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Sleepers at Auction: Boon or Bane?

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Each work of art is attributed to an artist, a period and the chain of its previous owners, the so-called provenance. It happens that experts come back on the attribution of a work as recently done by conservators at the Courtauld Gallery in London regarding *Le déjeuner sur l'herbe* by Edouard Manet (1832-1883). Based on a technical analysis, they now consider that this painting is not a copy of the master's work exhibited at the Louvre, but an authentic preparatory version of the Louvre painting (1). All at once the value of the work goes from thousands to millions. Such changes in attributions occur regularly and can only delight owners of the given works of art. Conversely, they frustrate sellers who suffer the consequences.

A sleeper is defined as an artwork or antique that has been undervalued and mislabelled due to an expert's oversight. These dormant treasures come into being through the actions of people around them: they result from a consensus of scholarship to reattribute the work of art. The art market will only accept the new attribution if it is endorsed by the expert recognized as an authority on that artist (2). For works of great masters such as Leonardo da Vinci, Caravaggio or Raphael, the plurality of leading experts frequently prevents a consensus on a sleeper's attribution and hinders a potential sale.

Sleepers have repeatedly appeared at auction, in particular when auction houses are asked to sell large collections of collectibles. The evaluation of a great number of objects within a short time increases the risk of having a master painting attributed to its follower, its pupil, an artist contemporary to the master, to no artist, or to a broad term such as "Flemish School". Sleepers illustrate how vital attributions actually are for the sale process, and how auction houses handle and use attributions as part of their commercial directive.

Many cases are terminated amicably, due to the advantages of out-of-court resolution (3). Nonetheless, several sleeper disputes were subject to court proceedings, some of which gave rise to court decisions.

Foxhound sleepers

A decision of 1990 which is still highly regarded today has established several legal principles on an auction house's liability for selling a sleeper. In *Luxmoore-May and another v*

Messenger-May Baverstock (a firm) (4), two owners of a pair of foxhound paintings instructed the local auctioneers Messenger May Baverstock to arrange their sale. The auctioneers' fine art consultant valued the paintings at £30-50. To ensure her valuation was accurate, the consultant showed the foxhounds to Christie's, whose employee expressed no more favourable opinion. The auctioneers transcribed the consultant's valuation into the sale catalogue and added the attribution "English School. Hounds by Rocky Seashore. Panel Pair. Oil on Paper. 5.75 inches x 9 inches".

At the sale, the paintings were hammered down at £840 – an amount far above the estimate price. A few months later, the same paintings were offered for sale at Sotheby's. The international auction house had directly attributed the paintings to the artist George Stubbs (1724-1806) with an estimate price of £18,000-24,000 for each painting. Both paintings were sold for a total amount of £88,000. Following the Sotheby's sale, the original consignors sued Messenger-May Baverstock for breach of duty to exercise reasonable skill and care when authenticating the consigned paintings. At first instance, the Court ruled in the consignor's favour. On appeal, the Court reversed the decision.

Auction houses' liability

From a legal viewpoint, a consignor must overcome several hurdles before an auction house is held accountable for failing to spot a sleeper.

The first difficulty is the test which courts apply to determine an auction house's liability vis-à-vis a consignor. Auction sales give rise to a threefold legal relationship between the consignor, the buyer, and the auction house. More specifically, the auction house and the consignor are bound by a consignment agreement, under which the auction house acts as the consignor's agent. The purchase agreement is concluded between the consignor and the buyer. For specific purposes, auction houses act also as agent of a buyer, such as when placing a bid on the buyer's behalf (5). This dual agency capacity of auction houses carries the risk of conflict of interests.

As a consignor's agent, an auction house has a duty to carry out the service with reasonable care and skill (6), and a



fiduciary duty to act solely in the consignor's best interest. The auctioneers' duty of skill and care encompasses a duty to describe the consignor's property accurately and to its optimum value (7).

In *Luxmoore-May*, the Court made it clear that an auction house may not be held liable simply for establishing a wrong attribution, or for failing to spot a sleeper. As formulated by Lord Justice Mann, "the question whether the two dogs were in fact painted by George Stubbs... is unnecessary to answer. ... [A]ttribution must remain forever a mystery." (8) Instead, the Court considered whether the auctioneers, through their consultant, were negligent in overseeing that the paintings had Stubbs potential (9). In doing so, the Court assessed the auctioneer's degree of skill and care when examining the sleeper, and whether that level was legally sufficient. The Court accepted the auctioneer's contention to distinguish between local auctioneers and international auction houses in establishing the applicable standard of skill and care. Furthermore, "compliance with the required standard is to be judged by reference to the actual circumstances confronting the practitioners at the material time, rather than with the benefit of hindsight." (10) Correspondingly, the auctioneer's diligence must be examined as to whether a body of competent experts examining the paintings support the auction house's attribution.

Finally, the Court concluded that available evidence was insufficient to establish that "no competent valuer could have failed to spot the Stubbs potential of the two foxhound paintings" as the specialists had widely differing views at the time of the second auction sale at Sotheby's (11). The Court's

A similar painting is in the collection of the Kimbell Art Museum, Texas, since 1987: *The Cardsharps*, Michelangelo Merisi da Caravaggio, c. 1595, oil on canvas.

standard leads to the requirement of a consensus on the sleeper's new attribution, failing which the consignor's claim for breach of duty of care and skill is unsuccessful (12).

