

Free agents?

Secret commissions and poorly defined relationships in art transactions pave the way for litigation, warn **Pierre Valentin** and **Azmina Jasani**

The highly publicised ongoing dispute between Dimitry Rybolovlev and Yves Bouvier has recently sent shockwaves through the art world,

again raising concerns and questions about the opaque nature of the sector.

In January 2015, Rybolovlev filed a criminal complaint against Bouvier in Monaco alleging that he had fraudulently made a secret profit of around \$1bn from the sales of 38 paintings acquired by Rybolovlev over the course of a decade. In addition to the criminal suit, Rybolovlev also issued civil proceedings against Bouvier in Hong Kong and Singapore. Discovery proceedings are also ongoing in a New York federal court.

The central question at the heart of this multi-jurisdictional dispute is whether Bouvier was buying the paintings as Rybolovlev's agent and was thereby required to disclose his profit in relation to each sale to his principal, or whether Bouvier was selling the paintings to Rybolovlev at arm's length, with each party acting in its respective self-interest. This issue, which is a question of fact and not law, has been and continues to be the subject of considerable litigation in the art world.

Complex transactions

Due to staggering sale prices and the desire for confidentiality, fine art transactions are becoming increasingly complex. Direct sales by an owner to a buyer are few and far between, and it is now customary to expect multiple parties to be involved in a given transaction of high-value art, with the buyer likely to be anywhere between two and ten parties removed from the owner.

In fact, nearly every transaction between Bouvier and Rybolovlev involved a chain of intermediaries, including dealers, finders and agents. Such a chain makes it difficult to track everyone involved, the price paid, or the commission or profit earned by each party in the chain. Bouvier, for example, paid a commission to Tania Rappo, among others, for each relevant acquisition by Rybolovlev. Rappo, who had introduced Bouvier to Rybolovlev, was Rybolovlev's trusted confidante and a godmother to his daughter.

Parties involved as intermediaries in an art transaction usually act in one of three ways: they buy to resell, they act on

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behalf of the owner, or they act on behalf of the seller.

Reselling

Where a party buys to resell, they act as principal in the transaction, make a profit or loss on the resale and must account for two transactions: the purchase from the owner, possibly through one or more agents, and the resale to the buyer, again, possibly through one or more agents. A party buying to resell also acquires ownership of the art and thereby assumes risks, although generally for a very short period of time if the purchase and resale occur simultaneously.

In principle, someone buying to resell does not owe fiduciary duties to either the original owner or the buyer. They act in their own interest, with a view to maximising their own profit. Bouvier claims that his relationship with Rybolovlev was one of seller to buyer, whereby he bought the paintings and resold them to Rybolovlev, making a profit that he was very much entitled to make as a dealer acting in his own best interest.

Agents

Where a party sells on behalf of the owner or for an agent acting for the owner, they act as an agent and do not make a profit on a resale but instead take a commission. As an agent, they do not acquire ownership, which reduces their exposure. However, a hallmark of agency is the bundle of fiduciary duties owed by the agent to their principal, including the obligation to account for any commission the agent makes when conducting the principal's business.

As a matter of English law, a commission made by the agent when acting on the principal's behalf belongs to the principal, unless the principal has authorised the agent to keep such a commission for their own account.

As a corollary obligation, the agent must disclose to the principal any commission they make in the course of conducting the principal's business. An undisclosed commission may be treated as a secret commission, and give rise to

allegations of fraud. If the commission is disclosed but the principal has not authorised the agent to retain it, the commission is generally referred to as an unauthorised commission.

Intermediaries

Finally, a party involved as an intermediary in an art transaction can act on behalf of the buyer, either directly acting for them or through an agent. Like the agent acting for the seller, an agent for the buyer cannot make a profit but can take a commission and does not acquire ownership of the artwork. Similar fiduciary principles to those described above also apply to an agent acting for the buyer.

Rybolovlev claims that he appointed Bouvier to buy for him as his agent and, as a result, Bouvier owed him fiduciary duties including the obligation to account for any commissions that he made. According to Rybolovlev, Bouvier's failure to disclose these commissions to him essentially amounts to secret commissions, which are illegal and to which Bouvier is not entitled.

Defining relationships

Difficulty arises when relationships between multiple parties are not properly defined by means of contract, and where it is unclear whether a party is acting as an agent or at arm's length. Although legal contracts are becoming prevalent in high-value fine art transactions, deals continue to be concluded without any written agreements, making the issue ripe for litigation.

Indeed, only the first four of the 38 paintings acquired by Rybolovlev were documented in writing. Rybolovlev and Bouvier did not enter into any agreements for the remainder, even though the sale price for some of those paintings was considerably more than \$100m.

