenienza; ovvero, in mancanza, di rilasciare, con le modalità previste dalle disposizioni legislative e regolamentari in materia di documentazione amministrativa, una dichiarazione recante tutte le informazioni disponibili sull'autenticità o la probabile attribuzione e la provenienza*” (“*Codice dei beni culturali e del paesaggio, ai sensi dell'articolo 10 della legge 6 luglio 2002, n. 137*”). English translation: “*documentation certifying the authenticity or at least the probable attribution and the provenance; or, failing that, to issue, in the manner provided for by the laws and regulations on administrative documentation, a declaration containing all available information on authenticity or probable attribution and provenance*” (Code of Cultural Heritage and Landscape, pursuant to Article 10 of Law no. 6 of 2002 July n. 137).

13 Martin Wilson, *Art Law and the Business of Art* (2nd edn, Elgar Practical Guides, 2022) p. 146.

### ***Appraisal by a Qualified Expert (Connoisseurship)***

Art authentication strives to establish whether or not a work is genuine.<sup>14</sup> Art authenticators are connoisseurs. This is the proverbial ‘Educated Eye’.<sup>15</sup> The term ‘connoisseurship’ sometimes evokes negative connotations caricatured in “metaphorical and, sometimes, actual white gloves and monocles and glasses of port”.<sup>16</sup> In connoisseurship the emphasis is on what can be learnt from the object itself, irrespective of context, science and documentation. The discipline encompasses factual knowledge about the work of art, comparative knowledge, knowledge of which works by the artist are historically relevant or characteristic of the artist’s process.

It is always advisable to seek out a scholarly opinion about the work before purchasing, as connoisseurship is often considered the most authoritative and conclusive way to determine authenticity.<sup>17</sup> Provenance and scientific testing alone are not enough. As discussed further below, scientific analysis may be helpful in proving a negative (for example, that a painting is *not* of the period), but usually has limited value in providing a positive attribution.<sup>18</sup> Similarly, provenance could simply trace the ownership of a forged work or be forged itself. For example, in the case of John Drewe and John Myatt,<sup>19</sup> a fraudster and a forger worked together and fooled the art world with numerous fake Giacometti paintings executed by John Myatt. John Drewe provided provenance documents for the forgeries which he then inserted into the archives of the Tate. Tellingly, it was Mary Lisa Palmer, the director of the Giacometti Association and a Giacometti connoisseur, who refused to believe the paperwork and, looking only at the works themselves, established that they were forgeries.

On the other hand, connoisseurship is not full proof. When connoisseurs of Vermeer despaired at the lack of religious works by the artist, the notorious forger Han van Meegeren provided them with just such works. Van Meegeren studied closely the brushstrokes and

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- 14 Not to be confused with art appraisals, which focus on an artwork’s monetary value.
- 15 A seminal work on connoisseurship is Giovanni Morelli, *Italian Painters: Critical Studies of Their Works*, (John Murray, 1893). In this work, Morelli expounds the virtues of connoisseurship by saying that art should be studied from the works of art themselves, rather than from books: “No one [...] would dream of writing on physiology without having first mastered anatomy”. Morelli’s method was to focus on certain elements of the composition, which are less important (e.g., an ear, or how a thumbnail is painted). These lesser elements, according to Morelli, were least likely to be influenced by the demands of a patron and were more likely to betray the artist’s own signature.
- 16 Stephen Deuchar (Director of the Art Fund) speaking at *The Educated Eye? Connoisseurship Now* webinar at the Paul Mellon Centre on 2 May 2014.
- 17 In *Thwaytes v. Sotheby’s* [2015] EWHC 36 (Ch.) at 31 the judge heard evidence from both technical experts and a connoisseur preferring the latter. Likewise, in *Drake v. Thos Agnew & Sons Ltd* [2002] EWHC 294 (Q.B.) at 43, both expert witnesses and the judge agreed that the question of attribution could be resolved by ‘eye’. In *Avrora Fine Arts Investment Ltd v. Christie, Manson and Woods Ltd* [2012] EWHC 2198 (Ch.) at 118, Newey J. held that connoisseurship evidence provides the most reliable guide to authenticity. Although note the comments by Jacobs J. in *Qatar Investment & Projects Development Holding Co v. John Eskenazi Ltd* [2022] EWHC 3023 (Comm.) at 704, that an ‘eye’ is far less significant in assessing the authenticity of an ancient object as opposed to attribution to a particular artist – in cases of antiquities, “[...] the most important factor – in the art historical context – is knowledge of and comparison with the known and undisputed historical record.”
- 18 As was acknowledged by Rose J. in *Thwaytes*, above, note 17 at 31.
- 19 Laney Salisbury and Aly Sujo, *The Conman* (Gibson Square Books, 2020).

materials used by Vermeer and specifically targeted Abraham Bredius, a well-respected Vermeer connoisseur, to authenticate and introduce his first works, knowing that once this man hailed the works as genuine the others would be reluctant to disagree.<sup>20</sup>

Connoisseurs can be individuals, who have typically studied an artist or particular era of art closely or foundations set up to safeguard the legacies of particular artists. For example, the estates of Warhol, Basquiat and Lichtenstein all (at one time) had their own authenticating bodies (they have since been disbanded as a result of either being embroiled in costly lawsuits or the fear of being sued).

The proliferation of forgeries in the art market in recent years means that art authentication is big business. However, it is also a risky one. A case in point was the grilling given to experts in the (infamous) case of *De Sole v. Knoedler*.<sup>21</sup>

Foundations, in particular, have attracted much controversy because of the power they are perceived to wield. An all-important certificate of authenticity issued from a foundation can make an artwork worth millions; if it is denied, then the work is worthless. This has led to allegations of, for example, conflicts of interest, and accusations of manipulating prices.

There have been some very high-profile disputes involving foundations within the last twenty years, for example, in 2007 Joe Simon-Whelan sued the Andy Warhol authenticating body claiming that it had twice rejected an authentic work by the artist. Mr Whelan ultimately dropped his lawsuit (alleging lack of funds to continue).<sup>22</sup> Having spent \$7m defending the action the authenticating body decided to disband in 2011. Perhaps having seen the writing on the wall, the Roy Lichtenstein foundation ceased providing authentication services in 2011 for fear of being subject to lawsuits, the Basquiat committee ceased authentication services in 2012<sup>23</sup> and the Keith Haring authentication board followed suit by disbanding in 2012. However, in 2014, the Haring Foundation was hit with a \$40m claim concerning 63 works that the owners said were genuine,<sup>24</sup> but the Foundation claimed were not. The lawsuit was dismissed in 2015.<sup>25</sup>

20 Frank Wynne, *I Was Vermeer: The Legend of the Forger Who Swindled the Nazis* (Bloomsbury Publishing, 2006).

21 974 F. Supp. 2d 274 (S.D.N.Y. 2013). A key piece of evidence during trial was a letter from Ann Freedman (the gallery's president) to the De Soles containing a list of eleven experts who had allegedly authenticated the Rothko. The list included Laili Nasr, who was making a supplement to the Rothko *catalogue raisonné*, Christopher Rothko, the artist's son, art historians Irving Sandler, Stephen Polcari and David Anfam, the author of the *catalogue raisonné* for Rothko's works on canvas and E.A. Carmean Jr, a former curator at the National Gallery of Art. However, Mr Anfam testified that he was never asked to give his opinion on the Rothko and he never saw it in person, only in pictures that Freedman had sent to him after the De Soles purchased it. Others whose names appeared on the list echoed this sentiment. Sandler testified that he had no knowledge his name was being used on a document presented to prospective buyers and said he did not authenticate works of art. Rothko gave similar testimony, saying he steered clear of offering opinions on the authenticity of his father's work so that he did not end up in court. The lawsuit was eventually settled for \$25m (more than the \$8.3m the De Soles originally paid for the painting). It also exposed a fourteen-year \$80m forgery ring during which the gallery had sold some 40 counterfeit paintings (including works by Robert Motherwell, Jackson Pollock, Clyfford Still, Willem de Kooning and Mark Rothko).

