

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2019

Before :

MR JUSTICE ROBIN KNOWLES CBE

Between :

SOTHEBY'S

Claimants

- and -

(1)MARK WEISS LIMITED
(2)FAIRLIGHT ART VENTURES LIMITED
(3)MARK ADRIAN F. WEISS

Defendants

And between:

FAIRLIGHT ART VENTURES LIMITED

Part 20 Claimant

- and -

MARK WEISS LIMITED

Part 20 Defendant

David Foxton QC and Emily Wood (instructed by **Freshfields Bruckhaus Deringer LLP**) for the Claimants
Joe Smouha QC and Claudia Renton (instructed by **Stephenson Harwood LLP**) for the First and Third
Defendants

Dr Richard Wilson QC, Joseph Dalby SC, Jessica Franses and Shyam Thakerar (instructed by **Mackrell**) for
the Second Defendant

Hearing dates: 1-4, 8-11 April 2019

Approved Judgment

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that
copies of this version as handed down may be treated as authentic

MR JUSTICE ROBIN KNOWLES CBE

Robin Knowles J:

Introduction

1. There exists a painting titled “Portrait of a Gentleman” (“the Painting”). On any view it is a fine painting. Some consider it to be the work of Frans Hals (1582/3 – 1666). Others disagree.
2. The parties to this litigation are involved in different ways in the fine art world. The claimant (“Sotheby’s”) is an international auction house. The first defendant (“MWL”) is a fine art dealership, and the third defendant (“Mr Weiss”) its owner. The second defendant (“Fairlight”) and the individual behind it, Mr David Kowitz, invest in fine art from time to time.
3. The Painting was purchased by MWL and Fairlight in 2010. They agreed, in particular by an exchange of emails on 17 May 2011, that a buyer should be sought, with MWL endeavouring to sell on behalf of both of them.
4. Sotheby’s was involved and in June 2011 the Painting was sold to a purchaser (“Nevada”) owned by Mr Richard Hedreen, a fine art collector and investor. The sale was by private treaty and the sale price was US\$10,750,000.
5. The sale contract was subject to provisions allowing rescission of the sale and return of the purchase price and of the Painting. These provisions were exercised or purportedly exercised by Nevada in 2016 following opinions as to the Painting’s authenticity formed by experts.
6. The Painting has been returned by Nevada, and Sotheby’s has returned the purchase price to Nevada. Sotheby’s and Fairlight however disagree on the question whether Fairlight is obliged to reimburse Sotheby’s for half of the returned purchase price. Originally MWL and Mr Weiss also disputed MWL’s liability for the other half of the returned purchase price but they have since reached a compromise with Sotheby’s.

Common Ground

7. The following matters are agreed common ground between the parties:
 - (1) On or about 21 June 2011 Fairlight and MWL agreed that they would accept a proposed offer of US\$10,750,000 for the sale of the Painting to a client of Sotheby’s.
 - (2) By what I will term “Contract A”, MWL (acting 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.

- (3) Pursuant to Contract A, Sotheby's identified a buyer for the Painting. That buyer (Nevada) and Sotheby's signed what I will term "Contract B", which was the contract of sale by which, and contained the terms on which, the seller of the Painting, acting by Sotheby's as their agent, agreed to sell the Painting to the buyer for the purchase price specified.
- (4) In or around 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 it with the Painting for forensic testing which Nevada duly did.
- (5) On 27 May 2016 Nevada wrote to Sotheby's providing or purporting to provide written evidence raising doubts as to the authenticity of the Painting and seeking to return the Painting and to be repaid the purchase price.
- (6) On 11 July 2016 Sotheby's determined or purported to determine that the Painting was a counterfeit ("the Determination").

Contract A

8. On 25 June 2011 a written agreement was entered into (Contract A). Fairlight's written argument contends that this agreement was in terms agreed between Mr Kowitz on behalf of Fairlight and Mr Weiss on behalf of MWL on 21 June 2011.
9. Contract A was in the form of a letter from Sotheby's addressed to MWL and each page is initialled. Contract A included these terms:

"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 of 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 of 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, which form an integral part of your agreement with Sotheby's and the Prospective Buyer."

The Private Treaty Terms

10. Sotheby's "Private Treaty Terms" attached to Contract A are set out in full in the Appendix to this judgment. There were two signatures to the terms. One is on behalf of Sotheby's, followed by the date 25 June 2011. The other is that of Mr Weiss stating that he is "duly authorised for and on behalf of" MWL, and is followed by the date 23 June 2011.
11. The Private Treaty Terms included the following, providing for an "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 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 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 claims; and (iii) return the item to Sotheby's in the condition in which it was purchased."

