Neutral Citation Number: [2022] EWHC 603 (QB)

Case No: QB-2021-003641

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

COVID-19 PROTOCOL: This Judgement was handed down by the Judge remotely for circulation to the Parties' representatives by email. The date of hand-down is deemed to be shown opposite:

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2022

Before :

THE HON MR JUSTICE BUTCHER

Between :

FAP ART MANAGEMENT GMBH & CO KG	**Creditor**
- and -	
(1) INIGO PHILBRICK	
(2) INIGO PHILBRICK LTD	**Debtors**

and Between

(1) EQUIVO LTD	
(2) NICHOLAS DAVY TODD	**HCEO**
-and-	
(1) AIDEN FINE ARTS INC	
(2) V&A COLLECTION LLC	**3rd Party Claimants**

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SHAHRAM SHARGHY (instructed by **Francis Wilks & Jones**) for the **Third Party Claimants**
JOSEPH SULLIVAN (instructed by **Clyde & Co Europe LLP**) for the **Creditor**

Hearing dates: 1-3 March 2022

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Approved Judgment

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THE HONOURABLE MR JUSTICE BUTCHER

Mr Justice Butcher :

1. This is an application under CPR 85.5 by Aiden Fine Arts Inc., which was formerly called The Art Collection Inc ('Aiden'), and V&A Collection LLC, which was formerly called V&A Gallery LLC ('V&A Collection'), to whom I will refer collectively or when it is unnecessary to distinguish between them as 'the Claimants'. The Claimants seek to establish that one or other of them has a proprietary interest in certain artworks which are the subject of a Writ of Control in favour of FAP Art Management GMBH & Co KG ('the Creditor').

2. The way in which this application arises is that the Creditor is a judgment creditor of Inigo Philbrick ('IP') and Inigo Philbrick Ltd ('IPL') (together, 'the Debtors'). The Creditor obtained enforceable European Orders for Payment ('EEOPs') from the District Court of Wedding, Berlin, in July and September 2020 in the Euro equivalent of £10,023,378.80. These were registered by the Queen's Bench Division in November 2020. The Creditor requested to enforce those EEOPs by means of a Writ of Control pursuant to s. 62 and Schedule 12 of the Tribunals, Courts and Enforcement Act 2007 ('the 2007 Act'). The Writ of Control was granted on 27 January 2021, and pursuant to it Mr Todd, a High Court Enforcement Officer (or 'HCEO'), was ordered to take control of goods belonging to the Debtors.

3. By Order of Master Eastman dated 17 February 2021, the HCEO was given permission to execute the Writ of Control and to search for and take control of artwork at premises belonging to two art storage and transportation companies, namely Williams & Hill Forwarding Ltd ('Williams & Hill') and Constantine Ltd ('Constantine'). By a further Order dated 26 March 2021 the HCEO was given permission to execute the Writ of Control and to search for and take control of artwork at premises belonging to Phillips, the auction house.

4. The HCEO duly executed the Writ of Control on 22, 23 and 26 February, 29 March and 1 April 2021 by taking control of some 70 artworks.

5. Paragraph 60 of Schedule 12 to the 2007 Act and CPR 85 provide for a procedure whereby a third party which claims a proprietary interest in goods which are the subject of a Writ of Control may do so. By Order of Master Eastman dated 5 March 2021, any third party claimant who wished to maintain a claim to any of the controlled goods was ordered to file and serve evidence in support of their claim by 4 pm on 19 March 2021. The Claimants gave notice of a claim in respect of ten of the artworks of which possession had been taken by the HCEO, although they failed to file evidence by the specified time and date. Master Eastman subsequently granted relief from sanction in that respect.

6. Subsequently, the Claimants made claims that they had proprietary interests in a further ten artworks which were subject to the Writ of Control. The Claimants conceded these pieces in September 2021 and given that concession were not the subject of dispute at the present hearing. At the outset of the current hearing, however, there remained issues in relation to ten artworks, as follows:

No	Artwork	Taken from
1	Kelley Walker Untitled, 2007	Williams & Hill

2	Carroll Dunham Big House (Twin Lakes), 1997	Williams & Hill
3	Christopher Wool Untitled, 1994	Williams & Hill
4	Jean-Michel Basquiat Untitled, 1987	Williams & Hill
5	Jean-Michel Basquiat 20th Century Fox, 1984	Williams & Hill
6	Rudolf Stingel Untitled, 1991	Williams & Hill
7	Ken Price Ghosted, 1998	Constantine
8	Wade Guyton Untitled Pevsner s7, 2004	Constantine
9	Carroll Dunham Fourth Birch, 1983	Constantine
10	Andy Warhol Untitled (shadow), 1978	Constantine

Background

7. The background to the present application lies in a wide-ranging fraud perpetrated by IP. The existence and essential nature of this fraud was not in dispute between the parties.

8. IP was an art dealer. After a period as an intern and as director of secondary market sales at the White Cube gallery, he opened his own gallery in or about 2013. He ran his business through, amongst other vehicles, IPL. The Creditor purchased artworks through IP/IPL, who were supposed to sell them on its behalf.