22 Lindsay Pollock, 'Case against Warhol Foundation Withdrawn', *Art Newspaper*, 1 Dec. 2010.

23 Eileen Kinsella, 'Basquiat Committee to Cease Authenticating Works', *ARTNews*, 24 Jan. 2012.

24 *Bilinski et al. v. The Keith Haring Foundation Inc et al.*, U.S. District Court for Southern New York, No. 14-cv-1085.

25 Reuters Staff, 'Judge Tosses Art Collectors' Lawsuit over Labeling Haring Works Fakes',



Perhaps the most famous (or infamous) case in recent times involving expert appraisal of an artwork is that of *Salvator Mundi* (widely dubbed ‘The Lost Leonardo’). Its eye-watering sale price of \$450.3m in November 2017 alone raised eyebrows but it also brought to the fore yet again tricky problems in relation to authentication and attribution. Although the study and examination by scholars “resulted in broad consensus that *Salvator Mundi* was painted by Leonardo da Vinci”<sup>26</sup> there are others who doubt that it was painted entirely (or even in part) by the Master and believe instead that it is more likely to have been painted by a pupil. In 2021, news reports referred to an undisclosed study by the Louvre confirming the attribution of the work to Leonardo Da Vinci<sup>27</sup> but given that the museum is not permitted to write about privately-owned works if they are not displayed in their galleries, no official record of the painting’s attribution exists. It has been (and continues to be) the subject of much debate among experts and critics due to doubts about its attribution, restoration and ownership history.

Therefore, an opinion from a recognised and respected expert or authority still has its place in the authentication process but buyers should also consider supplementing with other tools, including scientific examination.

### ***Scientific Examination***

Developments in scientific and forensic analysis go a long way to alleviating some of the problems inherent in using subjective expertise in the authentication process. Forensic analysis is a useful way of separating the wheat from the chaff. However, such procedures can be costly and not always conclusive, i.e. they can prove that an artwork is a fake but they cannot prove it is genuine.<sup>28</sup>

When authenticating a painting, for example, scientists will evaluate whether its material composition matches what is known to have been available and used during the time period in which it was supposed to have been created. Techniques range from the non to minimally invasive (forensic imaging, X-rays, infrared spectrometry) through to the more invasive (dendrochronology and radiocarbon dating). Usually, two or more scientific techniques are used in combination to ensure accurate findings.

In 2016 Sotheby’s became the first auction house to set up an internal forensics laboratory aimed at strengthening its efforts to identify forgeries before putting them up for auction.<sup>29</sup>

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*Reuters*, 7 March 2015.

- 26 See the Lot Essay for Leonardo da Vinci’s *Salvator Mundi* on Christie’s website at: <[www.christies.com/en/lot/lot-6110563](http://www.christies.com/en/lot/lot-6110563)>.
- 27 Alison Cole, ‘The Real Reason Why the *Salvator Mundi* Didn’t Make it into the Louvre’s Leonardo Show’, *Art Newspaper*, 7 April 2021.
- 28 For example, the use of scientific testing to establish the correct period of attribution of artworks was extensively debated in the cases of *Thomson v. Christie Manson & Woods Ltd* [2005] EWCA Civ. 555 (noted by A.H. Hudson in (2005) X *Art Antiquity and Law* 307) and *Coleridge v. Sotheby’s* [2012] EWHC 370 (Ch.) (noted by Paul Stevenson in (2013) XVIII *Art Antiquity and Law* 77). However, scientific evidence was not determinative and the courts had to analyse a wider range of evidence in order to come to their conclusions. In *Thomson*, May L.J. (giving the leading judgment) appeared to prefer the combined evidence of the experts over the metallurgic evidence presented to the Court (para. 152). In *Coleridge*, Judge Pelling Q.C. was not persuaded that an assay test on the gold of the Coleridge Collar would assist with determining the date of manufacture (paras 100-101).
- 29 James Pickford, ‘Sotheby’s Creates Forensic Art Unit to Detect Forgeries’, *Financial Times*, 5 Dec. 2016.

## Condition

An agreement for sale will often contain a clause to the effect that the buyer has inspected the artwork and has satisfied himself or herself as to its condition or, alternatively, that the buyer is purchasing the work ‘as is’, i.e., in whatever condition it is in at the time of the sale.

It is always advisable to examine the work in person prior to purchase. An Old Master painting would almost certainly have been restored in the course of its existence simply because it is old. The goal of the examination is to assess the extent of this manipulation and see if there are any red flags. In some cases, it may be worth retaining a reputable conservator to provide a condition report.

Wilson<sup>30</sup> points out that, while auction houses will guarantee the authenticity of the works they sell, they will usually not guarantee the condition of the works, inserting exclusion of liability clauses in their terms of sale.<sup>31</sup> This is because many condition issues become apparent only following invasive treatment of the work (such as cleaning) and not on simple physical examination. In case of a dispute, the auction house will seek to rely on the exclusion clause. In a private sale through a gallery there may be more flexibility in negotiating the terms or in agreeing further testing prior to purchase.

## Valuation

Art valuation is a sophisticated branch of financial valuation requiring a high level of expertise in valuation methods, as well as a developed knowledge of the art world. Estimating the fair value of artworks can be a difficult task given the naturally subjective nature of the product. Getting it right is vital. The value of a piece of art is necessary for matters including tax planning, insurance, inheritance, divorce and debt.

Not only will insurance need to be taken out on the current value of a piece of art, but the future value will also be considered given the natural fluctuation of value inherent in the art market. Insurance generally covers claims relating to damage, loss or incorrectly valued works. Determining the value of an artwork is also essential in situations of inheritance and divorce where multiple parties will have an interest in a piece or a collection. When Microsoft executive Christopher Larson and his wife, Julia Calhoun, began divorce proceedings, their collection was valued at \$102m. It was not as simple as splitting the collection in half since the couple attributed different values to the artworks.

30 Wilson above, note 13 at pp. 369-370.

31 For example, here is Christie’s clause on condition in online auctions:

*“(a) The condition of lots can vary widely due to factors such as age, previous damage, restoration, repair and wear and tear. Their nature means that they will rarely be in perfect condition. Lots are sold “as is”, in the condition they are in at the time of the sale, without any representation or warranty or assumption of liability of any kind as to condition by Christie’s or by the seller.*

*(b) Any reference to condition in the Sale Particulars or in a condition report will not amount to a full description of condition, and images may not show the condition of a lot clearly. Colours and shades may look different on the screen to how they look on physical inspection. Condition reports may be available to help you evaluate the condition of a lot. Condition reports are provided free of charge as a convenience to our buyers and are for guidance only. They offer our opinion but they may not refer to all faults, inherent defects, restoration, alteration or adaptation because our staff are not professional restorers or conservators. For that reason, they are not an alternative to taking your own professional advice. It is your responsibility to ensure that you have requested, received and considered any condition report.”*

Ultimately, the case went before a judge to split the collection as private negotiations were unsuccessful. He asked each party to write an essay explaining which pieces meant the most to them, ultimately resulting in Larson receiving \$49m worth of the collection with the rest going to Calhoun.<sup>32</sup>

Leverage has increasingly become a part of art finance over recent years, boosting the loans market. Collectors and museums alike will turn to the art finance market seeking to use their artwork as collateral. Typically, the loan to value limit does not exceed 50 per cent.<sup>33</sup> To assess the artwork's value, art lenders will instruct professionals who ensure accurate valuations to determine the size of loan they are comfortable to provide.

