



Neutral Citation Number: [2020] EWCA Civ 1570

Case No: A4/2020/0176

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE COMMERCIAL COURT (QBD)**  
**MR JUSTICE ROBIN KNOWLES CBE**  
**CL-2017-000071**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 23/11/2020

Before :

**LORD JUSTICE HENDERSON**  
**LORD JUSTICE PETER JACKSON**  
and  
**LADY JUSTICE CARR DBE**  
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Between:

**SOTHEBY'S**

**1<sup>st</sup> Respondent/Claimant**

- and -

**(1) MARK WEISS LIMITED**

**2<sup>nd</sup> Respondent/ 1<sup>st</sup> Defendant**

**(2) FAIRLIGHT ART VENTURES LLP**

**Appellant/2<sup>nd</sup> Defendant**

**(3) MARK ADRIAN F. WEISS**

**3<sup>rd</sup> Defendant**

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**James Collins QC and Philip Jones** (instructed by **Mackrell. Solicitors**) for the **Appellant**  
**Nathan Pillow QC and Emily Wood** (instructed by **Freshfields Bruckhaus Deringer LLP**)  
for the **First Respondent**  
**Joe Smouha QC and Claudia Renton** (instructed by **Stephenson Harwood LLP**) for the  
**Second Respondent**

Hearing dates: 10 & 11 November 2020

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**Approved Judgment**

“Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties’ representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be [Listed Time & Date].”

## **Lady Justice Carr DBE:**

### **Introduction**

1. This is an appeal by the Appellant, Fairlight Art Ventures LLP ("Fairlight"), against the judgment and order of Robin Knowles J CBE ("the Judge") dated 11 December 2019 following an eight-day trial in April 2019. It relates to a painting entitled "Portrait of a Gentleman" (oil on oak panel 13 ½ by 10 ½ inches) ("the Painting"), considered by some (at least formerly) to be the work of Frans Hals, the famous Dutch Golden Age painter (1582/3-1666). Whilst the correctness of that attribution is now very much under scrutiny, that is not an issue that arises for consideration on this appeal.
2. All the parties are involved in the fine art world. The First Respondent, Sotheby's, is an international auction house. The Second Respondent, Mark Weiss Limited ("MWL"), is a fine art dealership. The Third Defendant, Mr Mark Weiss ("Mr Weiss"), is a director and the sole shareholder of MWL. Fairlight is the special purpose vehicle of Mr David Kowitz ("Mr Kowitz"), who is its designated member and ultimate beneficial owner. He is an investor in fine art.
3. In 2010 the Painting was purchased by Fairlight on behalf of itself and MWL. In 2011 the co-owners agreed to sell the Painting onwards. Sotheby's, pursuant to a consignment agreement, was involved in its sale in June 2011 by private treaty for US\$10,750,000 to EPC Nevada LLC ("Nevada"), controlled and beneficially owned by Mr Richard Hedreen, also a fine art collector and investor. The sale contract was subject to provisions allowing for rescission and return of the Painting and the purchase price. In 2016 Nevada sought to rescind the sale contract following expert opinion on the authenticity of the Painting. Sotheby's returned the purchase price to Nevada and Nevada returned the Painting.
4. The parties disagreed on the question of whether MWL, Fairlight and Mr Weiss were obliged to reimburse Sotheby's for the returned purchase price.
5. MWL and Mr Weiss compromised their differences with Sotheby's in a settlement deed dated 18 March 2019 ("the Settlement Deed"). Under the Settlement Deed, MWL and Mr Weiss agreed to pay Sotheby's US\$4,200,000 ("the Settlement Sum") and Sotheby's agreed to indemnify MWL in respect of claims against MWL and Mr Weiss by Fairlight up to a cap of US\$2,500,000.
6. Upon his judgment, the Judge ordered:
  - i) Fairlight to pay Sotheby's the principal sum of US\$6,550,000 (being the principal amount claimed of US\$10,750,000 less the Settlement Sum);
  - ii) Fairlight to pay MWL, the sum of US\$2,100,000 (being 50% of the Settlement Sum);
  - iii) MWL to pay Fairlight US\$3,275,000 (being 50% of the principal amount due from Fairlight to Sotheby's).
7. After adjustment by way of set-off, the net principal sum due from Fairlight to Sotheby's was US\$5,375,000 and MWL was under no further liability to contribute

towards the principal sum of US\$10,750,000. The Judge also made consequential orders relating to interest, the delivery up of the Painting and costs.

8. Fairlight has been granted permission to pursue four grounds of appeal relating to the Judge's findings: i) on sub-agency and privity; ii) on partnership; iii) on the construction of a clause relating to the views of scholars and experts (and the Judge's findings on the substance of the expert evidence itself); and iv) on whether or not Nevada was entitled to rescind. Fairlight argues that the Judge made substantive errors of law; repeatedly failed to give adequate reasons for his conclusions; and reached perverse conclusions on the facts or failed properly to weigh relevant evidence.
9. The appeal is resisted by Sotheby's. MWL is party to the appeal since, if Fairlight succeeds, Fairlight seeks consequential orders (in the event that it succeeds on the third and/or fourth grounds of appeal) quashing all provisions directing it to make contributions to MWL in respect of the sums ordered to be paid by MWL to Sotheby's. MWL supports Sotheby's position. Mr Weiss is not a party to the appeal.

### **Overview of the parties' dealings**

10. As at 2010 Mr Kowitz was a long-standing and important client of MWL and friend of Mr Weiss. Mr Kowitz had bought his first Old Master from MWL in 1997.
11. Mr Weiss first viewed the Painting in Paris in April 2010. Two years earlier, in 2008, the French government had declared the Painting a "trésor national" and refused it an export licence until 2011.
12. Mr Weiss viewed it together with Mr Kowitz in May 2010. They agreed to buy the Painting for €3,300,000 on a 50/50 basis, each contributing €1,650,000. For this purpose Mr Kowitz (personally) agreed to lend Mr Weiss/MWL €1,150,000. Mr Kowitz stated in an email to Mr Weiss dated 31 May 2010:

"If Louvre buys picture, we split the profits.

If Louvre/French state makes a lower offer, we do our best to negotiate, but we agree now that we are not going to fight them, unless it's ridiculous...

If exported, DK has option to buy picture for 3.9 million euros - ie giving Weiss a profit of 600,000...This would be only to keep the picture; Kowitz not free to sell it or if he does additional profit share due to Weiss

If we decide to sell it, we figure out a fair split then - ie if be just ship it to Sotheby's we probably split evenly; if sold to a private at great price maybe 60/40 in favor of Weiss, etc." (sic)

13. Mr Weiss responded on the same day:

"As I said, the problem with you having option @3.9m is that, on the old deal, I would expect you to have given me an additional amount anyway if you had kept it, so I would be no

better off even though I now own 50%! I am entering into this new venture on the basis that I will have the opportunity to sell this painting for a much larger profit!"

He added in a further email sent shortly thereafter that it was best not to put a definitive value on the "put option" being contemplated by Mr Kowitz, which should be based more on a "willing buyer, willing seller" basis and reflect a fair and equitable discount on the amount Mr Weiss could realistically expect to achieve for the Painting on the international market.

14. On 7 June 2010 Fairlight (acting on behalf of itself and MWL) duly purchased the Painting (from a Mr Giuliano Ruffini ("Mr Ruffini")) for €3,000,000. The contract was reviewed by Fairlight's lawyers who liaised with both Mr Weiss and Mr Kowitz on its terms.
15. On 8 July 2010 Fairlight's lawyers emailed Mr Weiss stating that Mr Kowitz had asked them to prepare a draft agreement covering "both the ownership/profit share and the loan" in respect of the Painting. A draft agreement was attached. It showed the parties as Fairlight, Mr Kowitz, Mr Weiss and (possibly) MWL. It recorded that Fairlight held the Painting on behalf of MWL and itself jointly with each party having a 50% interest, and that any profits were to be shared equally. At paragraph 8 it stated:

**"NO PARTNERSHIP**

8.1 Nothing in this agreement shall be deemed to constitute a partnership between the parties or any of them."

The agreement was never executed ("the Unexecuted Acquisition Agreement").

16. According to Mr Weiss (in his first witness statement which Fairlight relied on at trial by way of hearsay notice), he and Mr Kowitz agreed to meet on 13 May 2011 to make a decision on whether Mr Kowitz would decide to keep the Painting (and buy Mr Weiss out) or they would agree to offer the Painting to the market. They failed to reach an agreement as to value at that meeting in what Mr Weiss said was a "difficult conversation". Further discussions took place in the following days in the course of which Mr Kowitz agreed that Mr Weiss could try and sell the Painting at a price at or above US\$12million.
17. On 17 May 2011 Mr Kowitz accordingly emailed Mr Weiss as follows:

"This is to confirm that I am authorizing you to sell the Hals at a price at or above \$12million. As mentioned on the phone, I would like to be consulted on any decision to consign it to any third party before you make such a commitment."
18. Mr Weiss states that following this email, Mr Kowitz indicated he wanted, after all, to consider keeping the Painting and asked for more time, to which Mr Weiss agreed. Mr Weiss also engaged with a prospective private buyer in the meantime. By 24 May 2011 Mr Kowitz was again willing for the Painting to be sold. Mr Weiss pursued various potential avenues to sell.