9. Towards the end of 2019 it emerged that IP and IPL had been engaged in a wide-spread fraud, and his victims had included buyers, sellers, clients and financiers. One of those who were the subject of the fraud was the Creditor. It became concerned about IP in September 2019 when he refused to return artwork which it owned to it, and it found that his gallery in Miami was shut up. On 23 September 2019 the Creditor filed for an emergency motion in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade, Florida, seeking to obtain possession of its artworks. The Debtors responded on 14 October 2019 asserting that the artworks were not in Florida and, in one case, was no longer in their possession as it had been sold.

10. Shortly thereafter, on 7 November 2019, the Creditor applied for and was granted a freezing order against the Debtors by Lavender J. That freezing order was granted in support of the then-intended German proceedings, which were subsequently pursued and which resulted in the EEOPs. The Debtors failed to appear in any of the various

Court hearings commenced by the Creditors. It transpired that IP had fled to Vanuatu. He was subsequently arrested by the Vanuatu authorities, extradited to the USA and prosecuted for defrauding victims out of some US$ 86 million. In November 2021 he pleaded guilty to the charges brought against him. I was informed that he is yet to be sentenced.

11. Andre Sakhai is a US-domiciled individual who deals in art. He co-owns the Claimants. He and his businesses purchased artworks from IP/IPL from 2012 onwards. This involved some 100 purchases/sales. Mr Sakhai was, until the fraud was discovered, a friend of IP.

The Nature of the Claimants' claimed interest

12. In relation to items Nos. 1 and 2, the Claimants contend that Aiden purchased a 50% stake in each from IPL, paid for by the allocation of credits to IPL in the sums of US$ 97,500 (item No. 1) and US$ 200,000 (item No. 2). Those aspects of the Claimants' claim were not disputed before me.

13. In relation to item No. 3, the Claimants contend that Aiden purchased this artwork from IPL for US$ 430,000. The Claimants contend that Aiden transferred US$400,000 for the painting, and that the remaining US$ 30,000 was paid for by the allocation of a credit.

14. In relation to item No. 10, the Claimants contend that this was owned by Aiden pursuant to a purchase made in 2015.

15. In relation to each of items Nos. 4-9 the Claimants contend that Aiden had a 100% interest in each artwork; in relation to items Nos. 1 and 2, a 50% interest; and in item No. 10, if its claim to ownership on the basis of the previous paragraph was incorrect, a 100% interest. The basis on which these claims have been advanced has developed over time, but before me the sole basis on which these claims was put was pursuant to an agreement which was called 'the Collateral Agreement'. It is necessary to explain what that Agreement was and the circumstances in which it was made.

Debt Due from IPL to Aiden

16. The Claimants contend that, in September / October 2019 IPL owed a debt to Aiden in the sum of US$2.5 million. They contend that this debt had arisen as follows. In February 2018 Aiden had purchased from IPL a 50% share of a painting by Jean-Michel Basquiat entitled 'Hallowe'en' for US$2,107,500. This share in 'Hallowe'en' was paid for by Aiden by way of a credit being applied in accounts with IPL in the amount of US$2,107,500. IPL then sold 'Hallowe'en' to a third party for US$2.5 million, without the knowledge of Aiden or Mr Sakhai. Mr Sakhai found out about the sale of 'Hallowe'en' in February 2019 and asked IP for an explanation. He was told that 50% of the sale proceeds would be paid over to Aiden. There was therefore a debt owing in the amount of US$2.5 million. That debt was not paid.

17. While the Creditor had not accepted this up until the hearing before me, in its Skeleton Argument it was accepted that this debt had indeed been due and owing from IPL to Aiden in October 2019.

Agreements entered into by the Claimants in October 2019

18. Mr Sakhai's evidence, which in this regard I accept, was that he had seen IP at the Frieze Art Fair in London in early October 2019. He had asked IP about the debt. IP had said that he was unable to pay that debt immediately and could not deliver two other paintings that Mr Sakhai owned. Mr Sakhai said that he and IP had sat on a bench in Hyde Park, and IP had broken down in tears at his situation.

19. On his return to New York, Mr Sakhai instructed a lawyer, Mr Taub, to seek to safeguard his position. Initially, Mr Taub drew up a 'Repayment Agreement'. The signed versions of this agreement are dated 9 October 2019. This agreement was, on its face, between 'V&A' or 'V& A', IP and IPL, and provided that 'Philbrick' conveyed 'full right title and interest' in artworks set out in an Exhibit to the agreement to 'V&A' as satisfaction for a debt said to be owed by 'Philbrick' to 'V&A'.

20. Subsequently, on 10 October 2019, Mr Taub emailed IP, copy to Mr Sakhai, saying that he was wrong to name 'V&A' as a party, and that 'we cannot go forward with this agreement. I am drafting a note and security agreement to put liens on the artworks rather than to transfer title to them at this point.'

21. Mr Taub then prepared a different document. This was the so-called Collateral Agreement. The signed versions bear the date 12 October 2019, though it may be that they were signed somewhat later than that.

22. The Collateral Agreement was in these terms:

'Promissory Note, Collateral and Security Agreement ("Agreement")

Agreement entered into this 12th day of October, 2019, by and between the undersigned parties.