When valuation goes wrong, millions could be lost. In 2010, a lost Titian was mistakenly valued by Christie's at £8,000.<sup>34</sup> Years later and after a light clean, it sold for \$4m. Christie's was later sued for misidentifying the artwork as being 'from the school of Titian' and the original owners received an out-of-court settlement for the loss sustained. In the case of *Luxmoore-May v. Messenger May Baverstock*,<sup>35</sup> an auctioneer determined that the claimant's two paintings were worth £30 to £50 – they later sold for £88,000. The claimant sought compensation based on the auctioneer's negligence, arguing the auctioneer owed her a duty of care. The Court determined that there was no liability as the auctioneer followed all tests and expected industry practices of a generalist valuation and there was no way to predict the future increase in value. The Court held that the standard will be higher if the auctioneer is a specialist or a leading auction house. The Court emphasised that just because a valuer gets it wrong does not mean they are negligent. In a recent 'sleeper'<sup>36</sup> case, art dealer Simon Dickinson sold *Le Bénédicité* by Chardin, (of which four versions accepted as having Chardin's hand are known to exist), for £1.15m as a work by the artist and his studio.<sup>37</sup> Chardin historically caused much confusion within the art trade by sometimes signing works prepared by his studio. In the *catalogue raisonné*, the painting was listed as a '*copie retouchée*', a term on the meaning of which there is no consensus. The judge acknowledged that consulting the author of the catalogue on its interpretation "was not a request for advice, it was a spin of the roulette wheel".<sup>38</sup> Although the selling price could have been improved by several millions, there was also a risk that it could have been destroyed. "The making of judgement calls of this kind was exactly what Mr Dickinson was being paid to do."<sup>39</sup>

After a deep clean by its new owner, Chardin's previously unseen signature was revealed and the piece sold for £4.9m more only six months later. Ultimately, the Judge decided that he could not "find this pricing determination to be negligent". The reason for this was that neither side's experts were prepared to dispute it, observing that the complete absence of any market precedent for a sale of a work with this particular combination

32 Ken Armstrong, 'The Art of Divorce: She Gets the Monet, He Gets the Renoir', *Seattle Times*, 28 July 2012.

33 <<https://www.fineartgroup.com/services/art-finance/>>.

34 Matthew Moore, 'Christie's Sued for 'Misidentifying Titian Painting Worth Millions'', *Telegraph*, 25 Feb. 2010.

35 [1990] 1 W.L.R. 1009.

36 A sleeper is an artwork whose true attribution goes undetected for a period of time.

37 *Feilding & Anor v. Simon C. Dickinson Ltd* [2022] EWHC 3091 (Ch.). The case is due to go to the Court of Appeal in June 2023.

38 *Ibid.*, para. 103.

39 *Ibid.*, para 106.

of attributes were simply not available. “Even if I agree that the price decided on was a “fudge”, I cannot, in the absence of evidence, determine that setting of that price at that level was negligent.”<sup>40</sup>

The case of *Thwaytes v. Sotheby's* involved a painting believed by the claimant to be an authentic Caravaggio. Sotheby's undertook the valuation and ultimately determined it was a copy.<sup>41</sup> The claimant requested further analysis by way of X-ray but this did not change the valuer's opinion. The piece went to auction and was sold for £42,000 to the close friend of Sir Denis Mahon, a leading Caravaggio scholar, who performed his own analysis and consultations which determined the piece was authentic and worth somewhere in the region of £10m. Thwaytes claimed in negligence and breach of contract. The Court held that there were no ‘red flags’ which could have alerted Sotheby's to the authenticity of the piece and so, despite owing a duty of care to the claimant, they were not in breach of this duty nor did they breach any contractual obligations.

Although one would expect leading auction houses with their significant resources to research thoroughly the authenticity of an artwork, it is very difficult to bring successful cases of mistaken attribution against them, and so collectors should ensure a proper valuation by qualified professionals prior to purchase.

## THE ART OF NEGOTIATION

As with a prenuptial agreement, a well-drafted contract is an unromantic yet necessary step in safeguarding your interests should the transaction unravel in the future. Under English law the principle of *caveat emptor* (buyer beware) applies with the result that there is no general duty of disclosure on the part of the seller (except in certain specific circumstances). The onus, therefore, is on the buyer to investigate thoroughly the artwork it is proposing to acquire. The importance of a clear contract using unambiguous language cannot be underestimated.

Contract terms can be classified as conditions, warranties or so-called intermediate (or innominate) terms. This classification is primarily significant for the effect it has on the remedies available to the non-defaulting party for breach of contract.<sup>42</sup>

A statement of opinion, for example, has no legal effect if it is only a statement of the maker's opinion or belief and if the parties wish to warrant the authenticity of the artwork being sold then they are advised to do so in clear, express language in the contract. The contract should also make clear whether any warranties are limited in time.

Other clauses to which buyers should pay particular attention are:

- *Governing law/jurisdiction* – since this clause will determine which country's courts will be competent to hear any disputes and different jurisdictions approach issues around ownership and authenticity differently.

40 *Ibid.*, para. 123.

41 *Thwaytes* above, note 17.

42 Breach of a condition gives rise to the claimant's right to terminate the contract (treat the contract as discharged) and claim damages for any loss. Breach of a warranty gives rise to a claim for damages only. The remedy for breach of an innominate term will depend on whether or not the breach is of a fundamental nature, i.e. whether or not the injured party has been deprived of substantially the whole of the benefit of the contract.

- *Dispute Resolution*– the parties should consider by what method they wish any disputes to be resolved, for example, through litigation or a form of ADR (as to which see further below).
- *Confidentiality* – private sales by their nature are discrete and therefore it is common for the parties to agree to keep the transaction confidential.
- *Entire Agreement* – this has the effect of restricting the parties’ bargain to the terms contained within the written contract itself. Often in the art world, there are many pre-contractual discussions and representations about the artwork, and so care should be taken to ensure that important representations by the seller are captured in the contract if it contains an entire agreement clause.
- *Liability Caps* – these are clauses which limit one or both parties’ financial liability to the other in the event of a breach of contract or other legal wrong. They are particularly important in the case of high-value art.
- *Commissions* – usually commissions are payable upon sale and purchase of an artwork. Given the number of intermediaries in the art world (advisors, agents, dealers etc.) the buyer should always confirm whether commissions are payable, and if so, to whom, when, how much etc. Buyers can protect themselves by asking questions and if necessary, ensure that appropriate language relating to the disclosure of commissions is included in the contract. Secret commissions have been the subject of disputes (see, for example, *Accidia v. Simon C. Dickinson Ltd*<sup>43</sup> and *Spencer-Churchill v. Faggionato*<sup>44</sup>).

- 43 [2010] EWHC 3058 (Ch.). The issue before the Court was whether Mr Dickinson, a dealer, could retain a secret commission of US\$1 million for arranging the sale of a drawing by Leonardo da Vinci between parties who wished to remain anonymous. At trial it was argued, on behalf of the Defendant, that it was standard practice in the art market for the seller to be paid a ‘return price’ on the basis that a dealer might sell at any price above the return price and retain the difference as his commission without having to inform the seller (or the seller’s agent) of the actual price paid by the buyer. The Judge rejected this argument and held that Mr Dickinson would have to account for the US\$1 million commission plus interest (subject to an allowance of US\$200,000 plus £2,500 for its reasonable remuneration and expenses) on the basis that it was acting as an agent for the seller (its principal) and could not make a secret commission in circumstances where it had not been disclosed to the seller or authorised by it.
- 44 [2012] EWHC 2318 (Ch.), noted by Elizabeth Emerson in (2012) XVII *Art Antiquity and Law* 359. Lord Edward Spencer-Churchill instructed Mr Faggionato, a director and shareholder in Faggionato Fine Arts Limited to find a purchaser for his Basquiat painting. Lord Spencer-Churchill claimed that he had specified that he did not want to sell to Mr Mugrabi. Mr Faggionato later informed him that he had received an offer from a Florida collector. Lord Spencer-Churchill asked Mr Faggionato to consult auction houses to deduce the reasonableness of the offer. Mr Faggionato informed him that he had obtained estimates from auction houses and advised him to accept the offer, which he did. It later transpired that the offer was actually from Mr Mugrabi and the invoice for the sale was addressed to Jombihis, which was a corporate vehicle used to hold art for Mr Mugrabi’s benefit. Mr Faggionato had received a secret commission from Mr Mugrabi or Jombihis in connection with the sale. Mr Faggionato had also not consulted auction houses. Lord Spencer-Churchill brought proceedings on the basis that the painting remained vested in him because the purported sale was unauthorised and therefore void. He also applied for an interim injunction restraining Jombihis from dealing with the painting until judgment. The Judge ordered an interim injunction restraining Jombihis from dealing with the painting without first giving 28 days’ notice to Lord Spencer-Churchill of any proposed dealing with the painting.

