

An ungentlemanly end to a gentleman's agreement

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A mighty fall out between two old friends has given us a rare insight into private sales of valuable paintings at the highest levels, a reminder of the importance of properly documenting agreements, and has underscored the attention that should be paid to trust provisions. The revelations have also fed into the ongoing debate concerning the ability of the art market to operate under a cloak of secrecy in a world demanding ever greater transparency.

The essence of the dispute was whether an agent, who orchestrated the sale of what was once considered the world's most expensive painting, was due commission on the basis of a typical art world 'gentleman's agreement'.

The parties

The main claimant, Simon de Pury (*'Simon'*), is one of the world's best known art auctioneers, a dealer, curator, consultant, Swiss baron, ex-Sotheby's executive and jet-setter. He married Michaela de Pury, (also a claimant) in 2010. Their wedding made it into every newspaper, society magazine and art publication, being an astonishing work of conceptual art hosted at the Saatchi Gallery where each room contained a wonder, from salamis dangling from the ceiling, to the bride and groom getting dressed in glass cabinets which were smashed once they were ready. When *'the Mick Jagger of art auctions'* and his wife, (known as *'the giraffe'* given her height of 5'10"), hit the High Court for the trial in the summer of 2017, there was widespread news coverage with allegations of tax evasion, and the involvement of the Emir of Qatar's agent.

The first defendant, Ruedi Staechelin (*'Ruedi'*), is the grandson of one of the foremost Swiss collectors of Impressionist and post-Impressionist artworks of the first half of the 20th century. Ruedi and Simon were childhood friends, after attending the same school for a time. Later in life, the friends moved in the same circles, meeting socially fairly regularly across Europe. Ruedi was appointed as co-head of Sotheby's office in Basel by Simon, eventually becoming its sole head until his departure in the late 1990s. Ruedi is the president of a family foundation and co-trustee of a family trust, both of which hold a substantial Impressionist and post-Impressionist art collection. His fellow defendant trustees were an English solicitor and a New York attorney.

The 'gentleman's agreement'

Simon had assisted Ruedi in previous sales and attempted sales of other artworks owned by the Staechelin foundation or family trust. Simon also had a long association with a Mr Bennett who was agent for the Emir of Qatar. In 2012, Simon first suggested to Mr Bennett that Ruedi's family trust might be interested in selling a beautiful painting of two Tahitian girls by Gauguin, called *Nafea faa ipoipo* which translates as *'When will you marry?'*, to the Emir. There followed a long drawn out process, during which Simon and Ruedi held numerous meetings to discuss the possibility of a sale and the process of introducing Mr Bennett to Ruedi. During March 2013, Simon negotiated with Mr Bennett for the sale of the painting. The end position of that negotiation was that Mr Bennett offered \$230 million and Ruedi made a counter offer of \$260 million. This was rejected angrily by Mr Bennett. Negotiations then stalled and were only re-started in January 2014, resulting in an offer in June 2014 from Mr Bennett of \$210 million. Later that month, Mr Bennett, Ruedi, Simon and the English solicitor trustee met in London to discuss the sale. At the meeting, Ruedi wore a tie with the painting on it and symbolically gave it as a gift to Mr Bennett indicating that he would finally agree to sell. After Mr Bennett left the meeting, Simon was told by Ruedi and his co-trustee, that if a sale went ahead for \$210 million, he would get a commission of \$10 million. Other than the solicitor's laconic hand-written note, which could be interpreted in many ways, there was no document recording this promise.

After the June 2014 meeting, Ruedi contacted Mr Bennett directly for the first time and tried to get the offer of \$210 million increased. He referred to the previous year's offer of \$230 million but was informed by Mr Bennett no such 'formal offer' had been made. Ruedi did not ask Simon about this or pay attention to the word 'formal' but decided that he had been lied to the previous year, to such a degree that he decided no commission was payable due to this alleged deceit. The judge found that, in fact, Ruedi didn't want to pay commission because he didn't want to part with \$10 million in circumstances where the previous year he would have got \$220 million (even after the payment of \$10 million to Simon). The sale for \$210 million, mistakenly referred to in the New York Times and elsewhere at the time as a sale for \$300 million and the 'highest price'

ever achieved for a painting, went through in September 2014 with the complete exclusion of Simon from the process. Two weeks later, once it became clear that Ruedi and the other trustees were refusing to pay his commission, Simon issued proceedings.

Was there a breach of duty?

The trustees made a number of wide ranging allegations. In the main, they argued that the right to a commission had either never accrued because most of the work that Simon had done on the deal took place in 2013 before any discussion of commission took place, or had been forfeited by Simon's alleged breach of fiduciary duty in misleading Ruedi to believe that an offer of \$230 million had been made the year before. The trustees made serious allegations of tax evasion against Simon and his wife and associated companies in order to try to prove that he was essentially a dishonest person.

The trustees also argued that any decision to pay commission in June 2014 by Ruedi and the English solicitor was not a valid decision of the trust because the third trustee, the New York attorney, had not been consulted. The starting point is that trustee decisions must be made unanimously. However, Ruedi's family trust contained some specific provisions about majority voting. Ruedi and the English solicitor argued that as they had not consulted the US lawyer trustee there was no way in which a valid trustee decision could be made.

Upholding the agreement

The judge rejected all the above arguments by the trustees and found that the trustees (Ruedi and the English solicitor) had made a valid and effective trustee decision. Their decision was legally binding on the third trustee. There was no breach of fiduciary duty by Simon and an offer of \$230 million had been made in 2013. The judge also found under the contract commission was payable upon the happening of an event and, as such, it was not relevant to look at when the work was done. The judge did set out the dishonesty allegations in detail and rejected them, having been persuaded that Simon and his wife were not dishonest in their dealings, in particular in the setting up of the first claimant, a Jersey company, to avoid tax, but had received advice in that respect and had done their best to follow it (albeit unsuccessfully at times).

Despite all their glamour, none of the main witnesses made a particularly good impression on the judge who did his best to reach his decisions carefully, considering and then almost always disregarding all their evidence. The judgment could be viewed as an example of why art-related agreements should always be made in writing and on advice, and why trust provisions on decision-making processes need to be checked before some of the trustees take actions that bind the rest. The art world is likely to continue to operate in the way it always has, with gentleman's agreements and relationships of trust and confidence taking primary position, safe in the knowledge that at least the English Court will uphold these if called upon to do so.

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