19. As at June 2011, Mr James Macdonald ("Mr Macdonald"), head of Old Master Paintings Private Sales Worldwide and a senior director of Sotheby's, and who had visited the Painting in MWL's gallery in May 2011, was keen to broker a sale. On 9 June 2011 he indicated to Mr Weiss that he had a private client very interested in the Painting. The Painting was delivered to Sotheby's on 17 June 2011 for viewing by Sotheby's client on 20 June 2011.
20. On 20 June 2011 Mr Macdonald emailed Mr Weiss with details of an offer at US\$10,000,000 (plus Sotheby's commission and export deal). Mr Weiss responded with thanks, although the offer was "a fair bit shy" of his aspirations for the Painting. He stated that he had forwarded the email to his "partner", Mr Kowitz. A Sotheby's internal email from Mr Macdonald the next day recorded that Mr Weiss was speaking "to his partner + will come back to me soon..."
21. Mr Weiss negotiated an increased offer of US\$10,750,000 on 21 June 2011. Mr Weiss states that during his negotiations with Sotheby's he kept in "close and regular contact" with Mr Kowitz. He relayed the increased offer to Mr Kowitz on 21 June 2011 and Mr Kowitz agreed to sell the Painting at that price. Mr Weiss communicated acceptance of the revised offer to Mr Macdonald: US\$10,750,000 net to the vendor, plus 5% Sotheby's buyer's commission, full payment in 30 days and export deal.
22. Mr Macdonald sent another internal email stating that Sotheby's had "reached an agreement to sell the Hals privately for Mark Weiss". An internal High Value Lot Questionnaire dated 22 June 2011 recorded MWL's confirmation that it was the "sole consignor" of the Painting.
23. There followed a consignment agreement contained in a letter from Sotheby's addressed to MWL. MWL (as agent for Fairlight and on its own behalf) appointed Sotheby's as exclusive agent and granted Sotheby's the exclusive right to offer and sell the Painting by private treaty to a prospective buyer identified by Sotheby's for a minimum price of US\$10,750,000. Mr Weiss signed the letter ("duly authorised for and on behalf of MWL") on 23 June 2011 and Sotheby's signed the letter on 25 June 2011 (each also initialling each page) ("Contract A").
24. Contract A read materially as follows:

"Mark Weiss Limited

...

Dear Sirs,

Frans Hals, "Portrait of a Gentleman, half-length, wearing Black", signed with monogram lower right: FH, oil on oak panel, 13 ½ by 10 ½ in. (the "Property")

This letter agreement (the "Agreement") confirms the terms on which you grant to Sotheby's in London ("Sotheby's") the exclusive right to offer and sell the Property by private treaty to a prospective buyer identified by Sotheby's (the "Prospective

Buyer") for a period of three months from the date you sign this Agreement.

1. You have instructed Sotheby's to apply on your behalf for an export licence allowing the Property to be permanently exported from the United Kingdom for sale outside the European Union (the "Licence"). ...
2. The minimum sale price for the Property, which you will accept, shall be US \$ 10,750,000 (ten million seven hundred and fifty thousand US dollars) (the "Reserve Price")
3. Sotheby's agrees not to charge you a seller's commission on the sale of the Property. You acknowledge that Sotheby's shall be entitled to charge the Prospective Buyer, and retain, a buyer's premium at a rate not to exceed 5% of the Reserve Price.
4. You hereby authorise Sotheby's to agree with the Prospective Buyer that payment of the total purchase price due for the Property (the "Purchase Price") may be made in three instalments (each, an "Instalment"), as follows;

- a first Instalment of US\$ 500,000 shall be payable as a "Non-Refundable Deposit" (as defined in clause 5 below) by the Prospective Buyer to Sotheby's within five (5) business days of signature by the Prospective Buyer of a private treaty purchase agreement for the Property; and

- a second Instalment of US\$ 1,000,000 shall be payable by the Prospective Buyer to Sotheby's within five (5) business days of signature by the Prospective Buyer of a private treaty purchase agreement for the Property; and

- a third Instalment equal to the balance of the Purchase Price shall be payable by the Prospective Buyer to Sotheby's within 30 days of signature by the Prospective Buyer of a private treaty purchase agreement for the Property.

You agree that Sotheby's shall remit to you (i) the first Instalment within two (2) business days after Sotheby's receipt of such Instalment in full in cleared funds from the Prospective Buyer, (ii) the second Instalment within two (2) business days of Sotheby's receipt of the later of (a) such Instalment in full in cleared funds from the Prospective Buyer and (b) the Property in accordance with clause 7 below; and (iii) the balance of the Reserve Price within five business days of fulfilment of the "Condition" as defined in clause 9 below. The balance of the Reserve Price will be equal to the third Instalment after deducting Sotheby's buyer's premium. In the event that the Prospective Buyer fails to pay any portion of the Purchase

Price, you agree that Sotheby's has no obligation to enforce payment by the Prospective Buyer. Sotheby's will not release the Property to the Prospective Buyer until it has received payment of the Purchase Price in full in cleared funds.

5. You acknowledge and agree that Sotheby's may agree with the Prospective Buyer that the first instalment shall be treated as a non-refundable deposit in the event that the Prospective Buyer fails to pay the second and/or third instalment(s) save that the first instalment (together with the second instalment, if applicable) shall be repayable by you to Sotheby's in full within two business days of the date of Sotheby's notification to you in writing of the occurrence of any one or more of the following: (i) breach by you of any of the terms, warranties or obligations under this Agreement, including, without limitation, failure by you to deliver the Property to Sotheby's as set out in clause 7 below; (ii) any loss or damage to the Property whilst it is in your possession; (iii) any rescission of the sale of the Property to the Prospective Buyer under Sotheby's authenticity guarantee set out in the Private Treaty Terms attached hereto, or (iv) any loss or damage to the Property whilst it is in Sotheby's possession to the extent that (a) such loss or damage prevents Sotheby's from completing the sale of the Property to the Prospective Buyer and (b) such loss or damage is caused directly or indirectly or results from any of the exclusions applicable to Sotheby's assumption of liability for loss or damage to the Property as set out in the Private Treaty Terms attached hereto (the "Non-Refundable Deposit"). The private treaty purchase agreement between Sotheby's and the Prospective Buyer shall provide for the first Instalment to be a Non-Refundable Deposit on the terms set out above.

6. ....

7. You agree to deliver the Property to Sotheby's premises in London no later than 11th July 2011. Sotheby's will assume liability for loss or damage to the Property at no cost to you on the terms set out in the Private Treaty Terms attached hereto, from the time of completion by Sotheby's of a condition check for the Property following the delivery of the Property to Sotheby's premises in London until the Property is either released to the Prospective Buyer at a location outside the European Union or returned to you (if the Property is unsold), as the case may be, up to a maximum amount equal to the Reserve Price.

8. You agree that following Sotheby's receipt of (i) the Licence and (ii) the Purchase Price in full as cleared funds (if later), Sotheby's shall arrange for the Property to be shipped in your name from Sotheby's premises in London to a location outside



the European Union to be confirmed by the Prospective Buyer at no cost to you. ...

9. You acknowledge and agree that title to the Property shall not transfer, and the Property shall not be released, to the Prospective Buyer unless and until the later of (i) receipt by Sotheby's of the Purchase Price in full as cleared funds and (ii) release of the Property to the Prospective Buyer or its agent following arrival of the Property at a location outside the European Union confirmed by the Prospective Buyer (the "Condition"). Following fulfilment of the Condition, Sotheby's will provide you with a certificate of shipment confirming the shipment of the Property outside of the European Union.

10. You hereby confirm and agree to the warranties and terms set out in the Private Treaty Terms attached hereto<sup>1</sup>, which form an integral part of your agreement with Sotheby's and the Prospective Buyer."

25. The Private Treaty Terms included the following "Authenticity Guarantee":

**"Guarantee:** [The Seller] agree[s] that subject to the guarantee set out in the following paragraph, [the Painting] will be sold "as is", with all faults and imperfections and errors of description. Subject as above, neither [the Seller] nor Sotheby's shall be responsible for errors of description or for the genuineness or authenticity of the Painting nor make any representations or warranties with respect to the physical condition, size, quality, rarity, genuineness, authenticity, importance, provenance, exhibitions, literature or historical relevance of the Painting, and no statement anywhere, whether oral or written, shall be deemed such a representation or warranty.

Notwithstanding the generality of the preceding paragraph, Sotheby's shall guarantee to the buyer that [the Painting] is not "counterfeit" (an imitation intended to deceive). This guarantee will not be assignable and will only be applicable to the original buyer and not to any subsequent owner or owners who acquire an interest in [the Painting]. In the event Sotheby's determines that [the Painting] is "counterfeit", you agree to a rescission of the sale and will return to the buyer the purchase price received by you for [the Painting] and the buyer will return [the Painting] to you. Sotheby's reserves the right to consult independent expert advice on whether [the Painting] is "counterfeit" and will only rescind a sale if the buyer can: (i) provide, within five (5) years from the date of their agreement to purchase [the Painting], written evidence raising doubts as to the authenticity or attribution of the item; (ii) transfer good title in the item free from third party

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<sup>1</sup> Set out in full in the Appendix to this judgment

claims; and (iii) return the item to Sotheby's in the condition in which it was purchased."

("Authenticity Guarantee A")

26. Mr Weiss sent Contract A to Mr Kowitz by email on 23 June 2011 "fyi". Mr Kowitz responded on 26 June 2011 without objection but asking whether Mr Weiss had insurance on the higher amount reflected in the minimum reserve price stated in Contract A, which seemed important to him, and as to the identity of the person with whom Mr Weiss had dealt at Sotheby's.
27. By separate letter, Sotheby's (as seller's agent) entered into a contract with Nevada for the sale and purchase of the Painting. The letter was signed for and on behalf of Sotheby's and Nevada respectively on 27 June 2011 ("Contract B").
28. Contract B provided materially as follows:

"EPC Nevada LLC

...