Many auction houses have their own standard terms and conditions upon which they transact (see, for example, those of Sotheby's,<sup>45</sup> Christie's,<sup>46</sup> Bonhams<sup>47</sup> and Phillips<sup>48</sup>) and in some respects it may be more advantageous to purchase artworks via an auction house since you get the benefit of a warranty of authenticity. They are variously referred to as an 'Authenticity Guarantee' (Sotheby's), 'Authenticity Warranty' (Christie's), 'Guarantee' (Bonham's) and 'Authorship Warranty' (Phillips). In the case of Leonardo da Vinci's *Salvator Mundi*, Christie's sale agreement included a five-year warranty.<sup>49</sup>

## MISATTRIBUTION? MISREPRESENTATION? MISTAKE? WHAT TO DO WHEN IT ALL GOES WRONG

What do buyers do if they suspect they have bought a fake or a forgery, or the artwork has been misdescribed?

Any recourse may depend on whether the artwork was bought through a dealer or at auction. Claims for breach of contract, negligence and misrepresentation are the most common causes of action brought by dissatisfied claimants and they can be pleaded together to maximise the chances of success.

### Claims Under Authenticity Guarantees

The contract will often contain an authenticity guarantee. It is important to carefully read the exact wording of such guarantees, as these are often limited to forgeries rather than misattributions<sup>50</sup> and can vary greatly in what they say. For example, Sotheby's guarantees what the object is *not* – it is not a 'counterfeit'.<sup>51</sup> Christie's, by contrast, guarantees what the object *is* – it is 'authentic'.<sup>52</sup> The guarantee is often further qualified by the so-called

45 See, for example, Sotheby's Conditions of Business for Buyers at Auction for London at: <[www.sothebys.com/en/buy-sell?locale=en#conditions-of-business](http://www.sothebys.com/en/buy-sell?locale=en#conditions-of-business)>.

46 See, for example, London Conditions of Sale Buying at Christie's at: <[www.christies.com/buying-services/buying-guide/conditions-of-sale?sc\\_lang=en&lid=1](http://www.christies.com/buying-services/buying-guide/conditions-of-sale?sc_lang=en&lid=1)>.

47 See, for example, Conditions of Sale for Buyers excluding wine, car and coin auctions at: <[https://images1.bonhams.com/original?src=legal/COS\\_UK\\_Main.pdf](https://images1.bonhams.com/original?src=legal/COS_UK_Main.pdf)>.

48 See, for example, the Conditions of Sale for London at: <<https://www.phillips.com/buysell/london/conditions>>.

49 See Anny Shaw, 'The Five Year Warranty on the *Salvator Mundi* by Leonardo is About to Run out - Could the Buyer have Asked for their Money Back?', *Art Newspaper*, 14 Nov. 2022.

50 See definition of 'forgery' v. 'fake' at note 3 above; Wilson above, note 13 at p. 365.

51 Condition 2(a) of Sotheby's Buy Now Marketplace Conditions of Business for Buyers: "*We, as principal, provide an Authenticity Guarantee to the Buyer, subject to the following terms and conditions, that the Property is not a "counterfeit". For these purposes, a "counterfeit" means an item of Property that in Sotheby's reasonable opinion is an imitation created to deceive as to authorship, origin, date, age, period, culture or source, where the correct description of such matters is not reflected by the description on the listing page (taking into account any glossary of terms, as applicable). [...]*" (<[www.sothebys.com/en/marketplacebuyerterms](http://www.sothebys.com/en/marketplacebuyerterms)>).

52 Condition 2 (a) of Christie's Conditions of Sale: We warrant that, subject to the terms below, the **lots** in our sales are **authentic** [...]; Christie's definition of "authentic" is: a genuine example, rather than a copy or forgery of: (i) The work of a particular artist, author or manufacturer, if the **lot** is described in the title description (and not **Qualified**) as the work of that artist, author or manufacturer; (ii) A work created within a particular period or culture, if the **lot** is described in the title description (and not **Qualified**) as a work created during that period or culture; (iii) A work for a particular origin source if the **lot** is described in the title

‘state of the art’ defence, which states that the guarantee will come into play only if the description in the catalogue was out of line with the state of scholarship and opinion at the time of sale. A clause of this nature was tested for the first time in the English Courts in 2019 in the case of *Sotheby’s v. Mark Weiss Ltd and Fairlight Art Ventures LLP and Ors*,<sup>53</sup> but unfortunately the Court of Appeal did not take the opportunity to clarify the law and what constitutes ‘*generally accepted views of scholars and experts*’ is still open to interpretation. Authenticity guarantees also usually contain a restriction on the right to reject to the actual purchaser and not his assignees. Thus, there is debate among lawyers as to how much protection warranties of authenticity actually offer the buyer, given that they can be hard to enforce (although there have been instances of successful warranty claims).<sup>54</sup> In the absence of an express authenticity guarantee the courts will be reluctant to attach contractual force to statements of authenticity, as these will often be deemed to be expressions of opinion.<sup>55</sup>

The buyer usually needs to notify the auction house of a claim within a set period of time (usually five years) and demonstrate to the auction house’s satisfaction that the work is a misattribution or a forgery (which may require scientific proof). Wilson suggests that in such circumstances finding multiple experts who agree with your evaluation or a single expert who is acceptable to both parties would be required.<sup>56</sup>

The consequences of successfully establishing a breach of an authenticity guarantee by an auction house are also set out in the conditions of sale. Usually, the buyer will need to return the painting in its initial condition<sup>57</sup> and the auction house will ensure that the contract is rescinded and will return the purchase price (further damages or expenses are usually excluded).<sup>58</sup>

### Claims in Negligence

Although the strongest claims are those founded in contract, a buyer may also be able to bring a concurrent action in the tort of negligence on the basis that the seller has assumed a duty of care towards the buyer (and the seller was negligent in discharging that duty when attributing the artwork to a given artist).<sup>59</sup> However, in an arm’s-length transaction, such as one between seller and buyer, in principle the parties do not owe each other a duty of care and therefore such a claim may be more difficult to articulate. In a claim for negligence, the six-year period would run from the date when the damage is suffered (which may differ from the limitation period under the contract).

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description (and not **Qualified**) as being of that origin or source; or (iv) In the case of gems, a work which is made of a particular material, if the **lot** is described in **UPPERCASE type** as being made of that material (<<https://onlineonly.christies.com/terms-and-conditions/386>>).  
 53 [2020] EWCA Civ. 1570.  
 54 For example, *De Balkany v. Christie Manson & Woods Ltd* [1995] 1 WLUK 276, *Avrora* above, note 15.  
 55 See discussion of the Sale of Goods Act below.  
 56 Wilson, above, note 13 at p. 365.  
 57 This may present difficulties if the painting was damaged in the process of testing.  
 58 See clauses 2(d)(ii) and (f) of Sotheby’s Buy Now Marketplace Conditions of Business for Buyers; Christie’s Conditions of Sale, clauses 2(b) and (c).  
 59 The standard of care in professional negligence is that of “*reasonable skill and care*”, as set down in *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582. Following the case of *Manchester Building Society v. Grant Thornton UK LLP* [2021] UKSC 20 there is a renewed emphasis on the purpose for which the advice was sought (judged objectively).

The following four (mis)attribution cases demonstrate the difficulties buyers can face when bringing claims in negligence, although the most recent case of *QIPCO v. Eskenazi*<sup>60</sup> may offer some hope.