Whereas, Inigo Philbrick and Inigo Philbrick Ltd., his company, having offices for the conduct of business located at 22 Davies Street, London United Kingdom (collectively 'Philbrick' or 'Debtor'), received from The Art Collection Inc., (hereinafter, 'Secured Party'), the sum of $2.5 million for a fifty (50%) percent interest in a painting by the renowned artist Jean Michel Basquiat entitled Halloween (acrylic and oil stick on canvas, 83 ½" x 59 ¾"1982 ('Painting'), and

Whereas, Philbrick sold this painting and failed to provide the Secured Party with any funds or remuneration with regard thereto; and

Whereas Philbrick, the Debtor and any other entity owned and controlled by Philbrick or the Debtor owes the Secured Party the sum of $2.5 million plus the appreciation in the value of the Painting (the Debt') and wishes to repay the Secured Party the Debt within six (6) mo[n]ths from the date of execution of this Agreement; and

Whereas, the Debtor, Philbrick and all companies and entities owned and controlled by Philbrick and/or the Debtor unconditionally acknowledge that the Debt is due to the Secured Party and hereby promise to pay the Debt to the Secured Party on or before April 10, 2020.

Based upon the foregoing it is hereby agreed as follows:

1. This Agreement constitutes an unconditional promise on the part of the Debtor, Philbrick and all entities owned or controlled by the Debtor or Philbrick to pay to the Secured Party the sum of $2,500,000 on or before April 10, 2020.

2. In connection therewith, Debtor, Philbrick and all entities owned or controlled by the Debtor or Philbrick unconditionally acknowledge that the Debt is due to the Secured Party and hereby waive any and all defenses in connection with the collection of the Debt or the security or collateral offered by the Secured Party pursuant to this Agreement.

3. Philbrick, the Debtor and all entities owned and/or controlled by Philbrick and/or the Debtor, jointly and severally hereby represents and warrants that they have full and complete title to the artworks listed on Schedule A annexed hereto (‘Artworks’ or ‘Collateral’), free and clear of any claims, debts, mortgages, taxes, or any further liens or encumbrances (‘Claims’). They hereby grant to the Secured Party a security interest in the Collateral and agree to deliver the Collateral to the Secured Party.

4. Philbrick, the Debtor and any entity owned and/or controlled by Philbrick and/or the Debtor agree to deliver the Collateral to the Secured Party as security for the repayment of the Debt as provided for herein.

5. Philbrick, the Debtor and any and all entities owned and controlled by Philbrick and/or the Debtor hereby agree to indemnify and hold the Secure[d] Party harmless against and (sic) claims which are made against it by anyone that they hold an interest in the items listed on Schedule A. In the event of any such claims from whatever source, including but not limited to any taxes, liens, debts or any encumbrance whatsoever, Philbrick agrees to hold the Secured Party harmless for any loss or damage, including but not limited to reasonable legal and accounting fees, caused to it as a result of a misrepresentation of the representations and warranties set for (sic) hereinabove. For the purpose of clarity, in the event of a default wherein the Debt is not paid pursuant to the terms of this Agreement and the Secured Party takes title to the Collateral as provided for herein, the Debt is only relieved, subject to any claims by any third parties. Upon the assertions of any such Claims the Debt owed to the Secured Party shall be restored to the extent of such Claim or the amount of damage caused to the Secured Party as a result of such breach of warrantees (sic) and representations on the part of the Debtor or Philbrick.

6. Default. The Debtor and/or Philbrick shall be in default in the terms of this Agreement, upon the failure to pay to the Secured Party, the Debt on or before April 20, 2020.

7. Upon a default as provided for herein, the Secured Party shall be entitled to take the Collateral in satisfaction of the Debt, subject to the provisions of paragraph 5 above. In this regard, Philbrick and Debtor hereby waive any requirement of a public or private sale of the Collateral, notice to any party, including the Debtor or Philbrick. The Debtor and Philbrick acknowledge that they professionals (sic) and

dealers and traders in the field of art and that the value of the Collateral under these circumstances is reasonable value in payment of the Debt.

8. The Debtor and Philbrick grant permission to Secured Party to file UCC-1 without requiring Debtor's or Philbrick's signature.

8 This agreement shall be governed by the law of the State of New York. The State and Federal Courts of the State of New York or the Southern District of New York shall have sole and exclusive jurisdiction over all matters related to this agreement.

In witness whereof, the parties have executed this agreement on the ---- day of October, 2019

[signatures IP for himself and IPL and Andre Sakhai for The Art Collection Inc]'

23. Schedule A to the Collateral Agreement listed 27 artworks. They included all the items in the Schedule which appears in paragraph 6 above, other than item No. 3.

24. On 23 October 2019 an agreement was entered into between V&A Collection and IP and IPL. It was entitled 'Assignment Agreement'. This agreement named IP and IPL as 'Assignors' or 'Sellers' and V&A Collection as 'Assignee' or 'Buyer'; provided that the Assignors assigned to the Assignee all of their right title and interest in item No. 9 in the above Schedule, namely the Carroll Dunham, Fourth Birch, 1983.