Contract B

12. A second written agreement was entered into (Contract B), and is dated 27 June 2011. It was again in the form of a letter from Sotheby's but is addressed to Nevada.
13. Contract B included these terms, including the Authenticity Guarantee at paragraph 4:

"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\$ 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 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."

The areas of dispute

14. On Sotheby's analysis of events the two contracts, Contract A and Contract B, were used in order that the buyer and the seller would not (at least by that means) know the identity of each other.
15. It is Sotheby's case that the Authenticity Guarantee was properly invoked by Nevada, and that Sotheby's properly reached the Determination and returned the purchase price under the Authenticity Guarantee. In the result, says Sotheby's, it is entitled to reimbursement from MWL and Fairlight as the sellers.
16. Fairlight challenges the claim at a number of points. Fairlight's arguments may be distilled as follows:
 - (1) There was no privity of contract between Fairlight and Sotheby's in Contract A, because Sotheby's was a sub-agent to MWL and MWL was not authorised to enter into any agreement with Sotheby's on behalf of Fairlight.
 - (2) MWL and Fairlight were not in partnership, and MWL was not authorised to enter into any agreement with Sotheby's on behalf of any partnership.
 - (3) Nevada did not "provide" to Sotheby's "written evidence raising doubts as to the authenticity or attribution of [the Painting]".
 - (4) Sotheby's acted unreasonably, irrationally, arbitrarily, capriciously and without good faith in making the Determination, in breach of an alleged implied contractual term between it and Fairlight.
 - (5) The offer to Nevada to rescind the sale of the Painting did not apply because at June 2011 the description of the Painting in Contract B accorded with "generally accepted views of scholars and experts".
 - (6) The Authenticity Guarantee was not available to Nevada in 2016 as Nevada was a "subsequent owner".
 - (7) Further, the offer to rescind was rendered ineffective by its having been transferred or assigned.
 - (8) Sotheby's failed, in alleged breach of duty, to indicate in Contract B that there was a "divergence of views among scholars and experts" over the Painting.
 - (9) Sotheby's acted in its own interests, and in breach of fiduciary duties owed by it to Fairlight.
 - (10) If Sotheby's has suffered any loss that is of its own making.

"Privity": Sotheby's and Fairlight as parties contracting with each other

17. For Fairlight, Dr Richard Wilson QC argues that the first stage of the inquiry, before looking at Contract A, has to be the position between itself and MWL.
18. Fairlight's case is that Fairlight was principal and MWL was agent. Sotheby's was then a sub-agent to which MWL delegated. The result is, it is argued, that "as a matter of mixed fact and law" Sotheby's and Fairlight did not contract together by means of Contract A and Fairlight has no liability in contract under Contract A.
19. By casting Sotheby's as sub-agent, Fairlight seeks to engage the particular authorities that deal with privity where a sub-agent is involved. Thus, in Calico Printers Association v Barclays Bank Ltd (1930) 36 Com. Cas. 71, 78 Wright J held:

"To create privity of contract it must be established not only that the principal contemplated that a sub-agent would perform part of the contract, but also that the principal authorised the agent to create privity of contract between the principal and the sub-agent, which is a very different matter requiring precise proof."

Further, in Grosvenor Casinos Ltd v National Bank of Abu Dhabi [2008] EWHC 511 (Comm) at [149] Flaux J (as he then was) held:

"What is clear from these citations is that, as a matter of English law, the Court will not conclude that there is privity of contract between a sub-agent and the principal merely because the principal is aware that his agent will delegate functions to a sub-agent and authorises such delegation ... Before a contract between [principal and sub-agent] could be found to exist as a matter of English law, the Court would have to be satisfied not only that [the principal] contemplated the involvement of [the sub-agent] as collecting bank, but in Wright J's words 'authorised [the agent] to create privity of contract between [the principal] and [the sub-agent].'"

