Responsibilities of Antiquities Dealers in a market marred by fakes

High Court agrees that various ancient objects in private sales were modern forgeries and ordered repayment of US $4.99M price, but decided the dealer's Director was not fraudulent

In the ancient antiquities authenticity case of ***Qatar Investment & Projects Development Holdings Co & His Highness Sheikh Hamad Bin Abdullah Al Thani v John Eskenazi Limited & Mr John Eskenazi*** [2022] EWHC 3023 (29 November 2022), the Judge decided that in attributing seven objects as 'ancient', the dealer who sold them had been negligent and acted without reasonable care when giving an 'unqualified' attribution of their origin as ancient. The dealer had been enthusiastic and emphatic during the sales negotiations. The dealer was also found to have breached the implied contractual term that it had an honestly and reasonably held opinion that the objects were of ancient origin.

This case provides insight into the operation of the international antiquities market and the potential risk of the sale being of a modern forgery.

All seven objects bought from the experienced London dealer were determined at trial not to be authentic, after consideration of extensive expert evidence on art history, restoration and materials science.

While a fraud allegation was made against the Director of the London dealer in respect of one of the seven objects, this did not, in the Judge's view, satisfy the test which was that a fraudulent misstatement must on the balance of probabilities be made (1) knowingly or without belief in its truth, or (2) recklessly - careless whether the statement is true or false, following general principles on proving fraud. Instead, the Judge regarded the dealer as having genuinely thought (although wrongly and without reasonable grounds) that the Hari Hara statue was an outstanding treasure from Vietnam.

Background

The Second Claimant was Sheikh Hamad, a member of the Qatari royal family and the CEO at the relevant time of the First Claimant ("QIPCO"), which owned various antiquities and works of art. During 2014/2015, the Claimants bought seven objects from the First Defendant ("JEL"), a specialist antiquities dealer from Mayfair London, of which John Eskenazi was the Director.

Difficulties in obtaining documents post-sale relating to provenance, as requested by a proposed exhibiting museum, led to concern that they were not of ancient origin.

QIPCO sought the return of the US $4.99M (about £4.2M) overall purchase price, alleging that all seven objects were modern forgeries, and that in respect of the most expensive - the Hari Hara statue – the Defendants knew that the statue was not authentic, or that it was sold not caring whether it was authentic or not (in other words the sale of that item was alleged to be fraudulent).

Overview of the allegations

The Court considered the legal duties owed by a specialist dealer to a buyer of antiquities. The issues included whether Mr Eskenazi had reasonable grounds to consider that the objects were authentic, and whether he personally, and/or via JEL, made fraudulent misrepresentations regarding the Hari Hara statue's ancient origin.

Contract

The parties to this dispute agreed that there was an **implied contractual term** that the antique dealer business had an **honestly and reasonably held belief** that the objects were of ancient origin.

An important issue was whether there was also a contractual promise that each object was, **in fact,** of ancient origin. If so, the question of Mr Eskenazi's belief (reasonable or otherwise) would not matter and if the Claimants could prove they were not ancient their claim for repayment would succeed.

The Claimants stated that each of the invoices represented the best evidence of the contract, as there were no formal written contractual terms. The invoices gave a brief description, which reflected the pre-sales discussions between Sheikh Hamad and Mr Eskenazi, such as which century or period the item was said to date from and the area it came from. Each invoice also contained the following phrase:

> *"I declare that to the best of my knowledge and belief the item detailed on this invoice is antique and therefore over one hundred years of age".*

Responding to the Claimants' assertion that it had a contractual assurance of authenticity, the Defendants asserted that Sheikh Hamad knew that no antiquities dealer could or would ever give an absolute assurance of certainty.

Duty of care / negligence

The parties agreed that JEL owed QIPCO a duty of care. It was also agreed by the parties that JEL, through its' Director, Mr Eskenazi, represented that it held the **honest and reasonable belief** that the objects were of the age and origin identified.

Where lack of reasonable belief is alleged, this involves assessing whether the **formation** of that belief/opinion was negligent.

Misrepresentation

The Claimants did not need to allege fraud in order to succeed against JEL. The 'fraudulent' misrepresentation allegation, regarding the Hari Hara statue, was a higher hurdle to cross. However, including the fraud allegation meant that Mr Eskenazi was sued personally, and therefore named as the Second Defendant.

Authenticity

The question of authenticity included the Court considering the circumstances in which the dealer acquired each item, the ownership history (i.e. provenance) and examining contemporaneous documents about how they came into the Defendants' possession. Certain provenance letters were found to be false or backdated.

The most expensive item, at US $2.2M, was the Hari Hara statue. It had been described as originating from Vietnam and to date back to the late 7th Century, whereas the other objects ranged from about 1st Century BC to 6th Century CE.

The Judge's view was that there was likely to have been a brief discussion on provenance of the first two marble heads and documentation was also provided for one, but there were no specific provenance discussions for the others. He regarded this as reflecting Sheikh Hamad's increasing trust of Mr Eskenazi, probably thinking that if he needed provenance documentation, say for an exhibiting museum, he could ask for it (para. 71).