25. By the time of the hearing before me, as I have said, the Claimants placed reliance only on the Collateral Agreement, and disclaimed reliance on the other two.

<u>The Issues arising</u>

26. As a result of a number of concessions on both sides, the issues which remain to be decided have narrowed considerably. There are now three issues or groups of issues, which are as follows:

    (1) First, and most importantly, whether the Collateral Agreement gave the Claimants a 50% ownership share of items Nos. 1 and 2 and 100% ownership of items Nos. 4-10 (to the extent that they were not already owned by the Claimants)?

    (2) Secondly, did the Claimants own item No. 3 as a consequence of having paid for it in full?

    (3) Did the Claimants own item No. 10 as a result of a purchase evidenced by an invoice dated 20 March 2015?

27. I will deal with these issues in turn.

The Issues relating to the Collateral Agreement

28. The Collateral Agreement is governed by New York law. The parties were also in agreement that the question of whether a security interest was created pursuant to the Collateral Agreement is one governed by New York law. The Creditor denies that the

Collateral Agreement gave any proprietary interest to the Claimants over any of the items in question.

New York Law: Framework and Essential Issues

29. Expert evidence was adduced from New York lawyers for each side. The Claimants called Mr Dennis Drebsky and the Creditor Mr Raymond Dowd. The following matters were not in issue between them or the parties.

30. In the first place, that in order for the Claimants to have acquired an interest pursuant to the Collateral Agreement, that Agreement must have been a valid and binding contract. If it was not, then the Claimants will not have acquired an interest in the relevant artworks pursuant to it.

31. Secondly, even if the Collateral Agreement was a binding contract, to have acquired a proprietary interest in the artworks, it was necessary for Aiden to have perfected its security interest by the time that the HCEO took control. Under the New York Uniform Commercial Code ('the UCC') there were two ways in which Aiden could have perfected a security interest. The first was under UCC 9-310, pursuant to which Aiden could have filed a UCC-1 form, thereby registering and making publicly known its interest in the artworks. It was common ground that no such UCC-1 form was filed. The second was by 'possession' under UCC 9-313.

32. What separated the experts and the parties were the following two issues. First, whether the Collateral Agreement was a binding contract. Secondly, if it was a binding contract, whether Aiden/the Claimants had perfected their security interest by possession. They contended that they had. The Creditor denied this.

Was the Collateral Agreement a binding contract?

33. The first question is, therefore, whether the Collateral Agreement was a binding contract. One aspect of this question was that the Creditor did not admit that the agreement was sufficiently certain and consistent for there to be any binding agreement. I did not consider that this point was correct. Though there were a number of errors in it, I consider that, applying the test summarised in the Restatement of Contracts 2d, and referred to by Mr Drebsky, the Collateral Agreement demonstrated mutual assent as to the material terms.

34. The more significant point on whether the Collateral Agreement was a binding contract, and that on which Mr Sullivan concentrated, was whether it was supported by any consideration provided by Aiden.

35. There was no dispute as to what, in principle, would be regarded as good consideration as a matter of New York law. The experts were agreed that the law was accurately set out in Lebedev v Blavatnik 193 A.D. 3d 175 (NY App. Div. 2021) as follows (at 183):

> 'As stated by our Court of Appeals, "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other" (Hamer v Sidway 124 NY 538, 545, 27 NE 256 [1891]] … Indeed, "any

basic contemporary definition would include the idea that [consideration] consists of either a benefit to the promisor or a detriment to the promisee" (Weiner v McGraw-Hill, Inc. 57 NY 2d, 458, 464, 457 NYS 2d 193, 443 NE 2d 441 [1982]. "The slightest consideration is sufficient to support the most onerous obligation" (Mencher v Weiss 306 NY 1, 8, 114 NE 2d 177 [1953]. However, "generally, past consideration is no consideration and cannot support an agreement because the detriment did not induce the promise" (Korff v Corbett 155 AD 3d 405, 408, 65 NYS 3d 498 [1st Dept. 2017] …'.

36. The experts and the parties disagreed, however, as to whether, applying those principles, consideration had been provided. For the Claimants it was submitted, in conformity with Mr Drebsky's view, that there was good consideration, in that, under the Collateral Agreement, Aiden had given IP/ IPL time to pay, namely until 10 or 20 April 2020, and had agreed not to sue in the interim. Aiden had thus agreed to forebear, and that constituted consideration. For the Creditor, it was submitted that the Collateral Agreement did not contain any forbearance.

37. Each side argued for its position on the basis of what the Collateral Agreement could be said expressly to provide for. There was no argument by the Claimants as to the Collateral Agreement containing implied terms, and no expert evidence as to particular principles of construction in New York law.

38. While recognising that the Collateral Agreement is not expressed with entire clarity, I consider that, read sensibly and as a whole, it must be regarded as providing that IP/IPL should have more time to pay, and that Aiden would not sue to enforce 'the Debt' in the interim. The Agreement's terms are said to be 'based upon' the recitals, which provide that IP/IPL wish to repay 'the Debt' within six months. In that context, the agreement that IP/IPL shall pay by 10 April (or possibly 20 April) 2020 should be read as mutual assent that IP/IPL should be permitted to pay in accordance with that wish. That objective would be negated if Aiden were able to sue immediately for the Debt.

