



**5 Stone  
Buildings**

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**Feilding v SC Dickinson  
Limited**

**Henry Legge KC  
Eliza Eagling**

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14 July 2023  
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## Bill of fare

- The unusual facts
- Published literature v. specific features of the piece
- Permission to appeal refused
- Duties of a consignment dealer
- Causation and loss – loss of a chance
- Causation and loss – fair wind

# **Jean-Siméon Chardin (1699-1779)**

## **The Basket of Wild Strawberries €24.4m**





## **Pierre Rosenberg**

**Former director of the Louvre  
and honorary president**

**Leading expert on Chardin**

**Author of the definitive  
catalogue raisonné of  
Chardin's work**

# Le Bénédicité (Saying Grace)

**Prime version**

**In 1740 it was given by  
Chardin to Louis XV**

**Now in the Louvre**



## **Le Bénédicité (Saying Grace)**

**Acquired in 1751 by an  
ancestor of Lord Wemyss  
at auction of Thomas Major**

**Remained in the Wemyss  
family until sale in 2014**



## Major Sale 1751

36.	Our Saviour	Membrane	2
37.	The Crucifixion	J Bourdon	3
38.	The Industrious Mother	Charis	2 1/2
39.	Figures saying Grace, its Comp <sup>n</sup>	Ditto	2 1/2
40.	A Landskip, Flight into Egypt	Domenichino	6
41.	Inside of a Church	P. Neuf	12
42.	A large Holy Family	J Bourdon	4 1/2
43.	An Upright Landskip & Fig <sup>s</sup>	Berghem	2
44.	An Holy Family	C. Maratta	10

# Rosenberg's 1992 visit to Gosford House

The Painting is *"totally studio"*





**120. LE BÉNÉDICTÉ. Paris, Louvre (Inv. 3202)**

t 49,5 x 39,5

**120 A. IDEM. Paris, Louvre (M.I. 1031)**

t 49,5 x 41

**120 B. IDEM ("copie retouchée"). ... (Grande-Bretagne), Gosford House, collection Earl of Wemyss**

t 51 x 40,5

**120 C. IDEM. Leningrad, musée de l'Ermitage**

t 49,5 x 38,5; signé dans le haut, au fond à gauche *chardin/1744*

**120 d. IDEM (copie?). Rotterdam, musée Boymans-van Beuningen**

t 50,5 x 66,5

**121. Le bénédicté. Paris, musée du Louvre (Inv. 3202)**  
t 49,5 x 39,5

**121 A. Idem. Paris, musée du Louvre (M.I. 1031)**  
t 49,5 x 41

**121 B. Idem (« copie retouchée »). ... (Grande-Bretagne), Gosford House, collection Earl of Wemyss**  
t 51 x 40,5

**121 C. Idem. Saint-Pétersbourg, musée de l'Ermitage**  
t 49,5 x 38,5; signé dans le haut, au fond à gauche *chardin/1744*

**121 d. Idem (copie?). Rotterdam, musée Boijmans van Beuningen**  
t 50,5 x 66,5

# Variations



**120/121 prime original**



**120B/121B**

## The sale of the Painting

**15 July 2014: sold by SCD for £1.15m to Amells**

**23 January 2015: sold by Amells for \$10.5m to Michel David-Weill**

- **Cash of \$7.5m**
- **Watteau valued by MDV at \$3m**



- Mr Dickinson's judgment of the Painting
- Decision not to consult Rosenberg
- What should SCD have said to the Wemyss?
- Decision to market the Painting as Chardin and Studio
- Sale price of £1.15m
- Sale to Amells, another dealer
- Relevance of the fact sheet



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# Chardin and Studio (i) Mr Dickinson's judgment

the brazier and the  
child's dress  
*"authentic Chardin"*

composition,  
background, and the  
hands of the woman  
*"very weak"*



# Chardin and Studio (ii)

## The published literature

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“The Defendant was hasty and careless in its reading of the published literature. In particular, the Defendant failed to appreciate that the Painting appears in Rosenberg's *catalogue raisonné* as a work by Chardin, not as a mere “reworked copy”...

...In Rosenberg's *catalogue raisonné*, the Painting is recorded as “*une « copie retouchée » par Chardin*” (“a ‘retouched copy’ by Chardin”)”...

...The Painting is number 121B. The use of a capital letter B ... indicates that the Painting is considered by Rosenberg to be by Chardin, copies by other hands being designed by lower case letters.”