Dear Sirs

Frans Hals, "Portrait of a Gentleman, half-length, wearing Black", signed with monogram lower right: FH, oil on oak panel, 13 ½ by 10 ½ in. (the "Property")

This letter agreement (the "Agreement") confirms the terms under which the seller and Sotheby's in London ("Sotheby's") as the seller's agent, will sell the Property to you subject in all respects to receipt by Sotheby's of a licence or licences allowing the permanent export of the Property from the United Kingdom to the U.S.A. (the "Licence").

1. You agree to pay to Sotheby's a purchase price of US\$ 11,287,500 (eleven million two hundred and eighty seven thousand and five hundred US dollars) for the Property (inclusive of Sotheby's buyer's premium) (the "Purchase Price") in US dollars, by wire transfer to the following account: ... Account Name Sotheby's, in three instalments (each, an "Instalment") as follows:

- a first Instalment of US\$ 500,000 shall be payable by you to Sotheby's within five (5) business days of signature of this Agreement by you; and

- a second Instalment of US\$ 1,000,000 shall be payable by you to Sotheby's within five (5) business days of signature of this Agreement by you; and

- a third Instalment equal to the balance of the Purchase Price shall be payable by you to Sotheby's within 30 days of signature of this Agreement by you.

You agree that in the event that you should default on payment of an Instalment, in addition to any other legal remedies that may be available to Sotheby's, Sotheby's will be entitled to exercise one or more of the following remedies, at Sotheby's discretion: (a) charge you default interest at 6% per annum above HSBC Bank plc's base rate on the amount due from the date on which the Purchase Price is payable to the date Sotheby's receives payment of the amount due in full; (b) demand immediate payment of the Purchase Price in full; and (c) cancel the sale of the Property retaining the right to damages for your breach of contract.

You hereby acknowledge and agree that in the event that you default on payment of the second Instalment and/or third Instalment, the seller will retain the first Instalment in full as liquidated damages and title to the Property will remain vested in the seller.

2. As soon as reasonably practicable following receipt by Sotheby's of (i) the Property; (ii) the Licence; (iii) the Purchase Price in full in cleared funds and (iv) written confirmation from you of the location in Seattle, Washington, U.S.A. at which you would like the Property to be delivered (the "Delivery Location") Sotheby's shall arrange for the Property to be shipped from London to the Delivery Location at no cost or risk to you. You hereby agree to pay any taxes or duties due in connection with the shipment and your purchase of the Property under this Agreement. Upon arrival of the Property at the Delivery Location, the condition of the Property shall be inspected by Sotheby's.

3. You acknowledge and agree that title to and risk in the Property shall not transfer, and the Property shall not be released, to you until the later of (i) receipt by Sotheby's of payment of the Purchase Price in full as cleared funds and (ii) arrival of the Property at the Delivery Location and completion of a condition inspection by Sotheby's. ...

4. You agree that subject to the guarantee set out in the following paragraph, the Property will be sold "as is", with all faults and imperfections and errors of description. Subject as above, neither the owner nor Sotheby's shall be responsible for errors of description or for the genuineness or authenticity of

the Property nor does either make any representations or warranties with respect to the physical condition, size, quality, rarity, genuineness, authenticity, importance, provenance, exhibitions, literature or historical relevance of the Property, and no statement anywhere, whether oral or written, shall be deemed such a representation or warranty.

Notwithstanding the generality of the preceding paragraph, in the event that Sotheby's determines that the Property is "*counterfeit*" (an imitation intended to deceive), as your sole remedy Sotheby's will rescind the sale and the owner will return the purchase price for the Property to you. This offer to rescind is only available on condition that you: (i) provide Sotheby's, within five (5) years from the date of this Agreement, written evidence raising doubts as to the authenticity or attribution of the Property, (ii) are able to transfer good title in the Property free from third party claims; and (iii) can return the item of Property to Sotheby's in the condition in which it was purchased. 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, or if the only method of establishing that the Property is "*counterfeit*" relies on a process which is either not in general use at the date of this Agreement or likely in Sotheby's opinion to risk damage to the Property. This offer to rescind is only made to you personally and may not be transferred or assigned in any way by you.

5. This Agreement shall be governed by and construed and enforced in accordance with English law. In the event of a dispute hereunder, you agree to submit to the jurisdiction of the English courts in favour of Sotheby's. ... This Agreement represents the entire agreement between you and Sotheby's concerning the sale of the Property and neither party may amend or supplement any provision other than in writing signed by each party.

6. ...

Please would you sign both originals of this Agreement where marked below, to confirm your agreement with its terms and return one copy to Sotheby's."

29. It can be seen that Contract B (at clause 4) contained an Authenticity Guarantee which broadly mirrored the terms of the Authenticity Guarantee A ("Authenticity Guarantee B"). However, Authenticity Guarantee A did not contain the proviso to the offer to rescind contained in Authenticity Guarantee B (namely that the offer to rescind did not apply if, at the date of the agreement, the description of the Painting in the

agreement accorded with generally accepted views of scholars and experts) ("the GAV Proviso").

30. On 7 July 2011 Mr Weiss sent Mr Kowitz a reconciliation document ("the Reconciliation"), setting out a proposed profit share and allocation of expenses in respect of the Painting (and other items). Fairlight's share of the total net proceeds was to be US\$7,730,689.65 and MWL's share US\$3,019,310.35. On 18 July 2011 Mr Kowitz responded, updating the values for sterling and euros. He did not disagree with the proposals and gave instructions for payment. He added that he was "also "awarding" [Mr Weiss] a £100,000 bonus for the work well done".
31. In December 2011 the Painting was transferred by Nevada to Mr Hedreen; in July 2016 it was transferred back again to Nevada.
32. In 2016 a painting attributed to Lucas Cranach, a German Renaissance painter, was seized by the French police as a suspected forgery. The source of that painting was Mr Ruffini.
33. In April 2016 Sotheby's approached Nevada to inform it of press reports raising concerns as to the authenticity of the Painting and invited Nevada to provide the Painting for forensic testing, which Nevada duly did.
34. Sotheby's commissioned a technical expert report (dated 24 May 2016) from Mr James Martin ("Mr Martin") of Orion Analytical LLC, a forensic art analyst, which concluded that the Painting was a counterfeit. There were synthetic pigments widely located in the ground and paint of the Painting, including under and in the figurative parts, which were not in use until the second quarter of the twentieth century and were irreconcilable with the attribution of the Painting to Frans Hals.
35. Mr Weiss also commissioned a report from Art Analysis & Research. That report (dated 24 May 2016) confirmed the presence of synthetic pigments not in use in the seventeenth century in the Painting. The Painting was either a modern pastiche or had undergone invasive treatment so that substantial passages of the work were of recent origin.
36. On 27 May 2016 Nevada wrote to Sotheby's with evidence raising doubts as to the authenticity of the Painting. It relied on Mr Martin's report and an independent peer review of that report dated 24 May 2016 by Mr John Twilley ("Mr Twilley"), an art conservation scientist. Nevada sought to return the Painting and to be repaid the purchase price.
37. On 11 July 2016 Sotheby's determined that the Painting was a counterfeit on the basis of the reports from Mr Martin and Mr Twilley, and also from Art Analysis & Research ("the Determination").
38. Since the trial in April 2019, a French criminal investigation into the Painting (and other paintings connected to Mr Ruffini) has been continuing. A Europe-wide arrest warrant for Mr Ruffini has been issued.

## **The proceedings, hearing and judgment below**

39. Sotheby's commenced proceedings in February 2017. Very shortly before trial, on 18 March 2019, the Deed of Settlement already referred to above was entered into by Sotheby's, MWL and Mr Weiss. Fairlight continued to contest the claim to trial in the following month.
40. For Sotheby's, the following witnesses of fact gave oral evidence: Professor Claus Grimm ("Professor Grimm") (one of three leading scholars on Frans Hals as at June 2011); Mr Michael Goss (chief financial officer); Mr Martin and Ms Rena Neville (then global head of client development). Reliance was placed on a written statement from Mr Hedreen.
41. For Fairlight, the following witnesses of fact gave oral evidence: Mr Kowitz and (under subpoena) Ms Clarissa Post (former Head of Private Sales for Old Master Paintings at Sotheby's). Further, as already indicated, Fairlight also adduced the first witness statement of Mr Weiss as hearsay evidence.
42. The Judge heard oral expert evidence from:
  - i) For Sotheby's: Dr Ashok Roy (former Director of Collections at the National Gallery);
  - ii) For Fairlight: Mr Timothy Warner-Johnson (director of Warner-Johnson Art Advisory Ltd).

It was common ground that as at June 2011 there were three leading scholars on the work of Frans Hals: Professor Seymour Slive ("Professor Slive"), Professor Grimm and Dr Peter Biesboer ("Dr Biesboer"). Professor Grimm's view was that the Painting was not by Frans Hals; Dr Biesboer's view was that it was by Frans Hals; Professor Slive had stated that it "could very well be by Frans Hals".