20. I noted above that it was common ground that by Contract A, MWL (acting 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.
21. The evidence at trial showed 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\$10.75 million.
22. I am fully satisfied that this episode gave MWL authority from Fairlight to enter into Contract A on their joint behalf. I do not accept the construct argued by Fairlight that Fairlight was simply giving MWL authority to enter into an agreement between MWL and Sotheby's. Having heard and read the evidence of Mr Kowitz and read the evidence of Mr Weiss, and considered the engagement of Sotheby's, in my judgment the structure of the relationship between MWL, Fairlight and

Sotheby's for which Fairlight contends is unrealistically narrow. In my judgment the authorities cited on sub-agency do not engage. The facts do not support the idea that Sotheby's was a sub-agent to which MWL delegated functions within an agency between MWL and Fairlight.

23. It was by Contract A that the owners of the Painting (i.e. MWL and Fairlight) bound themselves as principals to the sale. The Private Treaty Terms incorporated in Contract A saw Sotheby's agree to give the Authenticity Guarantee (in its own right, committing its own balance sheet) to the buyer of the Painting and saw Sotheby's obtain the right to require the seller of the Painting to return the purchase price and accept re-delivery of the Painting in specified circumstances.
24. Fairlight placed reliance on an internal Sotheby's email from a Mr James Macdonald of Sotheby's to various employees in which Mr Macdonald used the language "an agreement to sell the Hals privately for Mark Weiss", with no mention of the sale being for Fairlight too. I do not find this persuasive. The email is not a legal document. Its imprecision is in fact illustrated by the reference to Mark Weiss rather than MWL.
25. Fairlight sought to make something of the fact that Mr Kowitz did not ask to see the text of Contract A at an early point. In my judgment that does not matter. It was simply one of the choices he made for Fairlight. Fairlight also laid emphasis on the point that Mr Weiss signed Contract A under the words "Duly authorised for and on behalf of [MWL]". That does not take Fairlight very far in my view, because it is common ground that MWL was acting as agent for Fairlight and on its own behalf.

Partnership between MWL and Fairlight

26. It is Sotheby's case that the essential relationship of MWL and Fairlight was one of partnership. Fairlight says that "partnership" mischaracterises the relationship and that the true analysis is that Fairlight and MWL were "carrying on a separate business wholly independently".
27. The evidence is not as complete as it might be. And in the event the question is not decisive given the conclusion reached on privity. However, had a conclusion on the question been necessary I would have found in favour of Sotheby's argument.
28. The interest of MWL and Fairlight 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.
29. Both parties relied on the provisions of the Partnership Act 1890. I bear fully in mind the fact that section 2(1) of the Act provides that joint property does not of itself create a partnership "as to anything so ... owned, whether the ... owners do or do not share any profits made by the use thereof".
30. Fairlight adduced evidence of how it used its interest in the Painting to provide security, suggesting that this was inconsistent with partnership. It is a piece of

evidence to be taken with others. In my view it carries little weight in the present case, as a single activity.

31. Fairlight also sought to rely on a draft written agreement prepared by Mr Kowitz's solicitors, arguing that it contraindicated partnership. The draft agreement was not entered into by Fairlight and MWL, and that is a strong reason to disregard it. Fairlight suggested that in about June or July 2010 Fairlight "entered into an agreement made partly orally, partly in writing and partly by conduct in respect of the matters set out in the Draft Agreement". In my assessment the evidence at trial did not make this suggestion good.
32. The language of "partner" was used between Mr Weiss and Mr Kowitz. In some cases that does not take one very far, but in the present case my assessment is that the choice of language had meaning. Mr Kowitz was reluctant to accept this, but I found him a witness who was guarded in areas that he appreciated were difficult for the case he wished to succeed.
33. In addition, Mr Weiss' evidence, adduced by Fairlight itself, included his understanding that "... in line with our previous practice, we would purchase the Painting as partners, deduct any expenses, and split the remaining profit." Mr Weiss said of the stage in July 2011 when the sale was all but completed: "In accordance with our agreement as partners in the transaction we were to split the profits of the sale of the painting equitably".
34. Of 2016, Mr Weiss gave evidence that "when Sotheby's threatened the current litigation regarding the Painting, it was understood between Mr Kowitz and me that in line with our agreement and understanding at the outset, Mr Kowitz, on behalf of Fairlight and I, on behalf of MWL were to share the costs and liabilities equally as joint partners." I accept all this evidence.
35. Fairlight argued that at the time of their original purchase of the Painting MWL and Fairlight had not determined what was subsequently to be done with the Painting. Even if this was the case it does not assist Fairlight, given Mr Weiss' evidence above about what was agreed "at the outset".
36. Fairlight argues additionally that MWL was not authorised to enter into any agreement with Sotheby's on behalf of any partnership. If there was a partnership in my view there can be no question in the present case that MWL as the more active partner had full authority to enter into Contract A on behalf of the partnership. In any event, as mentioned above, 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\$10.75 million.