*Taylor Thomson v. Christie Manson & Woods Ltd and others*<sup>61</sup> concerned the issue of whether Christie's owed the buyer, Ms Thomson, a duty of care which they had broken in not warning her of a risk that their judgment that a pair of Louis XV vases were made in the eighteenth century might be questionable or wrong. The Court of Appeal concluded that since Christie's, at the time of the sale, held, and were reasonably entitled to hold, the certain and definite opinion that the vases were eighteenth century and to be described without qualification as 'Louis XV', they were not obliged to express any different opinion to Ms Thomson.<sup>62</sup> As to the duty of care, during trial Christie's conceded that it owed Ms Thomson a duty to use reasonable skill and care in describing the vases as Louis XV and in making statements to her about their date and quality. The standard of care conceded was that of a reasonably competent international auction house specialising in the sale of fine art and antiques (and not a more 'exacting' duty of care to her as a result of a "special client relationship").<sup>63</sup>

In *Luxmoore-May v. Messenger May Baverstock*,<sup>64</sup> the claimant (seller) sued the defendant for negligently failing to recognise and advise as to potential value of the two 'sleepers'. The Court of Appeal held that the duty of care owed by auctioneers was to give a considered opinion as to the value of the goods. The defendant was a general (provincial) practitioner (as opposed to a leading (specialist) auction house). The defendant had followed all tests and practices which were usual in a generalist valuation. Nothing in the tests ought to have put the defendant on notice that the paintings might be genuine. Since they were merely a generalist auction house, they were not obliged to carry out other tests. They had therefore given a properly considered opinion and were not negligent. The Court of Appeal also stated that the duty of care to be imposed on a leading and world-renowned auction house will be higher than that of a provincial auction house.

The higher standard of care was confirmed in the case of *Thwaytes v. Sotheby's*.<sup>65</sup> First, those who consigned their works to a leading auction house could expect that the painting would be assessed by highly qualified people – qualified in terms of their knowledge of art history; their familiarity with the styles and oeuvres of different artists; and in terms of the connoisseur's eye. Further, the specialists at a leading auction house would have ready access to the opinions and services of art historians at the highest levels of scholarship around the world. Secondly, a leading auction house had to give the work consigned to it a proper examination devoting enough time to such examination so as to arrive at a firm view where that was possible. Third, it would be much more difficult for a leading auction house to rely on the poor condition of a painting as a reason for failing

60 *Qatar Investment & Projects Development Holding Co. & Anor v. John Eskenazi Ltd & Anor* [2022] EWHC 3023 (Comm.) (noted by Alexander Herman in (2022) XXVII *Art Antiquity and Law* 179).

61 *Taylor Thomson v. Christie Manson & Woods Ltd and others* [2005] EWCA Civ 555, 155.

62 See, in particular, the remarks of May L.J. at paras 78 and 85 of the judgment, Christie's were not obliged to raise "fanciful doubts" to Ms Thomson.

63 *Taylor* above, note 58, para. 11.

64 [1990] 1 W.L.R. 1009.

65 *Thwaytes* above, note 17.



to notice its potential. The principle that an art expert had to know his limitations and consider when to bring in an outside expert applied as much to a leading auction house as it did to a provincial auction house, albeit that the bar for where that threshold was crossed was set at a much higher level in the case of the leading auction house. Merely because Christie's and Sotheby's could be shown to act routinely in a particular way did not automatically mean that that way was not negligent. There had to be a back stop consideration of the need to protect the interests of the client.<sup>66</sup> However, Mr Thwaytes' claim was dismissed on the facts, and the Court found that Sotheby's was not negligent in their assessment of the painting.<sup>67</sup>

The only successful case of a buyer claiming in negligence (so far as we are aware) is that of *QIPCO v. John Eskenazi*.<sup>68</sup> In this case, the Qatar Investment & Projects Development Holding Co. (QIPCO) advanced claims for breach of contract, misrepresentation and in the tort of negligence in relation to the acquisition of seven (purportedly) antique objects. In terms of the negligence claim, Jacobs J. ruled that Mr Eskenazi (who held himself out as a world-leading expert in Indian, Gandharan, Himalayan and South-East Asian antiquities) should be held to the higher standard of skill and care owed by a leading auction house.<sup>69</sup> In all three claims, the question of the 'reasonableness' of the opinions expressed by Mr Eskenazi was essential to judging whether he had met the higher standard. In this regard the question to be asked (said the Court) was "whether it can be said that no reasonable leading specialist antique dealer would have concluded that these objects were ancient, and expressed an unqualified opinion to that effect."<sup>70</sup> The Court commented that the factual, art-historical and scientific evidence in relation to authenticity put before it were all important parts of the picture. Having carefully analysed and weighed the evidence in respect of each of the antique objects, Jacobs J. found that Mr Eskenazi was negligent and that "no reasonable leading specialist antique dealer would have expressed an unqualified opinion"<sup>71</sup> that the particular object in issue was ancient. The Court held that QIPCO was entitled to restitution/damages equal to the amount of the purchase price paid for the objects (\$4,990,000).

Whether or not a buyer chooses to bring a claim in contract or tort is also influenced by the measure of compensatory damages since these are different. Where both claims are available, a buyer is free to choose whichever measure produces the more beneficial result.<sup>72</sup> Since the measures can produce significant differences in the amount of damages which the injured buyer stands to recover, it will therefore be of strategic consideration when considering bringing a claim.

Lord Justice Lewison demonstrated the consequence of the difference in the case of *Wemyss v. Karim*.<sup>73</sup> B buys a painting from A for £8,000 because A told B that it was painted by a famous artist. This was not true and the painting was therefore only worth £100. If it had been true, however, it would have been worth £10,000.

66 *Ibid.*, 76-79.

67 See the reasons given by Rose J. at para. 166 of the judgment.

68 *QIPCO* above, note 58.

69 *Ibid.*, paras 114 to 117.

70 *Ibid.*, para. 148.

71 *Ibid.*, paras 692, 709, 722, 740, 747, 749.

72 *Wemyss v. Karim* [2016] EWCA Civ. 27.

73 *Ibid.*, para. 25.

If B can establish that what A said constituted a contractual warranty, B could recover the difference between what the painting would have been worth if the quality was as warranted by A (£10,000) and its true value (£100), so £9,900. However, if A's statement constitutes only an actionable misrepresentation, then B would be entitled to the difference between the price paid (£8,000) and the true value (£100), so £7,900. If, on the assumption that the representation was true, the claimant's bargain would have been a good one, the contractual measure (under which he may recover something even if the actual value of what he has recovered is greater than the price) is better. If the claimant's bargain would have been a bad one, even on the assumption that the representation was true, the tortious measure is better.<sup>74</sup>

## Misrepresentation

The law on misrepresentation is a mix of common law, equity and statute. The remedies available for misrepresentation depend on whether the misrepresentation was fraudulent, negligent or innocent. It is also important to check the terms of the contract to ensure that liability for misrepresentation has not been excluded or limited.<sup>75</sup>

Fraudulent misrepresentation arises where the seller falsely represents that a work is authentic, whilst knowing this to be false, or not believing it to be true, or, recklessly, not caring whether it is true or false.<sup>76</sup> Bringing a claim in fraudulent misrepresentation also allows the claimant to pierce the corporate veil and go after the representor personally.<sup>77</sup> Negligent misrepresentation is a representation made carelessly and in breach of duty to take reasonable care that the representation is accurate. This requires there to be a 'special relationship' between the parties. If no 'special relationship' exists, there may be a misrepresentation under section 2(1) of the Misrepresentation Act 1967 where a statement is made carelessly or without reasonable grounds for believing its truth. Conversely, the misrepresentation will not be negligent if the seller can prove that they had reasonable grounds to make the statement, believing the description to be true and not having formed that view carelessly. Innocent misrepresentation is a representation that is neither fraudulent nor negligent.