39. Further, the provision in clause 6 is to the effect that 'the Debtor and/or Philbrick shall be in default in the terms of this Agreement, upon the failure to pay … the Debt on or before April 20, 2020'. That must mean that 'the Debtor and/or Philbrick' are not to be treated as in default under the Agreement, including in relation to the obligation to pay the Debt provided for and acknowledged in clauses 1 and 2, until there has been non-payment by that date. It would be inconsistent with that if suit for payment of the Debt could be brought before then.

40. I consider that it must also be legitimate to take into account that, if there was no forbearance, then the Collateral Agreement would be unsupported by consideration, and would not be a binding agreement. Yet it would appear clear that the Collateral Agreement was intended as a binding contract. I consider that it must be appropriate to read its terms in such a way as is consistent, rather than inconsistent, with there being such a binding contract.

Was the Security perfected?

41. On that basis it is necessary to consider the second issue, namely whether Aiden perfected its security.

UCC 9-313

42. There was only limited dispute as to the principles of New York law relevant to this issue, as opposed to their application to the facts, on which there was substantial disagreement.

43. Thus, there was no dispute that, given that Aiden did not file a UCC-1, the relevant provision is UCC 9-313. It provides, in relevant part, as follows:

‘When possession by or delivery to secured party perfects security interest without filing.

(a) [Perfection by possession or delivery]

Except as otherwise provided in subsection (b), a secured party may perfect a security interest in … goods … by taking possession of the collateral. …

…

(c) [Collateral in possession of person other than debtor.]

With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of business, when:

(1) the person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party’s benefit …’

44. The leading authorities in relation to UCC 9-313 are Hutchison v CIT Corporation 726 F 2d 300 (6th Cir, 1984), In re: Jeffrey Lew Liddle 608 BR 356 (Bankruptcy SDNY, September 6, 2019) (‘Liddle 1’) and In re: Jeffrey Lew Liddle 613 BR 186 (SDNY, March 6 2020, Rakoff J) (‘Liddle 2’). These were cited by Mr Dowd, and Mr Drebsky did not disagree with the principles stated in those cases.

45. In Liddle 1 the Judge referred (at 361) to the fact that Article 9 of the UCC does not define ‘possession’. In Hutchison Krupansky J referred to the principle that:

‘The UCC permits perfection by possession because possession can give notice to third-parties that the creditor has an interest in the collateral. … Thus, in order to effect perfection, possession must be “unequivocal, absolute and notorious, so that third parties may be advised.” Transport Equipment v Guraranty State Bank 518 F. 2d 377, 381 (10th Cir. 1975) quoting In Re Westbrook 228 F. Supp. 966 (ED Ark, 1964) aff’d 337 F 2d 404 (8th Cir. 1964).’

46. In Liddle 2, the Judge referred (at 190) to the rationale of UCC 9-313 as being that ‘ “the debtor’s lack of possession coupled with actual possession by the creditor [or] the creditor’s agent … serves to provide notice to prospective third party creditors that the debtor no longer has unfettered use of [its collateral]…”’ At 191 the Judge further referred to the rationale of UCC 9-313(a) as being that possession should ‘have placed other potential creditors on notice that [the relevant creditor] had an interest in the sale proceeds…’

47. In Liddle 2 it was confirmed that a secured party may establish possession within UCC 9-313(a) through the possession of a third party if it can establish that the third party was its agent. The ordinary principles of principal and agent apply (190).

48. In relation to UCC 9-313(c), for the security interest to be perfected, the third party in physical possession must authenticate a record stating that the collateral 'is being held for the secured party's benefit' (Liddle 2 at 365).

49. The rationale behind UCC 9.313(c) was explained in Liddle 2 as follows (at 365), by reference to other cases and the commentary on UCC:

> ' "Section 313(c) serves as a safety measure for parties when it is uncertain whether the person in possession would be deemed an agent of the secured party: 'In some cases, it may be uncertain whether a person who has possession of collateral is an agent of the secured party or a non-agent bailee. Under those circumstances, prudence might suggest that the secured party obtain the person's acknowledgement to avoid litigation and ensure perfection by possession regardless of how the relationship between the secured part[y] and the person is characterised''.

50. A 'record' is defined in UCC 9-102(a)(70) as 'information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form'. 'Authenticate' is defined by UCC 9-102(a)(7) as '(A) to sign; or (B) with present intent to adopt or accept a record, to attach to or logically associate with the record an electronic sound, symbol or process.' As it was put (by reference to other cases) in Liddle 1 (at 365) 'it no longer suffices to show that a bailee had received notification of a security interest. Rather the bailee must acknowledge that it possesses on behalf of the secured creditor…'

Relevant facts

51. Those being the relevant legal principles, are the facts such that Aiden had perfected its security under either UCC 9-313(a) or (c)? The factual position was addressed in evidence in particular by Mr Myles Nurse, and by reference to documents which were put before me.