Written evidence provided by Nevada to Sotheby's

37. Fairlight built several arguments from the foundation of the provision in Contract B that set the 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 Painting]”. The arguments were framed as breach of an alleged implied term.

38. The arguments all depend on the proposition that Nevada did not “provide” a report by a certain Mr James Martin because that report had been commissioned by Sotheby’s. All Nevada did was to “return” the report, it is said. With respect, I regard the proposition as hopeless. There is no limitation (in terms of origin or otherwise) to the written evidence that Nevada might provide, what mattered was that it was provided and that it “raised doubts as to the authenticity or attribution” of the Painting.
39. I take the opportunity here to deal with one further aspect of Fairlight’s arguments, which is the suggestion that Mr Martin’s report was not “written evidence” as contemplated by Contract B because it was not independent expert evidence. Having read the report and heard Mr Martin’s evidence under cross examination I am satisfied that the evidence was independent expert evidence, assuming that that was indeed a requirement. I refer further to Mr Martin and his report below.

The Determination by Sotheby’s

40. It is common ground that the Determination, by Sotheby’s, had to be a rational determination and could not be capricious or perverse. It is clear that the Determination had to be in good faith. Fairlight argued that it had to be reasonable too, applying a meaning to that standard that went beyond a requirement for a rational determination.
41. I do not need to reach a view on the question of whether the Painting is in fact by Frans Hals. It is positively desirable that I do not do so where to do so is not necessary, as that could have collateral impact on the value of the Painting.
42. The question is simply whether the Determination (by Sotheby’s that the Painting was “counterfeit”) was reasonable and rational and not capricious or perverse, or in bad faith. In my judgment it amply met those requirements. The Determination might or might not ultimately be correct. There is also room for views that the Painting is not counterfeit, and those views too would be reasonable and rational and not capricious or perverse.
43. Sotheby’s determination finds support from a number of sources that I will mention in turn.
44. First and foremost, Sotheby’s determination finds support in the results of testing undertaken by Mr Martin, who found particles within the ground layer of the Painting and under background paint that tests showed corresponded to the pigment phthalocyanine blue dating from times well after the death of Frans Hals. Mr Martin’s work and findings were discussed at a meeting on 7 July 2016 following which Sotheby’s made the Determination.
45. Mr Martin’s work was peer-reviewed by a Dr Twilley who concluded that Mr Martin had followed best practice. I reject the suggestion from Fairlight that Dr

Twilley was anything other than a proper professional choice of peer reviewer. A team from AAR instructed by MWL and Mr Weiss described Mr Martin's report (and Dr Twilley's work) as "professional and clear in approach". I listened carefully to a long cross examination of Mr Martin by Dr Wilson QC for Fairlight in which Fairlight had every opportunity to challenge Mr Martin's work. I was left satisfied that Mr Martin worked conscientiously and expertly, to a high professional standard and with professional integrity. He came across as a careful professional.

46. There was debate whether Mr Martin worked in an advisory expert capacity in undertaking this work, with Fairlight suggesting this compromised the independence of Mr Martin's work. I respectfully question the distinction sought to be made, noting that the Private Treaty Terms expressly reserved to Sotheby's "the right to consult independent expert advice". Notwithstanding, in my judgment what matters for the purposes of the present case is the quality of his work and the professional integrity he brought to his work. I found no shortcomings in either respect.
47. Mr Martin was in contact with Sotheby's legal team before and during his work. The exchanges, which were disclosed where they were in document form, were tested by Fairlight at trial. It is clear to me that the lawyers involved had not sought to influence Mr Martin's methodology or findings. The exchanges went to the presentation of his work and did not in my judgment influence or attempt to influence his work. Mr Martin did perhaps get a little drawn into tactics but not at the expense of the fundamental integrity of his opinion.
48. The Determination made by Sotheby's also finds support from the opinion questioning authenticity of the Painting reached by an expert appointed by the French Court. For their part AAR recognised that "the conclusion ... that the painting is a pastiche matches one of the two possible scenarios ..." that they had themselves outlined in initial findings.
49. I also accept that Sotheby's made the Determination against rather than in favour of its own interest. Mr Michael Goss, Chief Financial Officer of Sotheby's and the person with ultimate authority to make the Determination, gave evidence that I considered honest and in which he was careful to be clear. The outcome has cost Sotheby's its commission, and (indirectly) more. I accept the evidence of Mr Goss, that Sotheby's would have preferred "that it not be a fake and that the commission stand".
50. Sotheby's was later to go on to purchase the assets of the business through which Mr Martin worked, known as Orion. Fairlight sought to make something of this, but in my judgment the acquisition had no influence on the work on the Painting. The first approach in relation to the acquisition was in October 2016 and the acquisition was in December 2016; both postdate the Determination.
51. In the course of its argument on Contract B, Fairlight argued that the Determination had to be made (or a discretion to determine exercised) in accordance with an implied contractual term in Contract B. The implied term was framed in its opening written submissions to include the following(emphasis as in the original):