43. In his judgment, the Judge stated that it was common ground that MWL entered Contract A not only on its own behalf but also as agent for Fairlight and he proceeded on that basis. He found that there was privity of contract between Fairlight and Sotheby's in Contract A, alternatively that Fairlight and MWL were in partnership such that Fairlight was bound by Contract A. He accepted Sotheby's case that Authenticity Guarantee B had been invoked properly by Nevada; that Sotheby's had properly determined that the Painting was "counterfeit" and returned the purchase price to Nevada. It was accordingly entitled to reimbursement from MWL and Fairlight under Contract A.
44. The Judge rejected Fairlight's various challenges:
  - i) In finding that there was privity of contract between Fairlight and Sotheby's in Contract A such that Fairlight was liable under it, the Judge relied on the evidence at trial demonstrating that Mr Weiss asked Mr Kowitz for Fairlight's consent to enter into the sale of the Painting. Mr Kowitz accepted in cross-examination that he gave his agreement on behalf of Fairlight to Mr Weiss to deal on the basis of consigning the Painting to Sotheby's for sale to a Sotheby's client at US\$10,750,000. The Judge was "fully satisfied" that this episode

gave MWL authority from Fairlight to enter into Contract A on their joint behalf. Taking into account the evidence of Mr Kowitz and Mr Weiss, the engagement of Sotheby's and the structure of the relationship between MWL, Fairlight and Sotheby's, Fairlight's "construct" that Fairlight was simply giving MWL authority to enter into an agreement between MWL and Sotheby's was "unrealistically narrow". In his judgment, the authorities cited on sub-agency were not engaged. The facts did not support the idea that Sotheby's was a sub-agent to which MWL delegated functions within its agency with Fairlight. It was by Contract A that the owners of the Painting (ie MWL and Fairlight) bound themselves as principals to the sale. An internal Sotheby's email referring to an agreement to sell the Painting privately "for Mark Weiss" (with no mention of Fairlight) was not persuasive on the issue. Nor did it matter that Mr Kowitz did not ask to see the text of Contract A at an early point. Nor did the words under Mr Weiss' signature advance Fairlight's position very far, since it was common ground that MWL was acting as agent for Fairlight and on its own behalf;

- ii) Had a conclusion on the question been necessary, the Judge would have found that the essential relationship between MWL and Fairlight was one of partnership. The interest in the Painting was indivisible. The written and oral evidence showed a broad agreement or an understanding to divide profit 50/50, albeit with the possibility for some adjustment. The Judge bore in mind that s. 2 of the Partnership Act 1890 provides that joint property does not of itself create a partnership. He laid little weight on the fact that Fairlight used its interest in the Painting to provide security. Nor did a draft agreement prepared by Mr Kowitz's solicitors in 2010 contra-indicate a partnership, not least since it had not been executed (and the evidence at trial did not make good any suggestion that its terms had been agreed). Mr Weiss and Mr Kowitz had used the language of "partner"; he accepted Mr Weiss' evidence as to his understanding that MWL and Fairlight would purchase as partners, deduct any expenses and split the remaining profit, something which they had agreed "at the outset";
- iii) Nevada had provided "written evidence raising doubts as to the authenticity or attribution of [the Painting]" as required by Authenticity Guarantee B;
- iv) Sotheby's had not acted unreasonably, irrationally, arbitrarily, capriciously and without good faith in making the Determination;
- v) The offer to Nevada to rescind under Authenticity Guarantee B did apply. At the date of Contract B, the Painting description in the contract did not accord with "generally accepted views of scholars and experts". Those words were to be given their ordinary meaning in context. They did not set a headcount or a majority, or a weighting between one scholar or another or between a scholar and an expert. On what was a question of opinion the words required that a generally accepted opinion had been reached. The views that were material were views that were considered and which resulted from the application by scholars and experts of their scholarship and expertise. He considered the evidence available, including the expert evidence. He concluded that, as at 27 June 2011, there was no "generally accepted view of scholars and experts" "over the authenticity of the Painting". The Painting had not long been

discovered. No scholar or expert by that date had submitted the Painting to tests; only one document (a catalogue commissioned by Mr Weiss) had been published on the Painting;

- vi) Authenticity Guarantee B was available to Nevada in 2016 as "the original buyer". Nevada was not a "subsequent owner". Nor had Authenticity Guarantee B been transferred or assigned. It was made to Nevada and remained with Nevada;
- vii) There was no breach of duty on the part of Sotheby's in failing to indicate in Contract B that there was a divergence of views among scholars and experts about the Painting;
- viii) There was no breach of fiduciary duty by Sotheby's, nor could it be said that any loss suffered was of Sotheby's own making. Sotheby's had simply dealt with the matter in accordance with the contractual framework between the various parties. It was fully entitled, legally and professionally, to inform Nevada of concerns over the Painting.

### **Fairlight's challenge on appeal**

#### Ground 1: Sub-agency and privity

- 45. Fairlight contends that the authorities concerning sub-agency (namely *Calico Printers Association v Barclays Bank Ltd* [1930] 36 Com. Cas. 71 at 78; *Kahler v Midland Bank Ltd* [1950] AC 24; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 202; *Prentis Donegan & Partners Ltd v Leeds & Leeds Co Inc* [1998] 2 Lloyds LR 326 at 331 ("*Prentis*"); *Grosvenor Casinos Ltd v National Bank of Abu Dhabi* [2008] 2 Lloyds Rep 1 at [147]-[149]) were fully engaged and the Judge was wrong to hold otherwise.
- 46. These authorities are said to show, normally in the context of a claim by the principal against the sub-agent, that:
  - i) The fact that the sub-agent has power (by virtue of a delegation from the agent) to bind the principal vis-a-vis third parties does not mean that the principal and the sub-agent are in direct contractual relations with each other;
  - ii) That remains the position even if the principal has authorised the sub-delegation. In order to create direct relations between the sub-agent and principal, the principal must have authorised not merely the delegation, but also the creation of direct contractual relations between principal and sub-agent;
  - iii) Any party claiming that direct contractual relations have been brought into being between the principal and sub-agent must adduce "precise proof" to displace the general rule that no privity exists between principal and sub-agent. What is required is cogent evidence to the effect that it was the intention of all three parties to effect a direct contractual relationship between principal and sub-agent. The absence of any reference to the principal in a contractual



document signed by the agent and sub-agent is a strong indicator negating any such intention.

47. In his oral submissions for Fairlight, Mr James Collins QC, who did not appear below or until very recently on this appeal, refers to the Privy Council decision in *The Pioneer Container* [1994] 2 AC 324 to make good his proposition that the sub-agency authorities do not represent a unique or "quirky" line of authorities: rather the principle established can apply, for example, in bailment situations. He emphasises that the exception to the general rule is a narrow one; the burden must be on the party seeking to establish that it exists to show "some special factors" to raise an argument "that the general rule makes way for the exception" (see *Prentis* at 332).
48. It is said that the fact that MWL was permitted to confer a power on Sotheby's to contract on behalf of the Painting's owners went no further than that. The fact that MWL consigned the Painting to Sotheby's with Fairlight's consent also took matters no further: the sub-agency cases all assume that the sub-delegation is authorised.
49. The question was thus not whether MWL was acting as agent in consigning the Painting, but whether it was authorised to do so in such a way as to create direct contractual relations between Sotheby's and Fairlight, something which required precise proof. The question of whether an arrangement was effective to confer on Sotheby's the power to bind Fairlight towards third party prospective buyers of the Painting is separate to the question of whether the arrangement was effective to bind Fairlight to Sotheby's (see *Henderson v Merrett Syndicates Ltd* (supra) at 202). The judgment is said to have been confused on this question.
50. Fairlight submits that the undisputed facts amply supported Fairlight's proposition that Sotheby's was a sub-agent to whom MWL had delegated functions within the scope of the agency between MWL and Fairlight: reliance is placed on the purchase of the Painting; the exchange of emails between Mr Kowitz and Mr Weiss on 17 May 2011; Contract A; and the fact that Mr Weiss signed Contract A for MWL, with no mention of Fairlight anywhere in the agreement. Mr Collins emphasises that the reference to "you" in Contract A, for example in clause 6, must be a reference to MWL (and not necessarily the owner(s) of the Painting). Sotheby's did not need a contract with all owners of the Painting.
51. It is said that the true effect of Contract A was that MWL delegated part of its agency function (within Fairlight's authorisation) to Sotheby's by consigning the Painting to Sotheby's for sale within 3 months, whilst still retaining its wider duties as agent for Fairlight. It is also said that the Judge gave inadequate reasons for his finding that there was no sub-agency, failing to identify the specific evidence considered or why he considered Fairlight's contention as "unrealistically narrow". He failed to recognise the heavy burden on Sotheby's to adduce strict proof of direct contractual relations between Sotheby's and Fairlight.
52. In summary on Ground 1, Fairlight contends that, had the Judge properly directed himself on the law and applied the law to the evidence, he would have been constrained to hold that:
  - i) Sotheby's was Fairlight's sub-agent;

- ii) No privity of contract existed between Fairlight and Sotheby's merely because MWL delegated authority to sell the Painting to Sotheby's as consignee;
  - iii) Sotheby's was under a persuasive burden to adduce precise proof to establish, as an exception to the general rule, that Sotheby's (as sub-agent) and Fairlight (as principal) had entered into direct contractual relations with each other under Contract A. On the evidence it had failed to discharge this burden.
53. Given what is said to be the undisputed nature of the primary evidence, Fairlight submits that this court is able to apply the law to the facts, drawing inferences as necessary, and reach the appropriate secondary conclusion that no privity of contract existed between Fairlight and Sotheby's.