Rybolovlev insists that Bouvier was very much acting as his agent and that he expected Bouvier's commission to be no more than 2% for each of the sales, citing the fees charged for the logistics services provided in relation to the first four paintings purchased by Rybolovlev. Bouvier on the other hand maintains that he was simply acting as a dealer and in his own self-interest, and that he owed no fiduciary obligations to Rybolovlev. Courts will need to parse many emails and other pertinent evidence to determine whether an agent-principal relationship existed between them.



Difficulty arises when relationships between multiple parties are not properly defined

It is important to point out that, although a legal contract often helps create certainty, it does not fully shield parties from litigation and liability, especially if the contract is poorly drafted. In *Accidia Foundation v Simon C. Dickinson Limited* [2010] EWHC 3058 (Ch), Accidia engaged an art dealer named Daniella Luxembourg as its agent to sell a drawing attributed to Leonardo da Vinci. In turn, Luxembourg enlisted Simon Dickinson to help her find a buyer.

Dickinson, through his dealership, successfully sold the drawing for \$7m and paid \$6m to Luxembourg. Luxembourg deducted her commission of \$500,000 and paid Accidia \$5.5m for the sale. After the sale, Accidia discovered that the drawing was sold for \$7m and sued Dickinson for \$1m. Accidia was under the impression that Luxembourg's commission would be split between herself and Dickinson.

At trial, the court reviewed three sets of agreements – one between Accidia and Luxembourg's company, recording the fact that Luxembourg was acting as Accidia's agent; another between Dickinson's company and the buyer of the drawing, which provided that Dickinson was acting as Accidia's agent; and yet another between Dickinson and Luxembourg, which provided that Dickinson was acting as agent for the buyer. The difficulty with these contractual arrangements was that Dickinson had no direct connection with Accidia, yet his company purported to act as its agent, while the evidence did not point to Dickinson having acted as agent for the buyer but as having sold the drawing to the buyer at arm's length.

In the end, the court found in favour of Accidia on the grounds that Dickinson had presented itself to the buyer as agent for Accidia, Accidia had ratified the sale of the drawing made by Dickinson's company in its name, and that company had made an unauthorised commission for which it was accountable to Accidia. The court rejected Dickinson's argument that it was standard practice for an art dealer to sell at any price above the

owner's agreed return or net price and retain the difference as their commission without having to inform the owner or the owner's agent of the actual price paid by the buyer.

The argument would have been viable if Dickinson's company had bought the drawing to resell, thereby acting on its own account. Unfortunately for Dickinson, the agreement between Dickinson and Luxembourg recorded an agent–principal relationship between Dickinson and Accidia, which created a duty on part of Dickinson to seek Accidia's informed consent and disclose its commission.

Indeed, the court confirmed that “an agent is liable to account to his principal for the full price received, must not profit from his position as agent except with his principal's consent, and that an agent is not entitled to retain a secret commission or profit.”

Keeping a clear view

Both Rybolovlev's litigation and *Accidia* impart some important lessons.

First, it is imperative that each party carefully considers its role in a given transaction and clearly communicates its understanding of the role to all other parties involved.

Second, it is imperative that parties enter into written agreements outlining the scope of the services they will provide and the capacity in which they will perform those services.

Third, if by acting as agent intermediaries carry fewer risks, in particular the risk of buying without being able to resell at a profit, they take on fiduciary duties including the obligation to account for any money they make when conducting the principal's business. Intermediaries who decide to act as agent yet seek to maximise their own return without proper disclosure and authority expose themselves to significant risks.

Fourth, operating on blind trust is not an option when millions of dollars are at stake. It is utterly baffling why Rybolovlev agreed to purchase a Gustav



Klimt painting from or through Bouvier for \$183m, a Leonardo for \$127.5m and a Rothko for \$189m all without a single written contract.

Fifth, if parties enter into a legal agreement it is important to ensure that the agreement reflects their intentions accurately. Dickinson's company, for example, could not have intended in a single sale to act as agent for Accidia, with which it had no direct relationship, and as agent for the buyer.

Sixth, even if an agreement explicitly provides that parties do not act as an agent and principal but as a seller and buyer, it is important not to behave in a way that creates a fiduciary relationship, as courts often analyse the actions and conduct of the parties to assess the existence of an agency relationship.

Finally, a chain of intermediaries carries serious risks if these intermediaries have no or little visibility over relationships further up the chain. Risks include the owner of the artwork not having authorised their agent to delegate their authority to sub-agents or the owner having capped all commissions at a certain amount. A sale by an unauthorised sub-agent, or the total commission earned by a string of agents exceeding the maximum commission allowed by the principal, can lead to significant financial losses for the intermediaries involved. P

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