“... an implied term ... that Sotheby’s *must* exercise the Discretion [“to determine whether the [Painting] is “counterfeit” (being an imitation intended to deceive)”... ; (b) by reference to the “written evidence” “provided” by the Buyer in relation to condition (i) [“that you ... 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”] and (c) in accordance with ... their fiduciary duties as the Seller’s agent.”

52. The implication of this term is based, according to Fairlight’s argument, on “reasons of business efficacy and/or as a matter of obvious inference”. In my judgment neither basis is made out, save to the extent recognised above. That apart, in the present case the parties have set out expressly and in writing the contractual terms that govern the Determination, and the elaborate implied term advanced by Fairlight is simply unnecessary.
53. Fairlight argued that Sotheby’s should have allowed more time for further work before reaching the Determination. Having regard to the nature and content of what was available to it at the date of the Determination, I am satisfied that it was reasonable and rational to reach a view at that point. I accept that some in Sotheby’s position might have allowed more time for further work, but that simply reflects that range of reasonable and rational approaches to the situation in hand.

Generally accepted views of scholars and experts as at 27 June 2011

54. Contract B included the provision that:

“... in the event that Sotheby’s determines that the Property is “*counterfeit*” (an imitation intended to deceive), as [Nevada’s] 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 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. This offer to rescind is only made to you personally and may not be transferred or assigned in any way by you.”

55. Fairlight argues that the offer to Nevada to rescind did not apply because at the date of Contract B the description of the Painting in Contract B accorded with generally accepted views of scholars and experts.
56. Sotheby’s argued as a first point that the provision in relation to generally accepted views of scholars and experts did not qualify Sotheby’s entitlement under Contract A to require MWL and Fairlight to return the purchase price where the Painting was determined to be counterfeit. In the event it is not necessary to reach a view on this.
57. The description of the Painting in Contract B was:

“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.”

58. Fairlight recognises that “there is always a risk that a newly ‘discovered’ piece might in fact be a counterfeit”. It recognises that this was “underlined” in the first paragraph of clause 4 of Contract B which was in these terms:

“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.”

59. Fairlight argues:

“The proper interpretation of the Generally Accepted Views Proviso is that the contracting parties set the level of commercial risk that was mutually acceptable. Basically, it was open to the parties to either rely on the views of connoisseurs in the art market (i.e. “scholars and experts”), or they could choose to agree a contract where the [Painting] would be subject to technical and scientific testing. On this contract the Buyer and the Seller agreed to set the bar at the level of view of scholars [and] experts. So, if the [Painting] description in the contract accorded with the generally accepted views of scholars and experts, the Offer to Rescind would not apply.”

60. Fairlight placed particular reliance on the conclusion of Mr Timothy Warner-Johnson, an expert on Frans Hals scholarship and expertise called by it. Mr Warner-Johnson’s expert report concludes:

“As of 27 June 2011, two Scholars (Prof Slive and Dr Biesboer) confirmed the attribution of the [Painting] to Frans Hals and one Scholar (Prof Grimm) rejected it. This represents a majority supporting the attribution. ...

These are identified in this report eight Experts ... As of 27 June 2011, five of these Experts confirmed or supported the attribution of the [Painting] to Frans Hals (with the other three doing so after that date). Combining this with the views of the Scholars, the views expressed thus confirmed by an overwhelming majority the attribution to Frans Hals, with Prof Grimm the only dissenting voice.”

61. It was a privilege to read and listen to the opinions of a number of experts at the trial, and I found some value from the evidence offered by each of them. No single expert caused me to accept one opinion to the exclusion of others; all had a contribution to make. For example, while Mr Warner-Johnson had closer knowledge of who were seen within the market as scholars and experts of Hals, Dr Ashok Roy gave me a valuable insight on how a leading institution such as the

National Gallery in London would recognise particular individuals as scholars and experts.

