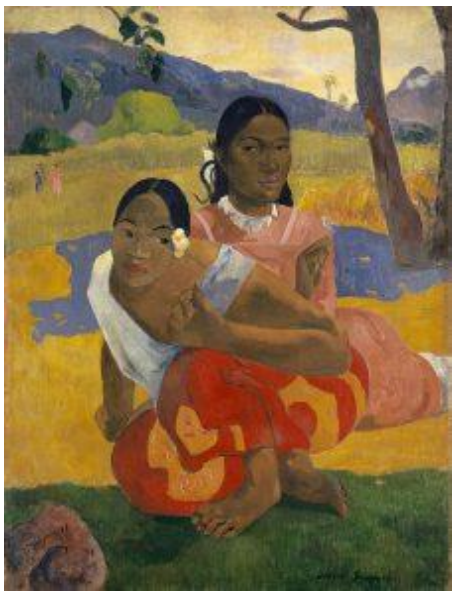
Article written by Michael Bowmer on 13th February 2018.

On a Handshake: the Gauguin and the Ten Million Dollar Commission

In this article Michael Bowmer of 4 New Square considers the recent judgment in the case of *ACLBDD Holdings Limited v. Staechelin* [2018] EWHC 44.



"*Nafea faa ipoipo?*" was painted by Paul Gauguin in Tahiti in 1892. The English translation from the Tahitian is "*When Will We Marry?*" The painting depicts two Tahitian women seated in a colourful landscape. It is a classic example of Gauguin's work from the period.

Well over a century later, in February 2015, the painting gained notoriety when it was widely reported in the press that it had become the world's most expensive artwork ever sold. As it turned out, that was not correct – at the time a Paul Cezanne had sold for more – but it was true that the painting had been sold some months earlier by its owners, the trustees of a Swiss based family trust, to the Emir of Qatar for an astonishing US$210 million.

The sale led to an acrimonious legal battle between art consultants, Simon de Pury and his wife Michaela, their Jersey registered company ACLBDD Holdings Limited and their English partnership De Pury & De Pury LLP, and the trustees about whether, as agents of the trustees involved in arranging the sale, they were entitled to a commission of US$10 million. After a two week trial last summer, the contest culminated in the recent judgment of Morgan J who decided that Mr and Mrs de Pury were so entitled.

The judgment of Morgan J is fascinating for the glimpse it affords of the world of private art sales and the activities of private art consultants and agents. This is a world in which, it seems, huge commission payments are at stake but in which agreements are made on a handshake, without the involvement of lawyers and without any formal written record.

Background

The Gauguin was acquired by Rudolf Staechelin-Finkbeiner in Geneva in 1917 as part of a significant collection of French impressionist and post-impressionist paintings amassed in the 1910s and 1920s. The ownership of the collection was transferred to a family foundation in 1931. Mr Ruedi Staechelin, the grandson of Rudolf Staechelin-Finkbeiner, became the president of the foundation upon his father's death in 1977.

In 2001 the foundation, as settlor, established the Rudolph Staechelin Family Trust. The trust was governed by a written trust agreement entered into in December 2001. The trustees were from its creation Mr Ruedi Staechelin, Mr Martin Paisner, an English solicitor practising for some 40 years with Berwin Leighton Paisner LLP and its predecessors, and Ms Carlyn McCaffrey, a New York qualified attorney who had for many years practiced with Weil Gotshal & Manges LLP and latterly McDermot Will & Emery LLP. Ownership of a number of works of art including the painting was transferred to the trust in early 2002.

Mr and Mrs de Pury described themselves as art consultants offering advisory services on the sale and purchase of art works and acting as brokers and agents in relation to such transactions. Mr de Pury and Mr Staechelin had known each other for many years. They had been to the same school for a short time and had worked together at Sotheby's in Basel. Mr de Pury had also advised the foundation in the mid-1990s on a move of the collection to the USA and in 2001 on the sale of a Matisse.

Discussions about the sale of the Gauguin began in 2012 and continued through until September 2014 culminating in the sale of the painting on 10 September to the Emir of Qatar for US$210 million. Of the three trustees Mr de Pury dealt almost exclusively with Mr Staechelin. He did not meet Mr Paisner until June 2014 and did not meet Ms McCaffrey at all.

The Decision

Legally, the decision is of interest in that Morgan J had to consider a range of issues concerning contract formation, trustee decision-making, potential forfeiture of commission and the existence and extent of any standard terms for the payment of commission in high-end art transactions.