### Ground 2: Partnership

54. Fairlight contends that the Judge erred in law by holding that a statutory partnership existed between Fairlight and MWL in relation to the Painting when the consignment agreement was executed on 25 June 2011 and that such partnership had entered into direct contractual relations with Sotheby's.
55. Fairlight submits that the judgment is silent on the law, and the Judge failed to direct himself properly on the law relating to statutory partnerships. The Judge's reasons for finding that a partnership existed between Fairlight and MWL are "extremely thin". He was wrong to state that the interest of MWL and Fairlight was indivisible. He needed (but failed) to address at least the following points:
- i) The history of the relationship between Fairlight and MWL;
  - ii) Whether the manner in which decisions were taken was consistent with carrying on a business in common or with a particular venture in which MWL acted as agent for reward;
  - iii) The manner in which the Painting was held, including the fact that the parties appear to have felt free to deal with their respective shares in it;
  - iv) The uncertainty as to the terms on which any profit and expenses would be shared;
  - v) The extent to which the parties owed mutual fiduciary obligations;
  - vi) The relevance of the Unexecuted Acquisition Agreement;
  - vii) How the parties described themselves. (In this regard, it is said that there was in any event a need for caution when relying on the words used. It was the substance of the relationship that mattered (see *Mann v D'Arcy* [1968] 1 WLR 893 at 899; *Protectacoat Firthglow Ltd v Szilagyi* [2009] IRLR 365 at [61]).
56. Fairlight further submits that, even if a statutory partnership existed, the Judge was wrong to hold that MWL was authorised to create direct contractual relations in connection with Contract A on behalf of such partnership. His reasons, (namely that there could be no question but that MWL "as the more active partner" had full authority to enter into Contract A on behalf of the partnership, and the fact that Mr

Kowitz accepted in cross-examination that he gave his agreement on behalf of Fairlight to Mr Weiss to deal on the basis of consigning the Painting to Sotheby's), did not make good that conclusion.

Ground 3: The GAV Proviso

57. Fairlight contends that the Judge erred in his construction of the GAV Proviso. He held that the relevant question was whether as at 27 June 2011 a single "generally accepted opinion ha[d] been reached". He ought to have held that the relevant test was whether most or a majority of the relevant views of scholars and experts on the Painting at that date accorded with the description of the Painting in Contract B (which attributed the Painting to Frans Hals).
58. Contrary to the Judge's conclusion, it is said that the natural and ordinary meaning of the word "generally" required both a headcount to be conducted and a majority. Any doubt should have been resolved in favour of Fairlight pursuant to the contra proferentem rule. The provision did not require a single generally accepted opinion. Reliance is placed on the unchallenged expert evidence of Mr Warner-Johnson (for Fairlight): that is not how the commercial art market operates. The Judge did not address Mr Warner-Johnson's evidence in this regard. The Judge ought to have asked himself the following sequential questions:
- i) Who are the scholars and experts?
  - ii) What are their views?
  - iii) Are those views generally in agreement such that they can be considered "generally accepted"? If so, this majority can then be described as "generally accepted views of scholars and experts".
59. Moreover, it is said that the Judge's findings on the expert evidence were perverse:
- i) Dr Buvelot: there was no rational basis on which to find that he was not persuaded on the evidence that Dr Buvelot had seen the Painting before 27 June 2011. Mr Weiss' unchallenged evidence was that Dr Buvelot had told him directly that Dr Buvelot had first seen the Painting in person at the Louvre in 2010;
  - ii) Professor Grimm and Dr Liedtke: it is said that the Judge's reasoning was contradictory and flawed: he held that Professor Grimm (who made a negative attribution) had provided a "considered" view on the Painting (from a "jpeg"), yet he found that Dr Liedtke (who made a positive attribution) had only seen a "jpeg" and could not be said to have provided a "considered" view;
  - iii) Professor Slive: Professor Slive was acknowledged as the world's leading scholar on the works of Frans Hals. There was cogent evidence that Professor Slive, having seen a photograph of the Painting, "enthusiastically" accepted it as a work by Frans Hals. Professor Slive expressly attributed the Painting to Frans Hals in the second edition (published posthumously) of his monograph on the artist. The Judge's finding that there was insufficient evidence that Professor Slive ever provided a considered view on the Painting was perverse;

- iv) Dr Roelofs: the Judge made no mention of Dr Roelofs. Mr Weiss' unchallenged evidence was to the effect that Dr Roelofs had seen a photographic image of the Painting in January 2011 and was "very complimentary".
60. It is also said that the Judge ought to have drawn adverse inferences from Sotheby's failure to call Mr Naumann, an employee or agent of Sotheby's. Mr Naumann had, in an email of 5 May 2011, referred to Professor Slive's positive attribution ("enthusiastic acceptance") of the Painting as a work of Frans Hals. The Judge stated that he had doubts about Mr Naumann's account because it was "indirect and not detailed".
61. Fairlight submits that the Judge should have held that a clear majority of the scholars and experts had expressed views on the attribution (which he wrongly confused with authenticity) of the Painting that accorded with the description of the Painting in Contract B. Six of the seven scholars and experts who had expressed a view by June 2011 had positively attributed the Painting to Frans Hals (Dr Biesboer, Dr Buvelot, Mr Naumann, Professor Slive, Dr Liedtke, Dr Roelofs). Professor Grimm was a lone dissenting voice. This majority view was reinforced by further evidence, such as Sotheby's own view at the time of Contract B.
62. Accordingly, he erred by failing to hold that the offer to rescind did not apply and Sotheby's had no sustainable cause of action against Fairlight.
63. In relation to the third ground of appeal, Sotheby's has served a Respondent's Notice seeking to revive, if necessary, its argument below that, even if there was a generally accepted view of scholars and experts as at 27 June 2011, the GAV Proviso did not qualify Sotheby's right under Authenticity Guarantee A to require MWL and Fairlight to return the purchase price where the Painting was determined to be counterfeit.

Ground 4: Nevada as a "subsequent owner"

64. Fairlight contends that Nevada was a "subsequent owner" and so not entitled to rescission and Authenticity Guarantee A was not applicable. The Judge erred in holding that Nevada was to be construed as "the original buyer" and not as a "subsequent owner" with the result that Authenticity Guarantee A applied. He ought to have held that Nevada was a "subsequent owner" at the relevant date in 2016. Properly construed, Authenticity Guarantee A required that the buyer of the Painting should remain the buyer at all times between the original purchase and purported rescission. Mr Collins emphasises that it does not matter that Nevada was the original buyer, at the time of rescission its "status" or "capacity" was that of "subsequent owner".
65. Alternatively, there was ambiguity as to the meaning of the subsequent owner provision, and the principle of contra proferentem ought to have been applied. Authority Guarantee A was a pro forma clause used by Sotheby's for its private treaty sales when it acts as consignee.
66. On either basis, the Judge ought to have held that Authenticity Guarantee A was not applicable in 2016 when Nevada sought to rescind Contract B.

## Analysis

67. It can be seen that Fairlight only pursues four of its original defences on appeal. Grounds 1 to 3 each raises a challenge to either mixed findings of fact and law or pure fact; Ground 4 is a pure challenge of construction on undisputed facts. As set out above, the Judge heard a substantial amount of factual and expert evidence. I propose to address the grounds in the order in which they were advanced below and in Fairlight's skeleton on this appeal, albeit that Mr Collins chose in his oral submissions to address Ground 2 before Ground 1.

### Ground 1: Sub-agency and privity

68. There is a line of sub-agency authorities as identified by Fairlight (arising out of attempts by a principal to sue a sub-agent) as set out in paragraph 45 above.

69. These authorities address circumstances where there is a contract of agency between a principal ("P") and agent ("A"). A enters into a contract with B whereby A delegates to B, and B promises A that he will perform some or all of the duties owed by A to P. B is a "sub-agent". The court in such circumstances will not conclude from the mere fact that P had authorised A to enter into the contract with B that P is privy to the contract with B, something which will require "precise proof" or, as it was put in *Prentis*, "special factors".

70. The starting-point is to consider whether, as the Judge put it, the facts "supported the idea that Sotheby's was a sub-agent to which MWL delegated functions within an agency between MWL and Fairlight". In my judgment, he was right to conclude that they did not.

71. Fairlight's case rests upon the notion that on 17 May 2011 a "main agency agreement" was created between Mr Kowitz for Fairlight and Mr Weiss for MWL that "Fairlight would employ MWL to sell, or endeavour to sell, the Painting on behalf of both Fairlight and MWL to a third party buyer". Everything that followed, including the decision to consign in June 2011, was carried out under this "main agency agreement".

72. I do not consider that the email of 17 May 2011 created such an overarching "main agency agreement". The suggestion appears to me to be an artificial construct designed to attract the sub-agency line of authorities. By the email of 17 May 2011 Mr Kowitz (for Fairlight) was simply confirming his permission to Mr Weiss (for MWL) at that time to sell the Painting for not less than US\$12million. He also stated that he wished to be consulted on any decision to consign it to any third party before Mr Weiss made any such commitment. He was thus not authorising any commitment to consign at this stage.

73. The email was but part of a continuum of discussions between the co-owners of the Painting as to how they wished to proceed as their plans evolved. Thus, very shortly after he sent the email on 17 May 2011, Mr Kowitz indicated that he wanted time to consider again whether in fact he did not want to sell the Painting. Matters moved on again when in early June 2011 Sotheby's indicated that it had a potential client buyer. Negotiations followed, to Mr Kowitz's knowledge, culminating in the eventual offer on 21 June 2011 that MWL and Fairlight accepted. That offer was discussed

specifically by Mr Kowitz and Mr Weiss on 21 June 2011 and both agreed to accept it. Contract A was not the product of (or entered into under the auspices of) the (limited) authorisation given by Mr Kowitz in the email of 17 May 2011, but rather the product of the agreement reached between Fairlight and MWL on 21 June 2011. It differed from the authorisation given in Mr Kowitz's email of 17 May 2011 in two material respects: first, the sale price agreed was significantly lower, and secondly, the consignment of the Painting to Sotheby's was agreed.