62. The words “generally accepted views of scholars and experts” are to be given their ordinary meaning, in context. The words do not set a headcount or a majority, or a weighting between one scholar and another or between a scholar and an expert. On what is a question of opinion the words require that a generally accepted opinion has been reached. Sotheby’s makes the important point that it can take time, after first discovery of a work, to reach the point where there are “generally accepted views of scholars and experts”. I accept the submission made on behalf of Sotheby’s that the views that are material are views that are considered and which result from the application by scholars and experts of their scholarship and expertise.
63. The matter is to be assessed at the date of Contract B, 27 June 2011. The Painting was unrecorded before 2008. Professor Seymour Slive, widely acknowledged as the leading international scholar on the life and work of Hals, wrote that the Painting “could very well be by Hals”.
64. A Mr Naumann referred on 5 May 2011 to Professor Slive accepting the attribution of the Painting. But I have doubts about this account, which is indirect and not detailed. All the evidence showed me that positive attribution of this Painting is not a straightforward matter. Professor Slive did not see the Painting in person. He had seen a photograph in 2008 and may have seen another between 2008 and 2011. A confirmed attribution without seeing a painting in person would have been a departure from his mode of working. Dr Roy convincingly brought out the importance of seeing a painting physically. Dr Liedtke expressed the view ahead of the sale that Professor Slive should be shown the painting in person “for his approval of the attribution”, but this did not happen.
65. Professor Claus Grimm, one of only three scholars of Frans Hals, held a dissenting opinion. His views were on the basis of photographs too. He was to see the Painting in person later, but not until July 2011. However, having listened to Professor Grimm give his evidence orally I came to understand more clearly that his ability to reach a negative attribution was not compromised by the circumstance of seeing a photograph or image. It was based on a deep appreciation and understanding of Hals’ style of painting. With what he learned in that respect from the photographs, more technical scrutiny in addition would not have changed his negative attribution.
66. I found Professor Grimm to be a learned and honest witness. He put things this way in his evidence in chief:

“... I considered that the work lacked the quality and artistic personality of a Hals. Once I had come to the view that [the Painting] was not by Hals, the date of the work was irrelevant to me; there was no need for me to investigate further.

I formed the view that [the Painting] could not have been painted by Frans Hals because multiple constituents of [the Painting] are inconsistent with Hals’ works. For example, Hals’ paintings generally exhibit elements of impulsive, dynamic brushwork. They are also typically clear and simple.

By contrast, [the Painting] contained an array of dots and excessive brushstrokes, which are not consistent with Hals' hand. ... In addition, the diagonal rhythm and impulsive action that I would expect to see in an authentic Hals painting were missing from [the Painting]. Moreover, [the Painting] lacked the dominant focus on the eye of the sitter, which is characteristic of Hals' paintings."

67. One scholar (Dr Biesboer) and one expert (Mr Naumann) had viewed the Painting in person. There was debate over whether Mr Naumann was an expert but I accept that he was, although not at the level of those who have published work. I was not persuaded on the evidence that Dr Buvelot, an expert, had in fact seen the Painting in person before 27 June 2011, as Fairlight suggested. Dr Liedtke, who had only a "jpeg" did not in my judgment express a considered expert view. On Fairlight's own written submissions in closing, in fact four of the eight experts identified by Mr Warner-Johnson viewed the Painting only after 27 June 2011.
68. As at 27 June 2011 no scholar or expert had submitted the Painting to tests in the way Mr Martin was later to do. As at 27 June 2011 only one thing had been published on the Painting, a catalogue commissioned by Mr Weiss from Dr Biesboer.
69. Ms Clarissa Post, then of Sotheby's, gave evidence under compulsion. She was a careful, informative and conscientious witness. She brought out the context of the Painting alongside other paintings, and accepted the importance of the views of, in particular, the two scholars Dr Biesboer and Professor Slive.
70. I was invited to draw adverse inferences from the fact that Sotheby's did not call as witnesses all relevant members of its staff (including Mr Naumann), and has not explained why not, but I decline to do so. It is for each side to call the evidence on which it relies, and I do not consider I had insufficient evidence from Sotheby's.
71. It is said by Fairlight that Sotheby's indicated its own view by the description it gave at the head of Contract B. On one way of looking at this, it did, but as a corporate entity it was not a scholar or expert and its acceptance of the views of scholars and experts does not mean they were "generally accepted". Elsewhere in Contract B the parties agreed that neither the owner nor Sotheby's would be responsible for errors of description or for the genuineness or authenticity of the Painting and neither made any representations or warranties with respect to the "genuineness, authenticity, ... provenance ... of the Property".
72. In the result I find that as at 27 June 2011 there was not a "generally accepted view of scholars and experts" over the authenticity of the Painting. The Painting had not long been "discovered", Professor Slive had not seen the Painting in person, there was a considered dissenting view from Professor Grimm, a good number of scholars and experts had not seen the Painting in person, no forensic testing had been undertaken and little had been written about it. In time a "generally accepted view of scholars" might have formed, but not as at 27 June 2011.
73. The Painting is included in a second edition of a catalogue the first edition of which was prepared by Professor Slive in 1974. Professor Slive worked on the second edition but sadly died before its publication in 2014. Fairlight says that the Court