The consequence of misrepresentation is that the contract is voidable.<sup>78</sup> Damages may

74 See G.H. Treitel, 'Damages for Deceit' (1969) 32 M.L.R. 556, 558-559 in a passage approved by Lord Steyn in *Smith New Court Ltd v. Citibank NA* [1997] A.C. 254, 282. The reason why the tortious measure will be better in the case of a bad bargain is because tortious damages aim to put the buyer, so far as is possible, in the position it would have been in had it not been induced by the representation of the seller to enter the contract, which means the party may be able to rescind the contract and recover its money. Contractual damages will only put the buyer in the position it would have been in if the representation had been true. If it is the case that, had the representation been true, the buyer would have made a good bargain, then the contractual measure will effectively give the buyer the benefit it would have received if that representation had been true.

75 Section 3 Misrepresentation Act 1967 provides that such exclusions or limitations are subject to the requirement of reasonableness as defined in s. 11(1) of the Unfair Contract Terms Act 1977. Liability for fraud cannot be excluded, however.

76 *Derry v. Peek* (1889) L.R. 14 App. Cas. 337, at 374. It is not necessary that the maker of the statement was 'dishonest' as that word is used in the criminal case. What is required is dishonest knowledge, in the sense of an absence of belief in truth (*QIPCO* above, note 58 at para.109).

77 Which is what the claimant attempted to do in *QIPCO* above, note 58 at para. 111.

78 *Clough v. L&NW Ry Co.* (1871) LR 7 Ex 26 at 34; *Urquhart v. Macpherson* (1878) 3 App. Cas.

be awarded if the seller is guilty of fraud, or negligence or if he fails to meet the test laid down in section 2(1) of the Misrepresentation Act 1967.<sup>79</sup> Careful choices will need to be made on whether to seek damages (generally putting the buyer in the position it would have been in if the misrepresentation had not been made) or rescission (the latter being an unwinding of the purchase and a return of the purchase price, which may be different from damages). If the misrepresentation was entirely innocent and has not become a term of the contract, the seller has no liability in damages unless rescission is available and the court exercises its discretion to award damages in lieu of rescission.<sup>80</sup>

As to time limits, section 32 of the Limitation Act 1980 postpones the commencement of the limitation period in an action for fraud, mistake or where “any fact relevant to the claimant’s cause of action has been deliberately concealed from him by the defendant” – the limitation period does not start to run until the claimant discovers, or could with reasonable diligence have discovered, the fraud, mistake or concealment. By contrast, in the case of negligent or innocent misrepresentation, the passage of time will probably bar the claim even if the buyer has no knowledge of the cause of action.<sup>81</sup>

### Mistake

Mistake negates consent where it puts the parties at cross-purposes so as to prevent them from reaching agreement, for example because they intend to contract about different things.<sup>82</sup> The effect of mistake is to make the contract void.<sup>83</sup> However, the courts will be slow to find a mistake as, in the interests of commerce, contracts should generally be enforced.

At first glance, the possibility of pleading mistake in the context of authenticity appears to have been excluded by Lord Atkin in *Bell v. Lever Brothers Ltd*,<sup>84</sup> who gave the following example:

A. buys a picture from B.; both A. and B. believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A. has no remedy in the absence of representation or warranty

However, Treitel takes issue with this example, as he explains that mistake as to quality can negate consent if it is a mistake as to a fundamental quality by which the thing is identified<sup>85</sup> and the way to test this is to ask the parties what they were contracting about.<sup>86</sup> In this case, the parties are likely to respond that they were buying ‘a Rembrandt’ rather than ‘a picture’. Treitel concludes that on the bare facts of Lord Atkin’s example the contract should be held void.<sup>87</sup> At the same time, Treitel notes that, in reality, case facts are likely to be more complex. Authenticity could be a term of the contract in

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831 at 838.

79 G.H. Treitel, *The Law of Contract* (15<sup>th</sup> edn, Sweet & Maxwell, 2020) para. 9-037.

80 Section 2(2) of the Misrepresentation Act 1967.

81 *Leaf v. International Galleries (A Firm)* [1950] 2 K.B. 86.

82 Treitel above, note 79 at para. 8-001.

83 *Associated Japanese Bank (International) Ltd v. Credit du Nord SA* [1989] 1 W.L.R. 255 at 268.

84 [1932] A.C. 161, at 224; see also *Leaf* above, note 81 at 89 (mistake not pleaded but held that mistake whereby both parties believed the picture to be a Constable would not suffice to rescind the contract).

85 Treitel above, note 79 at para. 8-046.

86 *Ibid.*, para. 8-020.

87 *Ibid.*, para. 8-021.

which case the question of mistake will not arise. On the other hand, the picture may be sold speculatively, in which case the contract will stand regardless of the fact that the buyer was mistaken in his belief on authenticity. Talking about cases where statements of authenticity were mere opinions,<sup>88</sup> Treitel concludes that it would also be wrong in such cases to regard the contract as void for mistake.<sup>89</sup>

It seems therefore that the cause of action for mistake is at best uncertain and, whilst worth considering, may not be the strongest avenue of attack.

As to time limits, where the contract is void for mistake, the buyer can seek the reversal of the seller's unjust enrichment within six years from the date of the breach of contract. As mentioned above, section 32 of the Limitation Act 1980 will serve to extend this.

### The Sale of Goods Act

In some cases,<sup>90</sup> it may be possible to bring a claim under section 13(1) of the Sale of Goods Act 1979,<sup>91</sup> which states that in a sale of goods by description, there is an implied condition<sup>92</sup> that the goods will correspond with the description. However, chances of success via this route are slim. The description must be a term of the contract if the condition requiring the goods to correspond with it is to be implied.<sup>93</sup> Paradoxical as it may sound, just because your invoice says that you are buying 'a van Dyck' does not mean that you have contracted to buy a van Dyck.<sup>94</sup> The judge will look at the entire course of dealings between the parties to determine whether they intended to make description a contractual term.<sup>95</sup>

There will be no sale by description if the references to authenticity and authorship were mere statements of *opinion*.<sup>96</sup> Where, in the course of negotiations, a dissenting view on authenticity is brought to the buyer's attention by the seller, the seller's own view that the work is authentic is likely to constitute opinion.<sup>97</sup>

The older the work, the more likely it is that a statement of attribution was opinion. As Lord Kenyon famously said in *Jendwine v. Slade*:

88 Treitel cites *Harlingdon and Leinster Enterprises Ltd v. Christopher Hull Fine Art Ltd* [1991] 1 Q.B. 564.

89 Treitel above, note 79 at para. 8-021.

90 This applies to business-to-business transactions and not to business-to-consumer sales. Consumers get separate protection under the Consumer Rights Act 2015, which is beyond the scope of this article.

91 As amended by Sale and Supply of Goods Act 1994.

92 By virtue of s. 13(1A) of the Sale of Goods Act 1979; thus, the usual remedy will be for the buyer to reject the artwork and reclaim the price.

93 *Gill & Duffus SA v. Berger & Co. Inc.* (No. 2) [1984] 1 A.C. 382 at 394 *per* Lord Diplock; followed in *Drake* above, note 17 at para. 24.

94 *Drake* above, note 17 at paras 20-22: in this case, the invoice referred to "[...] *the picture by Sir Anthony van Dyck (1599-1641)* [...]", but Buckley J. held that the invoice was "only relevant insofar as it may indicate what has gone before. It is an accurate reflection but adds nothing new"; see also *Power v. Barham* 111 Eng. Rep. 965 (K.B. 1836): invoice is not, by itself, capable of being a contractual representation.

95 *Ibid.*, at para. 32.

96 *Ibid.*, para. 25.

97 *Ibid.*, para. 33: as Buckley J. noted: "it would be a remarkable outcome if a buyer informed at the time of such a sale of another expert's contrary view, could later set aside the sale or claim damages based on that same expert's views"; see also *Hoos v. Weber* [1974] 232 E.G. 1379.