74. In these circumstances and without more, the sub-agency cases were not engaged and privity existed between Fairlight and Sotheby's in Contract A under the normal principles of agency relating to an unnamed (albeit here disclosed) principal (see for example *Siu yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199 at 207). Mr Kowitz's evidence in cross-examination made it crystal-clear that MWL was authorised to bind Fairlight to Contract A jointly with MWL as co-owner of the Painting: Mr Kowitz transferred to Mr Weiss "the authority to do what [Mr Weiss] saw fit in his judgment".
75. Further and in any event, it can be seen that the sub-agency cases do not assist Fairlight (either because they are not engaged for additional reasons or because "precise proof" of privity between Fairlight and Sotheby's or "special factors" existed), as follows:
- i) Fairlight and MWL were co-owners of the Painting. MWL was not a mere agent for Fairlight, nor by Contract A was it an agent sub-contracting or delegating mere authority (along the lines identified in the sub-agency cases). It was entering into detailed contractual arrangements for the owners of the Painting including as to risk, delivery, inspection and authenticity;
  - ii) The terms of Contract A included reciprocal commitments between Sotheby's and the owner (or "Seller") of the Painting (including for example as to liability for loss or damage to the Painting (as set out in the Private Treaty Terms)). Clauses 3, 4, 5 and 7 of Contract A make no sense if both owners of the Painting are not privy to them;
  - iii) Sotheby's was not acting as agent (let alone a sub-agent under a delegation by MWL of agency duties owed by MWL to Fairlight) in giving Authenticity Guarantee A. The Judge's unchallenged finding was that in giving the guarantee Sotheby's was acting "in its own right, committing its own balance sheet", "with financial and reputational consequences attached";
  - iv) Authenticity Guarantee A was a promise being given to the owners of the Painting; the seller's obligation to rescind was Sotheby's contractual protection: it would be meaningless if it bound only a part-owner;
  - v) Contract A and Contract B were part of a package designed to achieve the sale of the Painting by Sotheby's to a third party at a particular price. Fairlight now accepts, contrary to its pleaded case and its case as advanced at trial (for which Mr Collins was not responsible), that it was party to Contract B. (This was a position that Fairlight was forced to adopt in order to explain how otherwise title in the Painting had ever passed to Nevada). It is wholly counter-intuitive (and artificial) for Fairlight to be privy to Contract B, a contract which neither

owner of the Painting signed or even saw at the time, but not privy to Contract A. It would either be party to both or none, or at least if it was party to any, that contract would be Contract A. As it was put, however, Fairlight seeks to "have their cake and eat it".

76. The facts of this case are thus very far removed from the facts of the sub-agency cases relied on by Fairlight, including *Prentis* (where marine insurance had been placed by plaintiff Lloyd's brokers on the instruction of defendant New York brokers acting for their principal, Offshore Oil Services UK Ltd).
77. The concession now made by Fairlight (that it was party to Contract B) gives rise to this further conundrum. It prompts the question of how it is not bound to comply with the obligation in Authenticity Guarantee B for "the owner [to] return the purchase price" for the Painting in the circumstances which have now transpired.
78. Whilst the Judge could usefully have expressed himself more fully, I do not consider that there is any legitimate challenge based on inadequacy of reasoning or a failure to deal adequately with relevant evidence. He stated in terms that he considered the evidence at trial, including the oral and written evidence of Mr Kowitz. The Judge addressed the fact that Mr Weiss had only signed as "[d]uly authorised for and on behalf of [MWL]". The question was whether MWL was acting only on its own behalf or on behalf of both owners. He addressed expressly Mr Macdonald's internal email of 22 June 2011 in which he stated that Sotheby's had reached an agreement to sell the Painting for Mr Weiss (and why it did not advance Fairlight's case). (It is also to be noted that it is clear that Sotheby's in fact knew that another party was involved as seller). He addressed the fact that Mr Kowitz was not sent and had not asked to see Contract A at an early point.
79. For these reasons, I would uphold the Judge's decision that by Contract A both owners of the Painting, Fairlight and MWL, were committed as principals to the consignment of the Painting to Sotheby's on the terms set out therein. The fact that Fairlight was not named in Contract A is in no way inconsistent with this conclusion; it may often be the case, particularly in the art world, that parties are keen to remain anonymous. The parties were themselves familiar with such an arrangement, not least because it was adopted when they purchased the Painting in June 2010 (when only Fairlight was named as buyer but the agreement was entered into for both Fairlight and MWL).
80. I would therefore dismiss Ground 1.

#### Ground 2: Partnership

81. In the light of this conclusion, as was the case below, the question of partnership is not decisive and does not need to be determined.

#### *The Law*

82. S. 1 of the Partnership Act 1890 ("the 1890 Act") provides:

"Partnership is the relation which subsists between persons carrying on a business in common with a view of profit."

83. S. 2 sets out the rules to which regard shall be had in determining the existence of a partnership, including:
- i) that joint property does not of itself create a partnership;
  - ii) the sharing of gross returns does not of itself create a partnership;
  - iii) the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business but such receipt does not of itself make him a partner in the business.
84. The formation of a partnership creates strict and important rights and obligations between the partners (see for example s. 20 (restrictions on the use of partnership property), s. 29 (accountability) and s. 30 (duty not to compete) of the 1890 Act). In determining whether or not a statutory partnership exists, it is important to look at the substance of the relationship, not the words used by the parties to describe it (see *Mann v D'Arcy* [1968] 1 WLR 893 at 899; *Protectacoat Firthglove Ltd v Szilagyi* [2009] IRLR 365 at [61]). For a very recent summary of the relevant law, reference can be made to *Patel and another v Barlows Solicitors and others* [2020] EWHC 2753 (Ch) at [100] to [110].

*The Law applied*

85. The pleaded partnership was as follows:
- "In the circumstances, it is to be inferred as a matter of fact and law that in agreeing to the purchase of the [Painting], MWL and Fairlight agreed between themselves to carry on the business of purchasing and dealing with the [Painting] in common with a view to profit as partners in that business".
86. Mr Collins launches a powerful attack on the Judge's conclusion (such as it was) that there was a partnership. He submits that the Judge failed to grapple with the three key requirements for a statutory partnership, namely i) the carrying on of a business ii) in common iii) with a view to profit. Had the Judge done so, it is said that he would have been driven to conclude that no such partnership existed.
87. Mr Collins submits that it was unclear what the business was said to be. The definition of "business" in s. 45 of the 1890 Act - "every trade, occupation, or profession" - is not exhaustive, but nevertheless gives a clear steer as to what is intended. Mere co-investment in or co-ownership of property is not enough (see *Lindley & Banks on Partnership* (20<sup>th</sup> ed) ("*Lindley & Banks*") at 5-07 and 5-08). Reliance is placed on the fact that Fairlight, whilst a trading vehicle, was not in the business as such of fine art dealership. Moreover, Mr Kowitz was from time to time considering buying out Mr Weiss's interest in the Painting.
88. It is said that none of the factors relied upon by the Judge justified his finding of a partnership:
- i) The shortage of evidence noted by the Judge indicated that there was no partnership. The burden to establish the partnership lay at all times on Sotheby's to prove its existence;



- ii) The meaning of the Judge's comment that the interest of MWL and Fairlight in the Painting was "indivisible" is unclear. If it means that neither could deal with its own interest, there was no basis for such a finding (and in fact Mr Kowitz gave evidence that Fairlight did charge its interest in the Painting). It was wrong to assume an incident of partnership and then rely on it in order to conclude whether there was a partnership;
  - iii) The Judge impermissibly relied (or placed far too much weight) on the (limited) references to the word "partner" in the documents. When read properly in their context, they could not reasonably be read as suggesting that a statutory partnership existed. In fact, properly analysed, the relationship was one of art dealer and client. As for the Judge's reference to Mr Weiss' evidence that his understanding was that "...in line with our previous practice, we would purchase the Painting as partners, deduct any expenses and split the remaining profit", that was a highly selective quotation and, again when read in full context, not a reference to a statutory partnership.
89. Reference is also made to Mr Kowitz's evidence that partnership accounts were never contemplated. The Reconciliation cannot have been a partnership account, not least since it covered items, profits and expenses wholly outwith the alleged partnership. Moreover, when dealing with the profit on the Painting, the gross proceeds were not "netted off" for expenses, as would happen in a partnership account. Rather the gross profit was simply divided 50/50. Further, the Judge was wrong to dismiss the relevance of the Unexecuted Acquisition Agreement, which stated in terms that there was no partnership.
90. In summary, submits Mr Collins,:
- i) As to the first requirement, it was not clear what the business is said to have been and the Judge's reasoning was inadequate. MWL and Fairlight were not carrying on a business;
  - ii) As to the second requirement, if they were, it was not in common. Each was acting on its own account with different interests;
  - iii) As to the third requirement, MWL and Fairlight had separate views as to profit.
91. In response, Mr Nathan Pillow QC for Sotheby's and Mr Joe Smouha QC for MWL mount a staunch defence of the Judge's conclusion on partnership:
- i) The Judge did not set out ss. 1 or all of 2 of the 1890 Act in terms (though he did refer expressly to and quote part of s. 2), or any related authorities or textbooks, but it is not in any way apparent that he was unaware of the statutory test and what are well-established principles. He referred to Fairlight's contention that "MWL were carrying on a separate business independently" which suggests that he was so aware. The law was put before him extensively in the parties' submissions;
  - ii) The Judge was entitled to find that (and adequately reasoned why) Fairlight and MWL were acting in common intending to make a profit and in business.