## The 1999 Cat Rais

**121.** Le bénédicité. Paris, musée du Louvre (Inv. 3202)  
† 49,5 x 39,5

**121 A.** Idem. Paris, musée du Louvre (M.I. 1031)  
† 49,5 x 41

**121 B.** Idem (« copie retouchée »). ... (Grande-Bretagne),  
Gosford House, collection Earl of Wemyss  
† 51 x 40,5

**121 C.** Idem. Saint-Pétersbourg, musée de l'Ermitage  
† 49,5 x 38,5 ; signé dans le haut, au fond à gauche  
*chardin/1744*

121 d. Idem (copie?). Rotterdam, musée Boijmans van  
Beuningen  
† 50,5 x 66,5

# *Thwaytes v Sotheby's* [2015] EWHC 36 (Ch)

14 July 2023



*The Cardsharps* c.1595 by Caravaggio  
Kimbell Art Museum, Texas

## Allegation:

D had failed to spot  
**certain features** of the  
painting



# **Permission to appeal hearing on 21.06.2023 before Asplin LJ, Simler LJ and Falk LJ**

## **Ground 1 – duty in contract**

Reason permission refused: new point on appeal

## **Grounds 2-6 – duties to warn etc.**

Reason permission refused: appeal academic because trustees would have followed Mr Dickinson's advice



David David-Weill by Vuillard 1925





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## Duties of a consignment dealer

- Wemyss a case with unusual facts (cf PTA hearing)
- 3 important points:
  - Not a sleeper case – Painting fully documented
  - Course of dealing between Wemyss and SCD before sale of Chardin, but express terms of mandate for sale/consignment of Chardin not pleaded
  - Not suggested by Wemyss that Painting would have been retained if correct advice had been given

## Duties of a consignment dealer (ii)

- 3 important findings
  - No advice on attribution given by SCD other than “*probably a Chardin but Rosenberg against it*”
  - The Wemysses left Dickinson to get on with finding a buyer for the Painting and were not concerned with the mechanics of selling [#106, 108, 109]
  - Not contested that this was a good price for a “Chardin and Studio” painting.

## **Duties - what can be taken from the judgment ?**

- A. Points on the relationship between attribution of the piece and advice in relation to sale.
- B. Does the consignment dealer have a duty to advise that they might be wrong in their attribution?
- C. When will sale by a consignment dealer to another dealer be negligent?



## **Attribution of the piece and advice in relation to sale**

Starting point is the duty of care owed by the person making an attribution:

- a) Appropriately qualified person (nb for the job in hand)
- b) Taking an appropriate amount of time and care in the process of attribution (ie including assessment of literature)
- c) Non-fanciful doubts must be shared if either
  - (i) The attributor in fact had those doubts or
  - (ii) The attributor ought to have had those doubts (see eg Thomson CA #157 and Feilding CA#16)

If this not the test for consignment dealers, what could it be ?

## **Attribution of the piece and advice in relation to sale (ii)**

- a) Is the attributor competent ?
  - Depends on the job in hand: may be less than a full attribution
  - In Wemyss the job was gauging whether there was anything in the Painting after it had been cleaned which made it worth showing the Painting to Rosenberg.
  
- b) Taking an appropriate amount of time
  - again, depends on the job in hand, but normally for a painting which is already catalogued will involve proper inspection and analysis of the literature

## **Attribution of the piece and advice in relation to sale (iii)**

c) non-fanciful doubts

- Nb that in the context of a catalogued piece these will be non-fanciful doubts that the literature is wrong
- ie, by inspection and/or by analysis of the literature
- In *Wemyss*, found that
  - Dickinson believed that the Painting was by Chardin and studio
  - This was consistent with the literature
  - No real suggestion that the Painting had features which made this view wrong - and what would they be ? (nb – contrast sleeper case with para 93)

## **Attribution of the piece and advice in relation to sale (iv)**

In *Wemyss*

- a) Dickinson was competent to do the job in hand
- b) Dickinson's actual non-negligent assessment was consistent with the literature
- (c) Mandate - and duty of care arising from mandate - did not require SCD to give advice on attribution for the purposes of the sale.

But what if ?

## **Attribution of the piece and advice in relation to sale (v)**

### **The Tension:**

Vendor's interest to sell the piece with the best reasonably obtainable attribution (probably)

– maybe also in consignment dealer's short term financial interest

*BUT*

Consignment dealer may face claims if they go too far

Compare and contrast auction house warranty

## **What if ? - competence**

*But what if:*

Attributor not competent to do the job in hand

Can the attributor merely rely on the literature ?

Or will it entail taking advice from recognised expert

Choosing expert:

Agreed in *Wemyss* that Rosenberg the pre-eminent expert

Is it negligent to go to the best expert rather than the expert who will give you the best answer?

## **What if ? Mismatch between attributor's view and literature**

*But what if:*

Attributor thinks the piece is better than its attribution in the literature

Non-fanciful doubt - must be shared with the vendor (nb contrast para 90)

Attributor thinks the piece is worse than its attribution in the literature

Obligation to advise vendor ?

Dealer may be exposing themselves to claim by a buyer so can/should withdraw ?

## **What if ? – mandate includes obligation to advise on attribution**

*But what if:*

Mandate does include an obligation to give advice on attribution

This may be either (a) as a term of the contract or (b) as part of the duty of care

How much of his reasoning will the dealer have to share ?

How much advice will the dealer have to give as to how the attribution could be improved ?



## Does attributor have duty to advise that they might be wrong

No general duty for an adviser to advise that they might be wrong (*Coutts v O'Hare* etc do not apply to all advice – para 88 and cf *Barker v Baxendale Walker* para 64)

Highly fact specific (*Barker v Baxendale Walker* para 61)(i))

Factors in attribution cases (cf *Thomson* test):

- Level of competence for the job in hand

- Has the attributor done enough that they can feel confident in their view ?