should “infer that Professor Slive would not have allowed the Property to be included in the monograph as an autograph work by Frans Hals if he himself had not believed that to be the case”. I do not feel able to draw this inference. There is no sufficient evidence about the decision to include the Painting.

The effect of Nevada’s dealings with the Painting between 2011 and 2016

74. The Authenticity Guarantee included the provision:

“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].”

Contract B provided in relation to the offer to rescind:

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

75. Between 2011 and 2016 the Painting was transferred from Nevada to Mr Hedreen and back again to Nevada. Fairlight argues that Nevada is not “the original buyer” but a “subsequent owner”, with the result that the Authenticity Guarantee does not apply. It also argues that the offer to rescind is “rendered ineffective” if the Buyer transferred or assigned it “in any way”.

76. These arguments may be dealt with shortly.

77. As for the Authenticity Guarantee, in my judgment on the true construction of the Authenticity Guarantee the “original buyer” is not the same person as a “subsequent owner”. Nevada was and is the original buyer.

78. As for the offer to rescind, this was not transferred or assigned, and the parties had agreed it could not be.

79. The offer to rescind was made to Nevada and remained with Nevada, who in due course invoked it.

80. It is convenient to deal here with a contention on behalf of Fairlight that rescission of the sale in the circumstances of transfer of the Painting was a repudiatory breach by Sotheby’s which Fairlight later accepted. The contention has, in my view, no quality. The contract was followed, not breached, and later acceptance by Fairlight of any breach would not relieve Fairlight of its accrued obligations to Sotheby’s.

Alleged breach of duty in failing to indicate in Contract B that there was a divergence of views among scholars and experts

81. Fairlight’s argument is that had Sotheby’s indicated there was a divergence of views Nevada would not have had a remedy against itself and MWL.

82. This argument fails on several bases.
83. First, Sotheby's was not asked to do this by Fairlight or MWL.
84. Second, Sotheby's was not obliged to do this – Fairlight again asserts an implied term but no such term is necessary; Fairlight asserts a duty of care at common law but has not satisfied me that there was a duty so to indicate.
85. Third, I am satisfied that the sale would not have proceeded at the agreed price had the indication been given. I do not overlook evidence given by Mr Hedreen in deposition in the United States. Fairlight suggests that this supports a view that Mr Hedreen “is likely still to have gone ahead with the purchase given the weight of opinion the other way and Sotheby's own dismissal of Professor Grimm's view”. I do not consider that to be an objective assessment.
86. Fourth, the contractual arrangements managed the subject of attribution in a different way; by a combination of a sale “as is” with the proviso in relation to generally accepted view.
87. It is also said that Sotheby's should have asked for further details of provenance. I am not satisfied that they should. They had the details that MWL and Fairlight had provided to them, and that formed the basis on which the Painting was consigned by Fairlight and MWL. Moreover, as Sotheby's emphasises, in Contract A MWL and Fairlight (as “the Seller”) warrant that they are not aware of any matters that would make the description of the Painting in Contract A misleading, and that they had provided Sotheby's with all information concerning the provenance of the Painting.

Alleged breach of alleged fiduciary duties owed by Sotheby's to Fairlight

88. Fairlight argues that Sotheby's acted in its own interests (or those of Nevada as an important client), in particular in making the Determination, in breach of fiduciary duties owed by it to Fairlight as Fairlight's agent.
89. I found no basis for this allegation on the facts. Sotheby's acted as the agreed contractual framework allowed it to act.
90. This may be a convenient point to address Fairlight's suggestion in its written closing argument that:

“... it is now clear that Sotheby's paid [Nevada] \$10.75m of the purchase price plus the buyer's premium not by reference to any term of [Contract B], but solely because it considered it to be in its best commercial interests to do so. This was an extra-contractual payment made for pure business reasons, not because of any contractual obligation arising under the Sale Agreement.”