When the Defendants did not provide provenance details after the sale (for the proposed exhibiting museum), the Claimants appointed their own forensic experts who found evidence of plastic and chemicals that ultimately led to the overall allegation that all of the seven objects were not of ancient origin.

During the trial, the Defendants admitted that the gold serpent bracelet was not ancient, because cadmium was found when the bracelet was tested during the litigation. Cadmium started to be used in the 19th Century and had never been found in genuine ancient objects.

At the end of the trial, after considering lengthy expert evidence on art history in the regions each antiquity was said to originate from, along with conservation and materials science, the Judge concluded that all seven objects were inauthentic, but the fraud allegation regarding the Hari Hara statue failed.

The fraud allegation regarding the Hari Hara statue

The Claimants' allegations of fraud were largely based on alleged false documents of the sales chain and its' illegal export out of Vietnam.

Mr Eskenazi/JEL bought the Hari Hara statue via a Mr Jewell in 2013, allegedly from a monastery seeking to raise funds. Even by the trial the particular monastery had not been identified, nor the Vietnamese dealer (para. 170).

However, the Judge concluded that a substantial amount of money was paid – not less than US $85,000 – for the Hari Hara and commented *"I do not think that he {Mr Eskenazi} would have done this unless he believed that he was buying a genuine antiquity"* (para. 728). The Judge went on to comment that, *"it seems improbable that US $85,000 would be the going rate for a forgery, even a good one…."* (para. 728).

Although JEL's corporate accounts showed the much higher figure of US $1.8M in respect of its' acquisition of the Hari Hara statue, the Judge's focus was on whether there were fraudulent misrepresentations of antiquity at the point of onward sale to Sheikh Hamad (not tax related points which could have been to reduce JEL's tax liability) (para. 731).

The Judge regarded the following assertions by the Defendants' barrister as having 'force':

1. paying US $85,000 when Mr Eskenazi did not have a buyer in mind, let alone one who had agreed to buy the object, would have involved a substantial risk if he had paid US $85,000 knowing, or not caring, whether he was buying a forged item from Mr Jewell, and

2. Mr Eskenazi would not have risked the relationship with Sheikh Hamad, a well-known collector, by selling a known forgery to him (para. 733/734).

Overall, Mr Justice Jacobs accepted that Mr Eskenazi genuinely believed that he had purchased an outstanding treasure in 2013 that he then sold on, in 2015, to Sheikh Hamad's company QIPCO.

Regarding the alleged illegal export point, the Judge concluded *"if the piece was genuine – Mr Eskenazi was involved in taking an antiquity out of Vietnam which in all likelihood it was illegal to export, and also that he knew of false documents which disguised what was happening"* (para. 730). He was referring to a Bill of Lading describing the item as a garden ornament valued at about US $575; such subterfuge was allegedly to avoid questions by Vietnamese authorities. However, as the Judge concluded that all objects were inauthentic it followed that there was **no** illegal export of that item out of Vietnam.

The Judge's assessment of the evidence was that *"if, as {Mr Eskenazi} maintained, it was genuine, some method would have to be found for getting the object out of the country without alerting the authorities. Mr Eskenazi's attitude was that it was more important to obtain and save ancient treasures, even if this meant disregarding export laws and indeed the principles on which members of BADA are required to operate. This attitude can certainly be criticised, but it does not lead to a finding of fraud in relation to the Hari Hara"* (para. 730).

The alleged illegal export and false document were matters concerning Mr Eskenazi's integrity or otherwise, but did not assist on the question of whether there were fraudulent statements as to antiquity.

Judgment

The Court decided that there was no contractual term that went beyond the agreed implied contractual term (that the First Defendant honestly and reasonably held the opinion that the objects were ancient in origin).

The trial Judge stated that a contract cannot be a sale by description unless the parties all intended the description to be a term of the contract (following the test of Slade LJ in ***Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd*** [1991] 1 QB 564). In the present case, the trial Judge's view that there was no common intention of attribution to objects (which were between about 1,000 and 2,000 years old) was *"put beyond any doubt"* by the declaration at the bottom of the invoice (para. 136). The only reasonable interpretation was that there was no guarantee of antiquity and Mr Eskenazi was declaring that the description in the invoice was correct to the best of his knowledge and belief, and he was giving an opinion. They remained statements of opinion, and were neither statements of fact nor contractual promises.

The Court also accepted the general position was that mere expressions of opinion or belief are not contractual, following ***Drake v Thomas Agnew & Sons Ltd*** [2002] EWHC 294 (QB) (which involved an art dealer's attribution of a painting to van Dyck).

Turning to the misrepresentation issues, the Claimants alleged a lack of reasonable belief. All the allegations (contractual, misrepresentation and negligence) involved assessing what was reasonable in the context of a dealer that held itself out as the world's leading expert in the relevant fields.