52. Mr Nurse is an artist. In his first witness statement dated 5 November 2021, he said that he had worked for Mr Sakhai for some 4 ½ years as his personal assistant, but as an independent contractor rather than an employee of Mr Sakhai or either of the Claimants. Mr Nurse did business under the name MAN Advisory LLC.

53. What the documents which I was shown reveal is, in summary, as follows:

    (1) That on 7 October 2019 Mr Nurse gave instructions to Williams & Hill to collect four artworks, which appear to have been items Nos. 3-6, from Safestore Self Storage in Hyde Park Estate, London W2, and deliver them to Williams & Hill's own storage unit at Feltham. Mr Nurse told Williams & Hill that he was looking to move these artworks to the USA; and also that the Billing would be 'MAN Advisory'. This removal instruction appears to have been effected by Williams & Hill on 8 October 2019.

(2) Also on 7 October 2019, Mr Nurse gave instructions to Williams & Hill to collect three artworks, which included item Nos. 1 and 2, from Constantine and deliver them to Williams & Hill's Feltham storage unit. This also appears to have been effected on 8 October 2019. Apparently as part of this transfer, a representative of Williams & Hill asked a representative of Constantine whether there was a sales invoice from 'Inigo Philbrick'; he was told that there was not; he said that normally an invoice was required to 'see whose name to bring the work into our bond under'; but said that in the circumstances the delivery should be specified as to Williams & Hill.

(3) On 8 October 2019 Mr Nurse communicated with Williams & Hill and said that 'the billing party is actually Inigo Philbrick who is facilitating this collection and shipment'. On 9 October 2019 Mr Nurse thanked Williams & Hill for arranging the collection 'yesterday'; stated that the 'Billing Party for invoice' was IPL; and said that the delivery would be to Fortress, Miami, account MAN Advisory.

(4) On 9 October 2019, Simon Mitchell, who worked for IP, sent an email to Constantine, asking that three artworks (namely items Nos. 7, 8 and 10) should be released 'to Myles'. In fact, those works were not removed from Constantine.

(5) On 14 – 15 October 2019 Williams & Hill confirmed to Mr Nurse that the six artworks which had been collected by Williams & Hill on his instructions on 8 October 2021, together with another artwork, were packed in crates.

(6) On 15-16 October 2019 Constantine informed Mr Nurse that while item Nos. 8 and 10 were 'ready for release', item No. 7 was 'currently under our bond in Inigo Philbrick's name'.

(7) Item No. 9 was released on 24 October 2019 by Phillips to Constantine 'on the instructions of the consignor, Inigo Philbrick Ltd'.

(8) On 25 October 2019 Williams & Hill issued a Proforma Invoice to 'Inigo Phillbrick', in an amount which related to Williams & Hill's collection of artworks both from Safestore and Constantine, and to their airfreight. On 30 October 2019 that invoice was paid by Mr Sakhai.

(9) Between 25 October 2019 and 6 November 2019 Mr Nurse gave further confirmations to Williams & Hill that the shipment of the six artworks should take place.

(10) On 7 November 2019 the Freezing Order was granted by Lavender J. This led to questions being addressed to the storage companies as to whether they held any goods belonging to IP. On 8 November 2019 Williams & Hill informed Peters & Peters who were acting for the Creditor:

'Please be advised that to the best of my knowledge Williams and Hill currently have no works in storage for Inigo Philbrick or Philbrick Limited.

We have multiple works by the named artists for our clients, we are a fine art storage company after all, b[ut with] 'untitled works' and no stock codes, it would be foolish to guarantee they are not the same works. But there does not appear to

be any connec[tion with] Philbrick with those works or with how they connect to our client or how they came into our care.

However, we do have an airfreight consignment that was due to fly tonight which I have pulled from the ai[ ]. It consists of three cases and contains six artworks destined for Miami. … At this point I would prefer not to provide exact details of the works or the final consignee as our client des[erves] some confidentiality…'

(11) Later on the same day, Peters & Peters sought confirmation that the consignment mentioned in the previous email was being processed for IP or IPL. Kerry Hill of Williams & Hill responded to this 'Yes I can confirm that Philbrick is the client', and Mr Gary Williams of Williams & Hill responded 'The Client to whom we are invoicing for this shipment is Inigo Philbrick Ltd…'

(12) Also on 8 November 2019 Mr Nurse wrote to Williams & Hill seeking confirmation that while the artworks were at Williams & Hill they will be held 'under MAN Advisory account'. On 11 November 2019 Mr Siavoshian of Williams & Hill replied to say that the works 'are under the same account as they were set up with'; and later on the same day Mr Williams informed Mr Nurse by email that the six works 'have been place into storage under Inigo Phillbrick (sic) Ltd as they were the Invoicing Party for this shipment.'

(13) Constantine consistently invoiced Inigo Philbrick Ltd for the storage of the artworks in its possession.

(14) In the inventory which it produced for the HCEO upon being served with the Writ of Control, Williams & Hill stated that it held items Nos. 1-6, identifying 'Inigo Philbrick Ltd' as the Customer. Constantine included items Nos. 7-10 in the inventory it provided to the HCEO of items it was holding for IPL.