As is common in partnerships, each made a different contribution of value to the relationship: MWL brought its fine art expertise and Fairlight brought its financial assets;

- iii) S. 32(b) of the 1890 Act makes it clear that a partnership can exist in relation to a "single adventure or undertaking" (in which case, absent agreement to the contrary, it will dissolve on the termination of that "adventure or undertaking"). The fact that at various stages Mr Kowitz was considering buying out MWL's interest in the Painting was in no way inconsistent with the existence of a partnership;
  - iv) The partnership arrangement was "very informal". The Reconciliation was an accounting exercise. The sharing of profit was "prima facie evidence" of a partnership (see s. 2(3) of the 1890 Act);
  - v) The Judge was entitled to rely on Mr Weiss' evidence, adduced by Fairlight, that Fairlight and MWL "would purchase the Painting as partners, deduct any expenses and split the remaining profit";
  - vi) The Judge was right to dismiss the relevance of the Unexecuted Acquisition Agreement, nor did the fact that the Painting may have been the subject of a charge by Fairlight assist (since the charge in question pre-dated Fairlight's purchase of the Painting);
  - vii) The fact that the source of repayment of Mr Kowitz's loan to Mr Weiss (carrying interest at 7% per annum) was to be the sale proceeds from the Painting made it inherently likely that the parties were acting in partnership;
  - viii) A proper consideration of the factors identified in *Lindley & Banks* at 5-08 distinguishing between co-ownership and partnership leads to the conclusion that there was here a partnership.
92. It is fair to say that the Judge's reasoning on the question of partnership is sparse. But this has to be seen in context, namely that, given his conclusion on privity, he did not have to decide the issue.
93. I harbour doubts as to whether, on the material that I have seen, I would have concluded that there was a partnership as alleged. In particular, I struggle to identify clear evidence of a "business in common" between the parties. However, that is not the test on appeal. In the absence of a demonstrable misdirection on the law, I would have been hesitant to interfere with the Judge's finding on the facts that a partnership existed. This was ultimately a question of fact for the Judge to determine. In circumstances where the question of partnership does not need to be resolved and where the Judge made no formal ruling upon it, it is in my judgment unnecessary for this court to make a ruling on Ground 2.
94. I add, however, that I would have rejected the suggestion that the entering into Contract A was something outside the partnership (if it existed). There can be no serious argument that the act of binding the partnership to Contract A was anything other than within the scope of a partner's authority.

Ground 3: The GAV Proviso and the expert evidence

95. The issue raised by Sotheby's in its Respondent's Notice is logically the first to consider under Ground 3, namely whether the GAV Proviso formed part of Contract A at all. It will be remembered that it is not included in Authenticity Guarantee A.
96. The point is a short one. The GAV Proviso was an additional proviso which does not appear in Contract A. It was for Sotheby's protection in Contract B, in the sense that it narrowed the circumstances in which Nevada could rescind Contract B. I agree that there is nothing to suggest that Sotheby's right under Authenticity Guarantee A was similarly restricted.
97. But in any event, I do not consider that the Judge erred in his construction of the GAV Proviso or that it can be said that his finding on the evidence was perverse.
98. I can find no fault with the Judge's approach to construction of the GAV Proviso. The material wording that is being interpreted is as follows:
- "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 ...."
99. The Judge held that the words "generally accepted views of scholars and experts" were to be given their ordinary meaning in context. I agree. The rather poor drafting invites argument, but the ordinary meaning of the words, read together, shows that the question is whether the description of the Painting is one that would be generally accepted by scholars and experts at the time. That is what the Judge rightly found. As was said for Sotheby's, what is required is for "views" plural to have coalesced into a "generally accepted view" singular. Another way of putting it, which avoids the use of the word "view's", would be to say that the question is whether there was a consensus (ie a generally held view not requiring unanimity) among scholars and experts at the time. There may be an absence of consensus either because of a divergence of views or because there has been insufficient time for a generally accepted view to have formed.
100. The Judge went on to say that the words did not set a "headcount or a majority" or require "a weighting between one scholar and another or between a scholar and an expert". The views that were material were views that were considered and the result of the application by scholars and experts of their expertise.
101. Fairlight's contention that the words require a headcount or majority approach does not accord with their natural meaning, nor is it apt in what is a far more nuanced situation. As the Judge said, in a literal sense, the words do not require a "weighting" between scholars and experts. However, when deciding whether there is a generally accepted view, it will be necessary to identify who the scholars and experts are in the field, and to survey their views in the light of their numbers, eminence and the degree of consideration that each has given to the question.
102. Fairlight's position, as set out graphically in a chart (with a tick or a cross against any scholar or expert who had expressed a view on authenticity, however fleeting,

informal or private, and irrespective of purpose and context), demonstrates the problem: it takes no account of the strength or precision of the view expressed, the status of the scholar or expert in question or the basis and background for the indication given. It does not reflect the exercise to be carried out, which is to look at the whole field of scholarly and expert opinion expressed and reach a judgment on whether or not i) there is a generally accepted view and, if so, ii) what that view is. This is an exercise of judgment that cannot be reduced to a mechanical process of the type contended for by Fairlight.

103. I turn then to the Judge's central point – or the “middle ground” as it was described – that can arise when a work of art is newly discovered. As the Judge stated, on what is a question of opinion, the words required that a generally accepted opinion has been reached. It can take time, after first discovery of a work, to reach the point where there are “generally accepted views of scholars and experts”. Fairlight was not in a position to attack this proposition.
104. The Judge found here, on the facts, that as at 27 June 2011 that time had not come: there was no generally accepted view of the authenticity of the Painting at that time. In these circumstances, the GAV Proviso did not bite.
105. It can be seen that this produces a commercially sensible method of risk allocation for parties dealing with a newly discovered work: the buyer does not take on the risk of the description of the work being inaccurate and the work being a counterfeit. The seller has the benefit of Sotheby's guarantee to attract buyers.
106. The Judge's finding of fact was made by reference to the extensive material and evidence heard and considered by him. It cannot on any view be said to be perverse. Indeed, it appears to be unassailable on the facts: the Painting was unrecorded before 2008; little had been written about it – indeed there had been only one publication mentioning the Painting, namely a catalogue commissioned by Mr Weiss from Dr Biesboer; Professor Slive, widely acknowledged as the leading scholar on the life and work of Frans Hals, had not seen the Painting in person (which the Judge understood did not compromise a negative attribution but would compromise a positive one); there was a considered dissenting view from Professor Grimm, one of only three leading scholars on Frans Hals; a good number of scholars and experts had not seen the Painting in person; no forensic testing of the Painting had been carried out. As it was put by Lord Justice Henderson during the course of the hearing, this was a “newly discovered painting which ha[d] no proper provenance, ha[d] not been published [except by Dr Biesboer] and had never been in an exhibition”. Any discussion between the scholars and experts, including reasons for disagreement with the reasoning of Professor Grimm was “conspicuously absent”.
107. As set out above, Fairlight makes a series of detailed criticisms in relation to the Judge's findings on the evidence relating to authenticity. Those criticisms do not appear to be well-made (and Mr Collins did not press them with any vigour). I take them shortly:
  - i) Dr Buvelot: the Judge was entitled to find that he was not persuaded on the evidence that Dr Buvelot had seen the Painting in person. The only evidence to that effect was Mr Weiss' written statement; there was no contemporaneous

evidence of any such inspection and no reference in any of the parties' pre-action correspondence to a positive attribution (or inspection) by Dr Buvelot;

- ii) Professor Grimm and Dr Liedtke: there was no irrational inconsistency in the Judge's approach to the reliability of opinions expressed by reference to photographs only. As the Judge explained from the evidence, a negative attribution made by reference to a photograph alone (such as that of Professor Grimm) could be relied upon safely, whilst a positive one (suggested to have been made by Dr Liedtke) cannot. Further and in any event, Dr Liedtke had only provided a "short answer" in an email sent to Mr Kowitz whilst on a train and by reference to apparently poor "jpegs". He described the Painting as "very good not great". It is not clear to what extent, if at all, he was being asked to consider or was commenting on authenticity;
  - iii) Professor Slive: the Judge's approach to the evidence of Professor Slive cannot be impugned. Professor Slive never saw the Painting in person; it was his modus operandi not to confirm attribution without physical inspection. All that could firmly be proved was that Professor Slive had written (in a private letter in 2008 and based on a black and white photograph) that the Painting "could very well be by Frans Hals". The Judge was entitled to conclude that the fact that the Painting appeared in a second edition of a catalogue, the first edition of which was prepared by Professor Slive in 1974, did not advance matters (in circumstances where the second edition was published after Professor Slive's death and in the absence of any evidence as to the basis for the Painting's inclusion). The Judge was also entitled not to place weight on an email from Mr Naumann in May 2011 referring to Professor Slive accepting the attribution of the Painting to Frans Hals (as indirect and lacking in detail);
  - iv) The suggestion that the Judge erred in failing to draw an adverse inference from the fact that Sotheby's did not call Mr Naumann to give evidence is hopeless. The evidential "rule" relating to adverse inferences is a narrow one; the drawing of an adverse inference is only ever likely to be appropriate in limited and precise circumstances following the approach identified helpfully in *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [154]. There was no adverse inference to be drawn here, not least since Mr Naumann's evidence (as to what Professor Slive had said in May 2011) would not have been material (going only to a second-hand report of a privately expressed opinion by an expert who had still not seen the Painting in person);
  - v) No criticism can be made of the Judge's failure to mention Dr Roelofs, a curator at the Rijksmuseum who had not made any positive statement of attribution.
108. The additional matters relied on by Fairlight, namely the fact that the Louvre sought to raise funds to purchase the Painting in 2010 with the statement that "international specialists ha[d] confirmed the attribution to Frans Hals", and Sotheby's own view in 2011 that the Painting was by Frans Hals, do not begin to undermine the justification for the Judge's conclusion that as at 27 June 2011 there was no generally accepted view on the Painting such as to invoke the GAV Proviso.