In terms of the standard of skill and care regarding the negligence claim against the dealer, it was acknowledged by reference to ***Thwaytes v Sotheby's*** [2015] EWHC 26 that the level of experience would be taken into account, and here Mr Eskenazi was viewed as one of the most highly respected dealers in these regions for their artwork. In ***Thwaytes*** the Court recognised that there would be a higher standard of skill and care owed by a leading auction house compared with a provincial auction house.

Was it unreasonable for Mr Eskenazi to have reached his unqualified or emphatic opinion? The existing test was that if there was a real (as opposed to a fanciful) doubt, an opinion will need to be qualified. In contrast, if a definite opinion is reasonably held then, following ***Thomson v Christie Manson & Woods*** [2005] EWCA Civ 555, a person is not required to express doubts.

As there was a proliferation of fakes in the market, the Judge considered that overall no reasonable leading specialist antique dealer would have expressed an unqualified opinion that each of the seven objects was ancient.

In reaching his decision, the Judge favoured the Claimants' experts and the methods adopted by them; in contrast, the Defendants' main expert was unable to attend the trial in person or virtually. The Defendants tried to resort to referring to one of the persons approached by the Claimants, at the early stages of the dispute, but he had recommended the Claimants arrange further testing, and had not produced a formal CPR Part 35 compliant expert report.

The Judge noted the Claimants' art historian's expert view that there was something odd about the idea that the Hari Hara would have been owned by a Buddhist monastery, as it was a representation of a Hindu, not a Buddhist, deity. However, he did not go so far as to regard the representations about that statue as being fraudulent.

CPB Comment

In this specialist antiquities case involving a private sale, historical and religious background knowledge, as well as knowledge of archaeological records carried more relevance than visual inspection (or "eye"), which is more likely to arise with attribution of paintings.

Most case law concerning authenticity and provenance relates to paintings where the period the artwork relates to dates back up to a few hundreds of years. However, different considerations arise with antiquities, and the availability of comparables and the materials used impact on the type of checks potentially available.

It was acknowledged that stone objects are one of the most difficult materials to authenticate. The age of stone does not assist with assessing **when** it was carved. However, when authenticating paintings carbon dating technology can potentially be used.

When paintings are attributed to a particular artist, the auction catalogue could describe the piece in different ways to reflect the degree of confidence. For example, Nourse LJ in the 1991 ***Harlingdon*** Judgment had explained that the completeness with which the artist's name is stated in the catalogue, e.g. "Peter Paul Rubens", "P.P. Rubens" or "Rubens" indicates in descending order the degree of confidence with which the attribution is made. Nourse LJ acknowledged, even in the early 1990's, that auctioneers' conditions of sale usually declared any description as being opinion only.

The key issue here was whether each of the objects could reasonably be dated to a particular period of time. One would expect a dealer of antiquities to focus on buying from a reputable source; doing all the necessary scientific and especially art history research and then looking into the history of the piece.

The Defendants had produced pre-sale reports for only some of the seven objects. However, these did not refer to the existence of fakes in the market and/or comment on why each was considered authentic. In a market rife with fakes, the Judge considered that the best comparators and source of knowledge regarding features were those of undoubted authenticity because provenance is known as a result of archaeological record. He was of the view that, in reality, there were no comparables in respect of the two marble heads; one of these was improbably similar, in the Judge's view, to a piece in terracotta which Mr Eskanazi had sold to a Singaporean museum, but was not referred to in the pre-sales research report. The Hari Hara statue was also similar to an object called the Vishnu, which had similar parts missing, and was exhibited in a Vietnamese museum. Those similarities raised serious question marks of copying having taken place.

As well as the unusual feature of the Hari Hara statue being a Hindu representation rather than a Buddhist deity (given that it was said to originate from a Buddhist monastery), there was no record of it being excavated; there was an absence of 'weathering' or damage generally which would have been expected if the object was 'ancient', and those objects that had inset gems were in excellent condition, whereas some gems will usually have been lost or stolen over time.

There is a difference between negligence and the higher requirements to prove fraud, and the allegation of fraud (as regards the Hari Hara statue only) did not succeed.

There has been another recent negligence claim of interest against London dealers. Simon Dickinson had advised a British aristocrat to sell an 18th Century French masterpiece for £1.15M in mid-2014 to a Stockholm art dealer, describing it as a painting "by Chardin and Studio". After a deep clean it was sold on for the substantially larger price of £8.5M in early 2015 as Chardin's own signature had, by then, been uncovered. This led to the allegation that Simon Dickinson had been negligent to advise to sell for the lower price of £1.15M. The allegations involved that the painting was not x-rayed for a signature, was not marketed to any other buyers and was not shown to the known Chardin expert art historian, Pierre Rosenberg. However, the Judge in that case was not satisfied that Mr Dickinson was negligent and there was no evidence that he knew the artwork could have been sold at a higher price.

April 2023

Any questions

If you have any questions regarding the insurance-related issues highlighted in this article, please get in touch with Helen or Bill.

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