54. At the hearing, the Claimants' primary case was that their security had been perfected under UCC 9-313(a), and in the alternative UCC 9-313(c). I will accordingly address the case in relation to sub-section (a) first.

55. Given that the artworks were, at all material times, in the physical possession of Williams & Hill or Constantine, the Claimants could only have 'taken possession' of any of them for the purpose of UCC 9-313(a) if Williams & Hill or Constantine had been the Claimants' agent for the purposes of such taking of possession.

56. The way in which, as I understood it, the Claimants contended that this had come about was that, through Mr Nurse acting for and as agent for Aiden, Williams & Hill and Constantine had themselves been constituted as Aiden's agents. The position is somewhat confused by the fact that, on an application for relief from sanctions, evidence was put in on behalf of the Claimants to the effect that communications between Mr Nurse / MAN Advisory and the storage companies had not been in the Claimants' possession for the purposes of CPR r. 31.8, which it was to expected that they would have been had Mr Nurse / MAN Advisory been Aiden's agents. I am prepared to proceed on the basis, nevertheless, that Mr Nurse / MAN Advisory were acting as agent for Aiden, as this is consistent with Mr Sakhai's evidence in paragraph 41 of his 3rd Witness Statement.

57. I am unable to conclude, however, that through the communications of Mr Nurse / MAN Advisory with them the storage companies became agents of Aiden for the purposes of possessing the artworks such that their possession counted as Aiden's possession for the purposes of UCC 9-313(a). For that to be the case, they would have had to have possessed the relevant goods for Aiden and **not** for IP / IPL; and they would have had to have owed an obligation, if required by Aiden, to refuse possession to IP / IPL. This is because, as explained in Liddle 2, it is necessary for the purposes of UCC 9-313(a) that the debtor should not have possession, and the secured party or its agent should have possession. I do not consider that the storage companies agreed or understood themselves to hold possession of the goods for Aiden instead of, and if necessary to the exclusion of, IP / IPL.

58. In the case of Williams & Hill, it is the case that that company acted in accordance with instructions given by Mr Nurse / MAN Advisory to collect, store and prepare for air transport a number of the artworks. It appears from the documents, however, that Williams & Hill did not regard Aiden or any other principal of Mr Nurse / MAN Advisory as being its client for these purposes as opposed to IP / IPL. Instead, it appears to have regarded Mr Nurse as authorised to give instructions on behalf of IP / IPL as well as on behalf of Mr Sakhai / Aiden. Hence, Williams & Hill accepted Mr Nurse's instruction that invoices for the tasks he had told Williams & Hill to undertake should be addressed to 'Inigo Philbrick'. Moreover, the communications which I have referred to in sub paragraphs 53 (11) and (12) above show that Williams & Hill regarded its client as IP / IPL, and that the goods were, throughout, 'under' that account.

59. I thus do not consider that Williams & Hill had been constituted Aiden's agent for the purposes of Aiden's having possession of the goods and IP/IPL not having such possession.

60. Further, even if, contrary to that conclusion, it could be said that Williams & Hill were constituted Aiden's agent to possess the goods, Aiden's possession was not 'unequivocal, absolute and notorious'. It was, instead, debatable, and far from clear even to the storage company which had physical possession of the goods.

61. In relation to the artworks at Constantine the position is *a fortiori*, by which I mean that the Claimants' case that it had possession of those works for the purpose of UCC 9-313(a) is more clearly wrong. Constantine apparently acted on the instructions of Mr Mitchell, for IP/IPL, to get items Nos. 8 and 10 ready for release, but they were not physically released. Item No. 7 was apparently in bond in 'Inigo Philbrick's name' throughout. Furthermore, Constantine billed IPL in respect of the storage of all the items throughout the time it had them, and regarded them as held for IPL, as shown by the inventory provided to the HCEO.

62. I therefore do not consider that the Claimants have shown that Constantine was Aiden's agent for the purposes of possessing the artworks in its keeping. Certainly I do not consider that Aiden had, through Constantine, a possession which was 'unequivocal, absolute and notorious'.

63. At the hearing the Claimants placed little emphasis on their case that security was perfected under UCC 9-313(c), though it was not abandoned.

64. There was no clarity in the Claimants' case as to what constituted a record authenticated by Williams & Hill or Constantine acknowledging that they held possession of the relevant artworks for Aiden's benefit. Suffice it to say that the case that there was any such authenticated record was not made out.

Item No. 3

65. Item No. 3 is a piece by Christopher Wool, 'Untitled' but referred to as 'Bubbles'. Aiden, then called The Art Collection Inc, through Mr Sakhai, bought this piece from 'Philbrick Ltd', acting by IP, in September 2015. This sale is evidenced by an invoice from IP dated 16 September 2015, which shows that the account into which the price should be paid as that of 'Philbrick Ltd'. The terms set out in that Invoice included, as (4)

'Title to the artwork (the 'Work') does not pass until payment of the Purchase Price has been received in full by Philbrick Ltd in cleared funds.'