Contract Formation

The primary issue for consideration was one of contract formation. In the absence of any written agreement or terms of business or indeed a clear exchange of letters or emails, the question was whether any legally binding consensus had ever been reached at all about the payment of commission. In order to answer that question Morgan J embarked on a painstaking analysis of the evidence assessing and weighing what was said at numerous meetings, in numerous locations, ranging from Zurich airport to London restaurants, in numerous emails and telephone conversations over the two year period between 2012 and 2014. He did so in circumstances where for various reasons he did not regard either Mr de Pury or Mr Staechelin as wholly reliable witnesses. Morgan J ultimately decided that a sufficiently certain and relatively straightforward binding agreement had been reached, at a meeting on 26 June 2014 attended by Mr Staechelin and Mr Paisner as well as Mr de Pury, to the effect that, if the painting were sold for US$210 million Mr de Pury would receive a commission of US$10 million.

Trustee Decision-Making

Secondly, an interesting point arose as to the unanimity of trustee decision-making. The general rule referred to at 29-069 of *Lewin on Trusts* (19th ed.) is that trustees of private trusts are required to act unanimously in the exercise of their powers and that a majority is not entitled to bind a trust against the opposition of a minority. However, as an exception, as *Lewin* states at 29-072, a trust instrument may expressly provide for majority decision-making, but in such cases "*… it is not open to a majority to exercise a power without reference to the*

other trustees, so that if a meeting is required notice must be given to all the trustees and a decision taken without such notice is ineffective".

The trust agreement of December 2001 contained the following provisions:

- Article X(C) was in terms that, except as otherwise provided, all decisions as to the trust authorised or required to be made by the trustees were to be made by a majority of the trustees who were not precluded by law or by the trust agreement from making the decision and who had not declined to participate in the decision.
- Article X(A) was in terms that any trustee might decline to participate in any one or more decisions to be made by the trustees and any such refusal should be set forth in a written instrument signed by the trustee and delivered to each other co-trustee.

It was argued on behalf of the trustees that although Mr Staechelin and Mr Paisner formed a majority of the three trustees they did not consult Ms McCaffrey at all about the decision to reward Mr de Pury with a commission. As such they argued there was no effective decision of the trust capable of being relied on by a third party such as Mr de Pury. Reliance was placed on the extract from *Lewin* set out above and Article X(A).

Morgan J held that the authority cited for the proposition in *Lewin* – a pensions decision by the name of *Sovereign Trustees Ltd v. Glover* [2007] PLR 2777 – concerned the specific terms of the trust deed in that case. The deed in that case provided for decisions to be taken by a majority, but also required meetings of the trustees to be convened by the giving of due notice. The court had held that a decision taken by two out of three trustees at a meeting which had not been convened by due notice to the missing trustee was not an effective majority decision. Morgan J therefore considered it was a decision concerning the construction of the trust deed in that case and did not assist the construction of the trust agreement before him. On that issue neither Mr Staechelin nor Mr Paisner had declined to participate in the decision to pay a commission to Mr de Pury. Neither was precluded from making that decision. For her part, although she had not been consulted, Ms McCaffrey had not declined to participate in the decision. As a result all three were to be counted as relevant trustees for the purpose of Article X(C) and a simple majority of two out of the three trustees was permitted. There was as a result an effective decision binding on the trust.

The Forfeiture Principle

The third point of interest was the allegation raised by the trustees that Mr de Jury's right to a commission had been forfeited by him as a result of a breach of his fiduciary duty. One of the reasons that Mr Staechelin and Mr de Pury had so spectacularly fallen out was that Mr Staechelin believed that Mr de Pury had told him a lie about the negotiations for the sale of the painting. More specifically, it was said that Mr de Pury had led Mr Staechelin to believe that an offer of US$230 million had been made in 2013 and that this had been relied on in persisting in the discussions and agreeing the commission. However, at a later stage, in July 2014, the intermediary acting for the Emir of Qatar, a Mr Bennett, told Mr Staechelin that he had never made a formal offer of that amount. It was alleged that Mr de Pury had reached a dishonest agreement with Mr Bennett not to inform Mr Staechelin or the trustees that what was being said was false, and that there had been a formal offer, or in any event had not informed the trustees that this was false.

The forfeiture principle was recently considered by Newey J in the context of an investment management partnership in the case of *Hosking v. Marathon Asset Management LLP* [2017] Ch

157. The basic idea, expressed in Snell's Equity (33rd ed.) at 7-062, is that if a fiduciary acts dishonestly he will forfeit his right to fees paid or payable by the principal. This can arise if a fiduciary takes a secret profit from a third party which is directly related to performance of the duties in respect of which the fees are payable by the principal. It can also arise if the fiduciary's breach of duty is so grave that there has effectively been no performance at all, on the basis of total failure of consideration. So it was in Hosking that a partner who resigned from the partnership and sought to persuade others to leave with him was deprived of part of his profit share on the basis that this represented part of his remuneration and it should be forfeit.