I reject this suggestion, as having no foundation in the evidence. Dr Wilson QC

suggested in his oral closing argument that an email of 29 April 2016 from Sotheby's to Mr Hedreen comprised or indicated that the payment was made by a separate agreement. It contained the sentence, from Sotheby's:

“Finally, I also wanted to confirm, as you requested, that in the event the painting is determined to be a counterfeit, you would be entitled to the return of the \$11,287,500 that you paid for the painting.”

In my judgment the email is referring to the existing contractual arrangements, even if in an imprecise way.

91. I add that there is no room for a fiduciary duty on the part of Sotheby's to MWL and Fairlight where (as here) Sotheby's itself provides the Authenticity Guarantee with financial and reputational consequences attached, and where (as here) the role of making a determination was as much for the benefit of the buyer as the seller, rather than one that was concerned to promote the interests of Fairlight and MWL as sellers.

Sotheby's loss

92. It was Fairlight's case that any loss suffered by Sotheby's was of its own making. At one point this was put as an argument on mitigation. On examination it does not add to the arguments that have already been addressed. Fairlight developed the point by saying that Sotheby's failed to rely on the proviso concerning generally accepted views and “took the unreasonable step of alerting [Nevada] to an issue with [the Painting]”. Fairlight even says that Sotheby's “contrived to produce [the report by Mr Martin] and [the peer review by Dr Twilley] where the conclusion would be that [the Painting] was counterfeit”.

93. In my judgment, Sotheby's 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. It went about the investigation of its concerns in a perfectly proper way, and the work of Mr Martin and Dr Twilley was properly and professionally undertaken.

The position between MWL and Fairlight

- 94 As between MWL and Fairlight there is a question of contribution under the Contribution Act 1978 because the liability to Sotheby's is shared.
- 95 Fairlight urges that there is “blameworthiness” on the part of MWL that warrants an allocation of liability between MWL and Fairlight other than in equal shares (see Brian Warwicker Partnership plc v HOK International Ltd [2006] PNLR 5 (CA)). On applications to amend raised at the trial itself, I confined Fairlight to facts and matters that it had already raised in its opening. I did this in the interests of fairness and finality. Fairlight also alleges that MWL's claim against it for contribution to the sums paid by MWL to Sotheby's under the settlement between those parties is barred as champertous.

- 96 Fairlight is liable to Sotheby's for failing to return the purchase price of the Painting in breach of Contract A. In considering what is just and equitable having regard to the extent of responsibility for this damage I find no conduct on the part of MWL "blameworthy" as between MWL and Fairlight. I further accept the submissions of MWL that equal shares are particularly apposite given the evidence of Mr Weiss and Mr Kowitz to the effect that each of Fairlight and MWL was prepared to share the risk of the venture.
- 97 The allegation of champerty by Fairlight is prompted by the fact that the settlement between Sotheby's and MWL (and Mr Weiss) assigns or purports to assign to Sotheby's a Part 20 Counterclaim of MWL against Fairlight for a contribution to the sum payable under the settlement. If Fairlight is correct in its allegation that would leave MWL with the Part 20 Counterclaim, and so the point takes Fairlight nowhere. In any event in my view Fairlight is wrong; Sotheby's had a genuine commercial interest looking at the transaction as a whole (see Recovery Partners GP Limited Revoker LLP v Rukhadze & Ors [2018] EWHC 2918 (Comm) at [458]-[462] per Cockerill J).

Conclusions

- 98 The precise terms of the Court's order to follow from this judgment will be a matter of discussion when the judgment is handed down, and may be capable of agreement between the parties. Essentially the events that happened give rise to liability on the part of Fairlight.
- 99 Among the remedies sought by Sotheby's against Fairlight is an order for specific performance of Fairlight's obligations. I find nothing in Fairlight's suggestion that Sotheby's conduct should cause the Court to deny it this remedy.
- 100 This judgment does not determine whether the Painting is by Frans Hals. Whether by Frans Hals or not, it is to be hoped that its intrinsic qualities will not be ignored, and that it may be enjoyed for what it is, which is a fine painting.

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 of 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."