109. I would therefore uphold the Respondent's Notice and I would dismiss Ground 3.

Ground 4: Nevada as subsequent purchaser

110. Authenticity Guarantee A provided:

"This guarantee will not be assignable and will only be applicable to the original buyer and not to any subsequent owner or owners who acquire an interest in [the Painting]."

111. Authenticity Guarantee B provided:

"This offer to rescind is only made to you personally and may not be transferred or assigned in any way by you."

112. There was no transfer or assignment by Nevada of the offer to rescind in Authenticity Guarantee B (nor any assignment of Authenticity Guarantee A). The offer to rescind in Authenticity Guarantee B was made to Nevada personally and remained with Nevada, which in 2016 invoked it.

113. As set out above, Fairlight contends that "crucially, at the time of rescission," Nevada was "first and foremost" a "subsequent owner" for the purpose of Authenticity Guarantee A. Like the Judge, I see no force in Fairlight's contention that Nevada was not "the original buyer" but a "subsequent owner" by reason of the transfer of the Painting by Nevada to its beneficial owner, Mr Hedreen, and back again, such that Authenticity Guarantee A was inapplicable.

114. Nevada was and remained the "original buyer". Those words are clear and unqualified: there is no suggestion that the "original buyer" only has that status for so long as it remains the owner. Authenticity Guarantee A was for the personal benefit of the party first purchasing the Painting, here Nevada, which was then fully entitled to rely on it. It conferred a (limited) personal (non-assignable) right on Nevada. What the "subsequent owner" provision seeks to do is to prevent a third party to whom the original buyer has sold the Painting from subsequently invoking the guarantee against Sotheby's. That is not the case on the facts here. There is no superfluity of wording on this construction, as Fairlight suggests, not least since Authenticity Guarantee A prohibited only assignment (and not, for example, transmissibility upon insolvency or death). Nor can it be said that there is anything commercially objectionable about the result. By contrast, Fairlight's construction could lead to very odd results: thus for example, were Nevada to sell the Painting on for profit, the onwards purchaser might require an authenticity guarantee from Nevada. On Fairlight's case, were the guarantee to be invoked, Nevada would be left with no remedy against Sotheby's, something which, objectively, the parties are unlikely to have intended.

115. For these reasons, I would dismiss Ground 4.

Ground 5: Impact on MWL's contribution claim against Fairlight

116. In the light of the findings above on Grounds 1, 3 and 4, there is no basis on which to interfere with the contribution order made against Fairlight in favour of MWL.

## **Conclusion**

117. For all these reasons, I would dismiss the appeal, though not without recording my gratitude to counsel on all sides for their skilful and focussed submissions.

### **Peter Jackson LJ:**

118. I agree.

### **Henderson LJ:**

119. I also agree.

## Appendix

### "Private Treaty Terms

#### *Seller's Warranties:*

You warrant to Sotheby's and to the buyer that at all relevant times (including but not limited to the time of the consignment of the Property and the time of the sale):

- (a) You are the true owner of the Property, or are properly authorised to sell the Property by the true owner;
- (b) You are able to and shall transfer possession to the buyer and good and marketable title to the Property free from any third party rights or claims or potential claims including, without limitation, any claims which may be made by governments or governmental agencies;
- (c) You have provided Sotheby's with all information concerning the provenance of the Property and have notified Sotheby's in writing of any concerns expressed by third parties in relation to the ownership, condition, authenticity, attribution, or export or import of the Property;
- (d) You are unaware of any matter or allegation which would render any description given by Sotheby's in relation to the Property inaccurate or misleading;
- (e) Where the Property has been moved to the European Union from a country that is not a member of the European Union, the Property has been lawfully imported into the European Union: the Property has been lawfully and permanently exported as required by the laws of any country in which it was located; required declarations upon the export and import of the Property have been properly made and any duties and taxes on the export and import of the Property have been paid;
- (f) You have or will pay any and all taxes and/or duties that may be due on the net sale proceeds of the Property;
- (g) Unless you advise Sotheby's in writing, there are no restrictions, copyright or otherwise, relating to the Property (other than those imposed by law) and no restrictions on Sotheby's rights to reproduce photographs or other images of the Property: and
- (h) Unless you advise Sotheby's otherwise in writing, any electrical or mechanical goods (or any electrical or mechanical parts of Property being offered for sale) are in a safe operating condition if reasonably used for the purpose for which they were designed and are free from any defect not obvious on external inspection which could prove dangerous to human life or health. You agree to indemnify Sotheby's and any Sotheby's affiliated company, their respective servants, directors, officers and employees and the buyer against any loss or damage resulting from any breach or alleged breach



of any of the above representations or warranties. Your representations, undertakings and indemnity will survive completion of the sale of the Property.

***Liability for loss or damage:*** If Sotheby's takes delivery of the Property, and unless otherwise agreed. Sotheby's will be liable for loss or damage to the Property from the time Sotheby's receives the Property until the property ceases to be in Sotheby's care and control, on the terms set out in this Agreement.

Sotheby's will not be liable for any loss or damage caused to frames or to glass covering prints, paintings or other work, for damage occurring in the course of any process undertaken by independent contractors employed with your consent (including restoration, framing or cleaning), or for damage which is caused directly or indirectly or results from (i) changes in humidity or temperature; (ii) normal wear and tear, gradual deterioration or inherent vice or defect (including woodworm); (iii) errors in processing ; or (iv) war, nuclear fission or radioactive contamination, chemical, bio-chemical or electro-magnetic weapons, or any acts or acts of terrorism (as defined and applied by Sotheby's insurers).

***Photographs and illustrations:*** You agree that Sotheby's shall have the absolute right (on a non-exclusive basis) to photograph, illustrate or otherwise produce images of the Property. Sotheby's shall retain copyright in all images created by Sotheby's of the Property and shall have the right to use such images in whatever way Sotheby's deem appropriate, both before and after the sale.

***Guarantee:*** You agree that subject to the guarantee set out in the following paragraph, the Property will be sold "as is", with all faults and imperfections and errors of description. Subject as above, neither you nor Sotheby's shall be responsible for errors of description or for the genuineness or authenticity of the Property nor make any representations or warranties with respect to the physical condition, size, quality, rarity, genuineness, authenticity, importance, provenance, exhibitions, literature or historical relevance of the Property, and no statement anywhere, whether oral or written, shall be deemed such a representation or warranty.

Notwithstanding the generality of the preceding paragraph, Sotheby's shall guarantee to the buyer that the Property is not "counterfeit" (an imitation intended to deceive). This guarantee will not be assignable and will only be applicable to the original buyer and not to any subsequent owner or owners who acquire an interest in the Property. In the event Sotheby's determines that the Property is "counterfeit", you agree to a rescission of the sale and will return to the buyer the purchase price received by you for the Property and the buyer will return the Property to you. Sotheby's reserves the right to consult independent expert advice on whether the Property is "counterfeit" and will only rescind a sale if the buyer can: (i) provide, within five (5) years from the date of their agreement to purchase the Property, written evidence raising doubts as to the authenticity or attribution if the item; (ii) transfer good title in the item free from third party claims; and (iii) return the item to Sotheby's in the condition in which it was purchased.

In order to fulfil the services you have requested, Sotheby's may disclose information to third parties (e.g. shippers). Some countries do not offer equivalent legal protection of personal information to that offered within the EU. It is Sotheby's policy to require that any such third parties respect the privacy and confidentiality of our clients' information and provide the same level of protection for clients' information as provided within the EU, whether or not they are located in a country that offers equivalent legal protection of personal information. By signing this Agreement, you agree to such disclosure. Clients can prevent the use of their personal information for marketing purposes by ticking the box or by contacting us at ....

***This agreement shall be governed by and construed and enforced in accordance with English Law. In the event of a dispute hereunder, you agree to submit to the jurisdiction of the English courts in favour of Sotheby's.*** This Agreement shall be binding upon you and your heirs, executors, beneficiaries, successors and assigns. Neither you nor Sotheby's may assign this Agreement without the prior written consent of the other party hereto, except that Sotheby's may assign this Agreement to any of its related or affiliated entities without your prior consent. Neither you nor Sotheby's may amend or supplement any provision of this Agreement other than in writing and signed by each of the parties hereto. This Agreement contains the entire agreement between the parties with respect to the transactions contemplated hereby and supersedes all prior agreements or understandings, written or oral with respect hereto.

You hereby acknowledge that you are aware of the relative advantages of consigning property for sale by public auction and via private sale, and having taken those considerations into account, wish to sell the Property via private sale with Sotheby's as your exclusive agent pursuant to the terms of this Agreement. In addition, Sotheby's reserves the right to remunerate any employee of the organisation out of the commission it earns on this transaction.

Please sign both copies of this Agreement where marked below and initial the Private Treaty Terms attached hereto, to confirm your agreement with its terms and return one copy to Sotheby's. "