The principle is a potentially very powerful weapon against wayward fiduciaries. It is penal in effect as Jacob LJ recognised in the leading modern case of Imageview Management Limited v. Jack [2009] Bus LR 1034 in which he said: "*The policy reason runs as follows. We are here concerned not with merely damages such as those for a tort or breach of contract but with what the remedy should be when the agent has betrayed the trust reposed in him – notions of equity and conscience are brought into play. Necessarily such a betrayal may not come to light. If all the agent has to pay if and when he is found out are damages the temptation to betray the trust reposed in him is all the greater. So the strict rule is there as a real deterrent to betrayal. As Scrutton LJ said in Rhodes v. Macalister (1923) 29 Com. Cas. 19, 28, "The more that principle is enforced, the better for the honesty of commercial transactions."*

Despite the best efforts of the trustees to depict Mr and Mrs de Pury as dishonest, for example in their decision to incorporate a Jersey company and for it to enter into a consultancy agreement with their LLP so as to avoid value added tax, Morgan J held on the facts that they were not in breach of fiduciary duty as alleged and not engaged in deception or trying to pull the wool over the eyes of the trustees. As such the principle was not engaged and the trustees' argument failed.

Reasonable Remuneration

Finally, since he had heard argument on the matter, and in case the matter were to go further, Morgan J considered the position if, contrary to his finding of fact, there had not been a binding consensus at the meeting on 26 June 2014. In that regard he had found that there was an earlier binding consensus in January 2014 that if the painting was sold Mr de Pury would be paid a commission, but there was no agreement as to the amount of the commission. There was as a result an agreement for the provision of services but no agreement as to the price to be paid for those services.

Directing himself by reference to the decision in *Benedetti v. Sawaris* [2014] AC 938 (although by the time that case was heard in the Supreme Court it concerned unjust enrichment as opposed to reasonable remuneration) Morgan J observed the legal principles to be as follows: (1) in a case where there is a contract for services but no price for the services is agreed, there will be an implied term that the provider of the services will be paid reasonable remuneration for those services; (2) in considering what is reasonable remuneration the court asks what a reasonable person in the position of the defendant would have had to pay for those services; (3) what a reasonable person in the position of the defendant would have to pay is usually the objective market price for those services; (4) it is not appropriate to consider whether the objective market price should be reduced to reflect the subjective views of the defendant in a case where the defendant has requested or freely accepted the benefit of services (so-called subjective devaluation); and (5) the court will not award a sum in excess of the objective market value of the services to reflect any subjective views of the claimant to that effect.

Both Mr and Mrs de Pury and the trustees called expert evidence in the form of art consultants and providers of art advisory services to provide evidence of the objective market value. The expert called by Mr and Mrs de Pury identified three different fee structures producing figures ranging from US$6.8 million to US$9.3 million. He was of the view that a flat fee of US$10 million not linked to any performance element was on the high side. The expert called by the trustees said that there was no industry standard for the fee payable to a seller's agent or intermediary. There were a number of different fee structures and which was selected was simply a matter of individual negotiation. He said it was impossible to identify a prevailing market practice, but a case could be made for anywhere between 1% and 5%.

In the absence of any standard fee structure Morgan J had in effect just to assess the likely outcome of a hypothetical negotiation between the sellers and the agent. Whilst he recognised that the figure actually agreed between experienced people was a good indicator, he concluded that at an earlier stage there were grounds for saying US$10 million would have been too high and would not have been agreed. With an element of a judicial "finger in the air" he considered on the other hand that the parties would have thought that US$5 million was too low and that they would have split the difference at US$7.5 million. However, since he had found that there was an agreement to pay a commission of US$10 million that is what was awarded to Mr and Mrs de Pury.

Implications

Aside from the rather obvious point that it is better to put agreements in writing than to spend two weeks in court arguing about the existence and terms of the agreement, there are perhaps three significant points to draw from the decision. First, a court will, notwithstanding the absence of a written agreement, drill down into the evidence to determine whether a consensus was reached. This is an inherently unpredictable exercise and can involve an investigation into the minutiae of the dealings between the parties and potentially the washing of a lot of dirty linen in public. Second, if acting for or advising trustees, one should always consult the trust instrument concerning the extent to which a majority of the trustees can make a binding decision on behalf of the trust. Third, there does not appear to be any standard market practice for the commission payable to agents acting for sellers at the high-end of the art market. There is a risk as a result that the court might arrive at a fairly arbitrary answer if it accepts there was some agreement to provide services but is unable to find agreement as to the amount of commission.