In the case *Lancelot Thwaytes v Sotheby's* (13) regarding what the then consignor of the painting considered to be an autograph work by Michelangelo Merisi da Caravaggio (1571-1610) (14), *The Cardsharps*, the Royal Court of Justice in London referred to *Luxmoore-May* and established the standard of diligence that international "specialist" auction houses must abide by. The Court held that "those who consign their works to a leading auction house can expect that the painting will be assessed by highly qualified people – qualified in terms of their knowledge of art history; their familiarity with the styles and oeuvres of different artists; and in terms of their connoisseur's 'eye'" (15). Also, leading auction houses must properly examine and devote sufficient time to authenticate the consigned property. A painting's poor condition must not mislead a specialist auction house as a reason to fail the painting's potential (16). This was one of the factors which the court in *Luxmoore-May* found weighed against a finding of negligence of the auction house. The *Thwaytes* Court ultimately endorsed Sotheby's attribution process in that specific case and ruled against the consignor.

Overall, liability is established by what could be reasonably expected from the auctioneer, given its size and expertise. Case law shows that in order to succeed, the consignor



The version of *The Cardsharps* in the *Lancelot Thwaytes v Sotheby's* case
Illustration: courtesy of Sotheby's

must prove that on a balance of probabilities, the auction house has failed to comply with the level of diligence that may be required from an auction house of the given kind.

The second hurdle are the auction houses' disclaimers included in the sale catalogues. These generally make it plain that the auction houses accept no liability for mistakes and misattributions. A limited authenticity warranty towards the buyer may apply to certain lots. However, consignors are not entitled to an authenticity warranty. English courts are divided between requiring a minimum standard of care from auction houses despite applicable disclaimers, and conceding that the disclaimers prevent any consignor's claim for negligence (17). In the first event, the consignor would still have to show that the auction house has not met the level of diligence that may be expected from a reasonable auctioneer acting under the same circumstances.

Finally, a further hurdle consists in the high risks and costs inherent in litigating attribution disputes (18). The legal claimants and defendants' costs in *Thwaytes v Sotheby's* totalled more than £6m (19). Also, legal proceedings may take years until a court reaches a decision, such as in the *Thwaytes* case which lasted 2.5 years.

Boon or bane?

Are sleepers ultimately boon or bane? The story of a new sleeper means that a masterpiece has been discovered, which was unknown before or believed to be lost. Sleepers are certainly a major loss to consignors and auction houses which missed an opportunity to make a great discovery and esteem and sell the work under its correct and much more valuable attribution.

Conversely, sleepers are great news to the ultimate buyer, who manages to profit from his discovery, that is if the work's attribution is not subject to a legal dispute or controversy among scholars.

Footnotes

1. Martin Bailey, "London version of Manet's *Le déjeuner sur l'herbe* predates the bigger picture in Paris," *The Art Newspaper*, 25 November 2016, <http://theartnewspaper.com/news/conservation/london-version-of-manet-s-le-deje->

[uner-sur-l-herbe-is-not-just-a-copy-of-bigger-picture-in-paris/](http://www.uner-sur-l-herbe-is-not-just-a-copy-of-bigger-picture-in-paris/) (accessed 11 January 2017).

2. On the concept of expert authorities, Anne Laure Bandle, "Fakes, Fears, and Findings," *Transnational Dispute Management (TDM) Journal* 6 (2014), 2; Eric Turquin, "Le point de vue de l'expert en art" in Quentin Byrne-Sutton and Fabienne Geisinger-Mariéthoz (eds), *Resolution Methods for Art-Related Disputes, Studies in Art Law Vol 11* (Schulthess 1999), 92.

3. See Norman Palmer, "Waging and Engaging – Reflections on the Mediation of Art and Antiquity Claims," in Marc-André Renold/Alessandro Chechi/Anne Laure Bandle (eds), *Resolving Disputes in Cultural Property/La resolution des litiges en matière de biens culturels, Studies in Art Law Vol. 23* (Schulthess 2012), 81-106, 89, fn. 14; Laurence Kaye, "Litigation in Cultural Property: A General Overview," in Marc-André Renold/Alessandro Chechi/Anne Laure Bandle (eds), *Resolving Disputes in Cultural Property/La resolution des litiges en matière de biens culturels, Studies in Art Law Vol. 23* (Schulthess 2012), 3-20, 20; Marie Cornu and Marc-André Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Settlement," *International Journal of Cultural Property* Vol. 17 (2010): 1-31, 12; Anne Laure Bandle and Sarah Theurich, "Alternative Dispute Resolution and Art-Law – A New Research Project of the Geneva Art-Law Centre," *Journal of International Commercial Law and Technology* 6, n. 1 (2011), 28-41, 31.

4. [1990] 1 All England Law Reports 1067.

5. More detailed in Anne Laure Bandle, *The Sale of Misattributed Artworks and Antiques at Auction* (Edward Elgar Publishing 2016), Chapter 5.

6. Section 13 of the Supply of Goods and Services Act 1982.

7. Brian W. Harvey and Franklin Meisel, *Auctions Law and Practice*, 3rd ed. (Oxford University Press, 2006), n. 5.15.

8. [1990] 1 All England Law Reports 1067, 1083b.

9. *Ibid.*, 1078d.

10. *Ibid.*, 1076a.

11. *Ibid.*, 1073a-f.

12. More detailed in Bandle, *The Sale of Misattributed Artworks and Antiques at Auction*, op. cit. 5, 285 et seqq.

13. [2015] EWHC 36 (Ch).

14. The auction house decided to attribute the painting to a follower of Caravaggio. It sold for £42,000. The painting's ultimate buyer, Sir Denis Mahon, insured the painting after the sale for £10m, believing it to be an authentic work by the master painter.

15. [2015] EWHC 36 (Ch), n. 76.

16. *Ibid.*, n. 77.

17. Bandle, *The Sale of Misattributed Artworks and Antiques at Auction*, op. cit. 5, 272 et seqq.

18. *Ibid.*, 291 et seqq.

19. *Ibid.*, 291 et seqq.