- Ought the adviser to have non-fanciful doubts that they may be wrong ?

  - Difficulty of job/chances of being wrong

  - Prevalence of fakes (cf *Eskenazi*)

  - Is severity of the effect of being wrong a factor ?

NB if the *Thomson* approach is not appropriate, what would be the right approach ?

## **Sale to another dealer**

This may have been the most important point in the case

- inter trade sales very common
- not standard practice to inform clients of the identity of the purchaser, even if (maybe especially if !) the purchaser is trade

*Wemyss* argument:

Sale within the trade must be sale at undervalue because the trade buyer intends to make a profit

*SCD* argument:

In this case, trade buyer only realistic buyer because only trade buyer would be willing to pay the “fudged” price

## **Sale to another dealer**

Held (para 133)

*"133 I cannot find that the sale of the Painting to another dealer constitutes any form of negligence unless there is some evidence to indicate that the seller knew or should have known that they could have sold at a higher price directly to that dealer's client, and actively decided not to do so."*

## Causation and loss

3 points

- A. If Dickinson had acted non-negligently the Wemyss would have done the same thing.
- B. The failure to consult Rosenberg should not be treated as a loss of a chance for the purposes of causation and assessing damages.
- C. In establishing whether Rosenberg would have published the Painting as a wholly autograph Chardin, the Wemyss are entitled to take advantage of the “fair wind” principle.

## **Causation and loss – loss of a chance**

Judge decided that failure to consult Rosenberg was NOT a loss of a chance.

*Obiter*

Issue in play – does a Claimant in an art case have to show on the balance of probabilities that an expert would have decided that the piece was right ?

## Causation and loss – loss of a chance

Basic Distinction (see eg *Palliser v Fate* [2019] EWHC 43)

Applies to assessment of counterfactuals:

- a) In cases where the counterfactual depends on what one of the parties would have done, the Claimants must prove what would have happened on the balance of probabilities.
- b) In cases where the counterfactual depends on what a *third party* would have done, the Claimants' loss will be assessed on the basis of the chances that the third party would have acted so as to establish the loss

## **Causation and loss – loss of a chance**

Classic example:

*Allied Maples*, in which the claimant lost the opportunity to negotiate better terms in a contract because of the negligence of the defendant.

Damages assessed at:

- a) the amount by which the Claimant would have been better off had the favourable terms been negotiated
- b) multiplied by the percentage chance that the landlord would have agreed to those favourable terms.

## **Causation and loss – loss of a chance**

*Wemyss* case:

decision of Rosenberg in the counterfactual in deciding whether the Painting was fully autograph was an action of a third party (like the contracting party in *Allied Maples*)

*SCD* case:

loss of a chance doctrine is really about the extent to which events in the counterfactual world are verifiable (see eg *Law Debenture v Elektrim [2010] EWCA Civ 1142* and see Helen Reece “*Losses of Chances in the Law*” (1996) 59 MLR 188).

Whether or not Rosenberg would have found whether the Painting was fully autograph was in this case verifiable



## Causation and loss – loss of a chance

### Held:

loss of a chance did not apply, because the question of what Rosenberg would have decided was analogous to the valuation issue in *Elektrim*.

NB Loss of a chance clearly does arise in other art contexts – eg cases on “burning”

## **Causation and loss – loss of a chance**

Points to note:

- a) Judgement *obiter* (but still persuasive ?)
- b) Judge accepted that the question of whether something is suitable for loss of a chance assessment is dependent on verifiability
- c) The answer may be specific to evidence before the court (eg in relation to particular artist, expert, context of the enquiry).
- d) The answer in the judgment is given on the assumption that the painting is clearly at least as good as the two Louvre pictures (see para 149, 152 and see 138 and 117) – therefore assumes the outcome of Rosenberg's assessment, so Rosenberg's decision is inherently verifiable ?

## **Causation and loss – loss of a chance**

“149. .... I come back to the fact that we only get to the issues of causation and quantification at all if we assume that Mr Dickinson was negligent in selling the Painting on the basis of an assessment that it is partially Chardin and partially studio. If that assessment was negligent, then we must assume that any competent Chardin professional viewing the Painting would have concluded that it was in fact wholly Chardin, and we must therefore proceed on the basis that M. Rosenberg, being a (supremely) competent market professional as regards Chardin, must be assumed in this context to have come to the same conclusion.”

## **Causation and loss – fair wind**

Judge applied “fair wind” principle to find that Rosenberg would have found the Painting to be fully autograph [152].

a) Did not need the principle. He was already assuming that the Painting was clearly as good as the two Louvre pictures [149].

(b) Principle normally only applies if the defendant has wrongfully made it difficult to prove the proposition in question (eg failure to keep records). In this case the Claimants had a transparency of the Painting (from MDW) and could have sent a transparency to Rosenberg – but did not risk it.

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## Thank you, any Questions?

Henry Legge KC  
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NB This paper is for discussion rather than advice. Readers should take their own advice on the issues considered.

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