66. On 25 September 2015 Aiden paid to Philbrick Ltd the sum of US $400,000 in respect of the piece, by bank transfer. It is the Claimants' case that the remaining US$ 30,000 was paid by way of a credit to IP and that this was confirmed in an email dated 20 March 2016. That email is from IP to Mr Sakhai. Its Subject is said to be 'Credits'. It contains a list of items 'To IP', one of which is 'Wool Air bubbles', and totalling US$ 7,409,500; and a list of items 'To Andre, totalling US $ 9,565,500'.

67. Mr Sakhai gave evidence that the US $30,000 had been paid 'as credit applied against debts owed to me by [IP]'. The Claimants also adduced evidence from Ms Somya Munjal. She is an accountant, whose private clients include the Claimants. Her evidence was that outstanding balances were often settled by credits issued by a party selling a work of art, where that seller already owed the buyer money. From 2016 she kept an accounting ledger of transactions between the Claimants and IP, and that ledger contained multiple instances of where artwork was paid for by credit.

68. The Creditor denied that any payment of the US$30,000 had been made in cleared funds, or at all; and thus denied that title to item No. 3 had passed to Aiden. As part of this case, the Creditor contended that no credence could be placed in Mr Sakhai's evidence because he had been demonstrably dishonest in relation to various matters, in particular in relation to the Repayment Agreement. The Creditor also submitted that the email of 20 March 2016 was not sufficiently clear to contain an agreement for a credit of US$ 30,000 or to evidence one made earlier; and that it was significant that the alleged credit did not appear in Ms Munjal's ledger.

69. I agreed with Mr Sullivan's submission, on behalf of the Creditor, that Mr Sakhai's evidence was to be accepted only if supported by documentary evidence. Mr Sullivan was, as I find, correct to say that Mr Sakhai had deliberately attempted to rely on the Repayment Agreement (which purported to effect an immediate transfer of title in the relevant goods) on various occasions after the point at which he knew that it was not a valid agreement, and had been superseded by the Collateral Agreement. That undoubtedly affects his credibility. Furthermore, I considered that Mr Sakhai's evidence as to matters of detail concerning his business transactions had to be regarded with circumspection. His evidence was marked by various inconsistencies and my assessment was that he is sometimes muddled.

70. Approaching Mr Sakhai's evidence in this way I nevertheless conclude that there was an agreement between Mr Sakhai and IP, and their respective companies, that the balance of US$ 30,000 for the Christopher Wool 'Bubbles' was treated as having been paid by a credit against sums owing to Mr Sakhai. There is no doubt that the transactions between Mr Sakhai and IP were conducted in a somewhat casual way. The nature of the email of 20 March 2016 is consistent with that manner of doing business. It does, however, seem to me to contain or to evidence an agreement that the amount of US $30,000 should be set off against sums due to Mr Sakhai. Furthermore, and importantly, there is no indication in the documents I have seen that the US $30,000 was ever thereafter in issue. The inference I would draw from this is that the parties (and in particular the principals on each side, Mr Sakhai and IP) regarded the payment as having been effected, and no longer to be outstanding. These matters, in my judgment, corroborate Mr Sakhai's evidence to the court in relation to the credit, and allow me to accept it.

71. Accordingly I find that Aiden is the owner of item No. 3.

Item No. 10

72. Item No. 10 is a 1978 painting by Andy Warhol, 'Untitled', but which has been called 'Shadow painting'.

73. It is not in issue that Aiden purchased this piece in March 2015. On 20 March 2015 Anatole Shagalov raised an invoice to Aiden (under its former name) in the amount of US$ 160,000. That was paid by Aiden by bank transfer on 23 March 2015.

74. The Creditor does not dispute that, in 2015, Aiden bought this artwork. It denies, however, that the Claimants can show that they, or either of them, owned it at the time of the issue of the Writ of Control or now. They point out that Mr Sakhai does not say in his witness statements that Aiden owns item No. 10; and that Mr Sakhai signed the Collateral Agreement which contained a representation and warranty by IP/IPL that *they* owned item No. 10. They refer further to a letter from the Claimants' solicitors of March 2021 which, after referring to the purchase of 2015, stated in relation to this item, 'We are instructed that title to this piece may have been transferred to [IPL] during the business relationship, resulting in [IP's] addition to Schedule A. It is also possible that [IP's] inclusion arose in error.' They submitted that the inherent probabilities must be that there was some sort of transfer to IP/IPL, for otherwise why did IP have possession of the piece in October 2019.

75. The position is far from clear and this again speaks to the informal nature of the dealings between Mr Sakhai and IP. The fact is, however, that Aiden acquired property to this painting in 2015, and I have been shown no document containing or evidencing any agreement or transaction whereby it was transferred to IP or IPL, nor has any witness evidence been adduced of such an agreement or transaction. On that basis I conclude, on the balance of probabilities, that Aiden remained the owner of the piece.

Conclusion

76. There is no dispute that the Claimants are entitled to a 50% share in items Nos. 1 and 2.

77. Aiden is, and was at the time of the Writ of Control, owner of items 3 and 10.

78. The Claimants' claims based on the Collateral Agreement fail. Thus the Claimants' claims in respect of the other 50% of items Nos. 1 and 2, and in respect of items Nos. 4-9, fail.

79. If they cannot be agreed, I will consider further representations from the parties as to the terms of the order necessary to reflect these conclusions.