It was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be a matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. What then does the catalogue import? That, in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it.<sup>98</sup>

This reasoning was followed in *Drake*, where Buckley J. concluded that:

No one could sensibly have believed that “Agnews” knew or had some magic formula for establishing, that van Dyck himself had painted the canvas.<sup>99</sup>

Most recently, Jacobs J. said in *QIPCO v. Eskenazi*:<sup>100</sup>

In the present case, there is nothing which supports an argument that it was the parties’ common intention that [the gallery’s] attribution be given contractual effect. These sales involved objects which were between 1,000 and around 2,000 years old. It would be very surprising for a dealer, particularly an experienced dealer, to give a guarantee of authenticity in respect of objects of that age. If this result had been intended, then I would have expected the parties to have said so expressly.<sup>101</sup>

Arguably, it may be possible to say, in a case involving a relatively modern work, that attribution could be made with sufficient certainty to be contractually binding.<sup>102</sup> However, one must consider the individual circumstances of the case. For example, statements on authenticity of a work by a modern artist who is routinely forged, will likely be treated as opinion.<sup>103</sup>

The relative experience of the buyer and the seller may also play a part. In *Drake*, the agent for the buyer who conducted the negotiation had some experience in purchases of valuable art and realised the importance of research. Buckley J. stated that the outcome might have been different if a confessedly ignorant member of the public said “‘I am afraid I can’t judge whether this is a, b or c but if you say so...’ and to which the dealer replies: ‘I do say so.’”<sup>104</sup>

Finally, for any condition as to description to be implied, the contract must not contain any clear intention to the contrary. Auction house terms and conditions routinely contain a term to the effect that no warranty is given by the auction house in relation to any statement made to the buyer about the lot other than as set out in the authenticity warranty.<sup>105</sup> In such a case, the argument of sale by description is likely to fail.

98 (1797) 2 Esp. 572; see also *Harlingdon and Leinster Enterprises Ltd v. Christopher Hull Fine Art Ltd* [1991] 1 Q.B. 564, where there was no sale by description where the purchaser had not relied on the description of the painting, but had bought it after proper examination, the description did not become an essential term or condition of the contract.

99 *Drake* above, note 17 at para. 26.

100 *QIPCO* above, note 60.

101 *Ibid.*, 134.

102 *Power* above, note 94.

103 Charlotte Dunn, ‘A New Importance for Provenance in Sale by Description’ (2019) XXIV *Art Antiquity and Law* 371-378, at p. 377.

104 *Drake* above, note 17 at para. 31. Having relied on his more experienced agent, the purchaser “[could] not pray in aid any greater lack of expertise” (para. 28).

105 *Wilson*, above, note 13 at p. 366.

A word needs to be said about sections 14(2) and 14(2A) of the Sale of Goods Act 1979 – the implied terms as to quality or fitness of goods, where goods are sold in the course of business. At first sight, if you are looking for an original van Dyck for your collection it seems logical to argue that a copy of a van Dyck would not be of satisfactory quality and in breach of these provisions. Yet this is not the case. First, sections 14(2) and 14(2A) will not apply to most sales by auction.<sup>106</sup> Second, as for private sales, there is an inherent difficulty in trying to stretch a provision intended to deal with defective consumer goods to cover questions of authenticity. By way of illustration, this cause of action was initially pleaded in *Drake* (though it was not supported in closing submissions). Buckley J. rejected it:

If the section 13 claim [sale by description] had succeeded [the claimant] would not have needed [section 14]. As it is, it cannot stand as an independent claim. The only criticism of “the Painting” is that it is not a van Dyck. If it was not a sale by description and there is no term of the contract to that effect, no other criticism could be sustained. It is, on any view, a fine painting as both experts agreed. It is suitable for display and appreciation in its own right.<sup>107</sup>

It is submitted that whilst there may be some merit in considering these provisions when pleading a case, depending on the particular circumstances at hand, this route is unlikely to succeed.

As to time limits, the cause of action for breach of condition of correspondence with description (or satisfactory quality) is extinguished after the expiration of six years from the date on which the cause of action arose<sup>108</sup> which for an implied term will be the date of the contract.

## ADR

Alternative Dispute Resolution (ADR) is any way of settling disputes without recourse to the courts. It offers a more flexible, cost-efficient and confidential process for resolving disputes. The most common types of ADR are arbitration, mediation and expert determination.

In addition, the parties have a degree of control over the process allowing them to choose a mediator, arbitrator or expert with specific expertise in art and cultural heritage and understanding of the cultural backgrounds and/or the specificities of the art market. Given that art-related disputes are often international and involve multiple parties, ADR is well placed to assist in the resolution of art and cultural heritage disputes. Arbitration, in particular, is advantageous from an enforceability perspective since arbitral awards are ‘portable’, i.e. they can be enforced pursuant to the New York Convention in any signatory State.<sup>109</sup>

106 This is because most auction houses state in their Terms and Conditions that they act as agents for private sellers and s.14(5) of the Sale of Goods Act 1979 states: “The preceding provisions of this section apply to a sale by a person who in the course of a business is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course of a business and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made.”

107 *Drake* above, note 17 at para. 40.

108 Section 5 of the Limitation Act 1980.

109 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958

Moreover, ADR can also assist in preserving long-term relationships (a key feature of the art world being relationships built on trust and personal connections over many years). In a realm in which reputation is everything, ADR allows parties to keep their dispute confidential and to settle it in a more discrete manner without attracting potential negative publicity. Arbitration, for example, is confidential and non-public and so may be of value where the identity of the parties and the artwork itself may be sensitive. It is therefore advisable when negotiating a sale and purchase agreement to consider whether it would be beneficial to include a dispute resolution clause providing for some form of ADR.

In the UK, the Civil Mediation Council promotes the resolution of disputes by mediation.<sup>110</sup> Private organisations such as Art Resolve also provide specialist art mediation services.<sup>111</sup>

The World Intellectual Property Organisation (WIPO) in Geneva provides services to assist parties resolve disputes involving art and cultural heritage. It has established rules for arbitration, mediation and expert determination that parties can use to govern their disputes. The organisation also acts as a neutral, independent administering institution.<sup>112</sup>

Other international organisations offering specialist art-related ADR expertise include the *Camera arbitrale di Milano* (CAM, Milan Chamber of Arbitration) in Italy and the Court of Arbitration for Art (CAfA) in the Netherlands. CAM established its ADR Art & Cultural Heritage (ADR Arte) project in 2015 in response to the need for a specific dispute resolution service for art-related disputes. In 2018, the Netherlands Arbitration Institute (NAI) and the Hague-based Authentication In Art (AIA) set up CAfA,<sup>113</sup> which is dedicated solely to art-law disputes.

Other institutions such as the Art-Law Centre of the University of Geneva have undertaken research projects dedicated to ADR in art disputes. This has led to the creation of the digital platform ArThemis, a detailed public database of information about art-law dispute resolution, focusing on disputes settled through ADR.<sup>114</sup>

A cautionary tale that highlights the potential benefits of ADR, particularly in terms of confidentiality and avoiding adverse publicity, is the case of *Greenberg Gallery v. Bauman*.<sup>115</sup> Although a US court case, it is an illustrative example of an authenticity dispute which may have been more suited to resolution via confidential ADR than litigation. The claimants (four art dealers) began to have doubts as to the authenticity of an Andrew Calder mobile sold to them by Ms Bauman. When Ms Bauman refused to rescind the contract they sued her for fraud, breach of express warranty and material mistake of fact. During the hearing the judge heard evidence from two art experts (Mr Perls and Ms Silverman) who presented diametrically opposed views as to the

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also known as the ‘New York Convention’ provides a regime for the reciprocal recognition and enforcement of foreign arbitral awards between contracting States without the need for claimants to begin fresh court proceedings in the country where enforcement is sought. The New York Convention has been signed and ratified by over 170 countries.

110 <<https://civilmediation.org/what-is-the-cmc/>>.

111 <<https://artresolve.org/art-disputes-mediation-adr-services/>>.

112 <[www.wipo.int/amc/en/center/specific-sectors/art/#:~:text=ADR%20mechanisms%20allow%20parties%20to,specificities%20of%20the%20art%20market](http://www.wipo.int/amc/en/center/specific-sectors/art/#:~:text=ADR%20mechanisms%20allow%20parties%20to,specificities%20of%20the%20art%20market)>.

113 <[www.cafa.world/](http://www.cafa.world/)>.

114 <<https://plone.unige.ch/art-adr/>>.

115 817 F. Supp. 167 (D.D.C. 1993).

authenticity of the Calder mobile. The judge ruled in favour of Ms Bauman. The judge found Ms Silverman's evidence (that the mobile was an original Calder) more persuasive with the result that the four art dealers were left in the unenviable position of being in possession of an artwork which the Court had authenticated as an original but which in the art market was not authentic, according to Mr Perl's assessment and reputation, and as such unsellable.

### Role of Experts in Art Disputes

Art experts are individuals with knowledge and skill beyond a lay person and whose primary function is to give expert opinion to the Court to help the Court understand matters in dispute it may not be familiar with. The expert's role is often to provide evidence so that the Court can decide whether it was reasonable at the time for the parties to make such a statement. As emphasised in *The Ikarian Reefer*,<sup>116</sup> expert evidence should be uninfluenced, unbiased and should consider all material facts, including those which might detract from their opinions.<sup>117</sup>

Expert witnesses in art litigation are treated differently by the Court from those in non-art-related disputes. In non-art matters the assessment of expert evidence is based on two grounds: (1) assessment of the expert's experience; and (2) critique of their methodology.

Holland notes that in art-related cases, or at least in relation to non-technical/scientific experts, since the Court recognises the highly subjective nature of connoisseurship:

the Court has tended to focus almost entirely on [...] the qualifications and reputation of the connoisseurship experts.<sup>118</sup>

Case law demonstrates the tendency for connoisseurs to be given more deference by the Courts, compared to other expert witnesses.<sup>119</sup> While scientific evidence bears influence, as historian Otto Kurz once said:

[n]o available method of scientific analysis allows us to dispense with sound and unprejudiced judgment, based on comparison and experience and above all, on the correct assessment of the artistic qualities of the picture in question.<sup>120</sup>

Where an expert appears to have insufficient qualifications, the Court will probably favour the other side.<sup>121</sup> This becomes ever more significant when facts are the same but opposing experts differ in their interpretation.<sup>122</sup> The expert with adequate and suitable qualifications, able to convey the science and their interpretation of it in a clear and convincing way, will lend credibility to their opinion.

The responsibility to consult leading art experts was most recently discussed in the case

116 *National Justice Compania Naviera SA v. Prudential Assurance Co. Ltd (The Ikarian Reefer)* (No.1) [1993] F.S.R. 563.

117 CPR Practice Direction (PD) 35 (2.1).

118 Jordan Holland, 'The Approach of the English Court to Connoisseurship, Provenance and Technical Analysis' (2012) XVII *Art Antiquity and Law* 365-376.

119 See note 17 above.

120 Ernst Kris, Otto Kurz, *Die Legende vom Künstler: Ein historischer Versuch* (Suhrkamp, 1995).

121 *QIPCO* above, note 60.

122 Theodore E. Stebbins, Jr, 'The Art Expert, the Law, and Real Life' in Ronald D. Spencer, ed. *The Expert Versus the Object: Judging Fakes and False Attributions in the Visual Arts* (Oxford University Press, 2004) 137.



of *Feilding & Anor v. Simon C. Dickinson Ltd.*<sup>123</sup> In this case, the Defendant claimed that the Claimant acted negligently in failing to instruct the world's leading authority on the artist in the case of the disputed Chardin. The Court found that the Claimant had not acted negligently. The Judge was critical of the so-called appraiser's 'duty to check' with a leading expert on any given artist as it would create the precedent that, by failing to do so, the appraiser would be deemed to be acting negligently. The Judge caveated this by stating that if the art professional is dealing with a piece "well outside of his ... sphere of expertise"<sup>124</sup> then they may be negligent in not consulting an expert.

The High Court distinguished between the treatment of experts in relation to antiquities and paintings in *QIPCO v. John Eskenazi*.<sup>125</sup> Expert evidence of the former requires a deeper understanding of historical time periods, and religion, as opposed to the latter where a visual inspection may be sufficient. A dealer's 'eye' will therefore not be sufficient in cases involving antiquities. The party relying on expert evidence has a duty to instruct an expert with suitable expertise on the relevant period.

The above suggests that, in art disputes (and authenticity disputes in particular), selecting the most reputable expert in the field is key. Ideally, an expert should also be able to convey complex specialist knowledge in a way that is easy for a layman to understand and should withstand cross-examination well. They must be credible and suitable for the specific claim. The case of *Avrora Fine Arts Investments v. Christie, Manson & Woods* explored this point in depth.<sup>126</sup> The 'trained eye' is fundamental and the case emphasised the importance of connoisseurship, as discussed above. Although both parties instructed highly regarded experts, the claimant's expert's more extensive and relevant experience of Kustodiev's work ultimately tipped the balance in their favour. This being said, procuring a specialist expert has its challenges. There is usually a narrow pool of acknowledged experts on a particular artist, academic institutions impose restrictions on their employees' ability to participate in litigation and auction houses have dominance in instructing the leading experts.<sup>127</sup> It cannot be stressed enough - at the earliest opportunity, candidates should be identified, the chosen expert retained and instructed while crucially ensuring they are available for trial dates.

## CONCLUSION

As set out above, proving the authenticity of artwork can be a challenging and complex task (particularly given the subjective nature of assessment). Evershed L.J. put it eloquently when he said:

[...] [t]he attribution of works of art to particular artists is often a matter of great controversy and increasing difficulty as time goes on [...] [on the question of] whether in truth a particular painting was rightly attributed to a particular artist, most costly and difficult litigation may result. There may turn out to be

123 *Feilding* above, note 37.

124 *Ibid.*, at para. 102.

125 *QIPCO* above, note 60.

126 *Avrora* above, note 15.

127 Isabel Paintin, 'The Art of Connoisseurship Through Judicial Eyes: The Law of Negligence and Fine Art Attribution' (2015) *XX Art Antiquity and Law* 101-124. Indeed, the shortage of experts has led to a situation in *Drake* where both expert witnesses had prior involvement in the case and gave both factual and expert witness testimony (see *Drake* above, note 17 at para. 41).

divergent views on the part of artists and critics of great eminence, and the prevailing view at one date may be quite different from that which prevails at a later date.<sup>128</sup>

Therefore, for the prospective buyer, it is all about research, research, research. A thorough investigation into the proposed acquisition using a combination of the ways of authentication set out above (particularly for high-value items) should greatly reduce the risk of making a bad bargain. A buyer should also ensure that the contract is clear, robust and provides them with adequate protection in terms of rights and remedies in the event the artwork turns out to be more fake than fortune. If purchasing at auction, a buyer should review the description of the artwork carefully to understand exactly what they are buying and check and double-check the fine print of the auction house's terms and conditions to understand the scope of any recourse they may have (particularly in relation to the authenticity guarantee/warranty).

If it all goes wrong, there are various routes to resolution, although the strongest claims tend to be those framed in terms of breach of contract. If a dispute does ensue, the best tip is to secure the best experts in the field before an opponent does, as this is likely to determine the outcome of the case (as seen in the recent *QIPCO* case).<sup>129</sup>

Lastly, as this article opened with an observation by Thomas Hoving, it seems appropriate to conclude it with another of Mr Hoving's musings:

To appreciate a work of art, is it okay to like what you like, and the heck with the art critics and experts? Absolutely.

Wise words for any collector.

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128 *Leaf* above, note 81 at 94.

129 *QIPCO* above, note 60.