

FAKES FORGERIES AND FEES

A discussion of the law in Australia relevant to art fraud. Also included is a checklist regarding authentication formulated by the Art Committee of the Bar of the City of New York.

The Authentication of Fine Art

There are a number of Australian painters who now make their living from the creation of fakes and forgeries. The Adelaide artist that specialises in Grace Cossington-Smith, the Sydney brothers who specialise in the painters of the Heidelberg School and so on. The favourites among Australian forgers and the fakers are Streeton, McCubbin, Gill, Heysen, Withers, Gruner, Lindsay, Rees, Drysdale, Nolan and Hart.

The problems of attribution and authenticity have created a great need for caution in those who buy or sell art and also in those who act as art consultants. It creates correlative concerns for any lawyers who advise such clients.

Few of these cases are reported in Australia for most are settled. In most cases involving a sale from a gallery, the gallery will do its utmost to settle the matter out of court so that its reputation remains unsullied. Thus, most of the cases that are litigated involve defendants who are either private collectors or dealers who do not operate through the traditional gallery system.

Other reasons for the scarcity of such cases include the complexity of the law of mistake, the difficulty of establishing that representation was a warranty or a condition, together with the difficulty of adducing opinion evidence in matters that are often more aesthetic than scientific.

The recent Federal Court decision of *The Saints Gallery Pty Ltd v Plummer*, unreported, (NSW G.100 of 1988, 24th June 1988, per Morling, Pincus and Burchett JJ) may not have decided any new legal principle of great moment but it did illustrate the use of the *Trade Practices Act* to avoid the difficulties of the old contract cases. The old cases are most unsatisfactory.

For example, in *Jendwine v Slade* (1797) 2 Esp 572; 170 ER 459, paintings sold as the work of Teniers and Claude Loraine were shown to be copies. Lord Kenyon held that it was impossible to establish a warranty as to the identity of the painters because the age of the paintings meant that authorship could only be a matter of opinion. Moreover, the description in the sale catalogue could only amount to an expression of opinion of the seller and left the determination of authorship to the judgment of the buyer.

Somewhat later, in *Power v Barham* (1836) 4 Ad & E 473; 111 ER 865, the defendant had sold four paintings which had been described as but were not the work of Canaletto. The evidence as to the exact words used at the time of the purchase was conflicting but the vendor had provided the purchaser with an invoice which included the following statement:

"Four pictures, Views in Venice, Canaletto, £160.00"

On appeal it was decided that it was for the jury to determine the ordinary meaning to be given to such words and whether they implied a warranty of genuineness or conveyed only a description or expression of opinion.

The difficulty of deciding whether paintings had been purchased on the basis of a warranty (a representation forming part of the contract) or merely an expression of opinion, was again apparent in *Hyslop v Shirlaw* (1905) 42 Scot LR 668. It was held that a statement in the receipts could not amount to a warranty for that written statement followed the oral transaction that constituted the sale. The receipt was merely evidence which, together with the parole evidence, was relevant to establishing the presence or absence of a warranty.

The difficulty in such cases is to establish that the representation was actually made, that it was as to a matter of fact and not merely a matter of opinion, and that having been made, it was a part of the contract. Even then, the plaintiff may still need to establish that the rescission was timely.

And so to the *All Saints Gallery* case. The facts are quite extraordinary. The defendant was (and indeed still is) a suburban gallery that specialises in paintings under \$500. Its owner did not usually deal with artists of eminence. The plaintiff was a professional art dealer and valuer who, over a period of years, had valued and authenticated works for the defendant.

The gallery was given certain works to sell on consignment by a barrister who had received them in lieu of fees. These included works purportedly by Lloyd Rees and Ian Fairweather. Although the plaintiff Plummer maintained that he had no particular expertise in the later work of Lloyd Rees or Fairweather it was found by the trial judge that he knew more about them than did the defendant. It was also common ground that the plaintiff had placed no reliance upon the defendant's ability to judge the authenticity of the works. The plaintiff purchased the works which were later shown to be fakes.

As would any wise purchaser, Plummer had asked about the provenance of the paintings before deciding to purchase. The court held that the answers given were not sufficient to make the gallery liable for it should have been clear to the purchaser from the parties' previous relationship and the whole of the circumstances, that the gallery owner was not the source of the information and was merely a conduit. Nothing indicated positive knowledge. (Thus were the arguments concerning *Yorke v Lucas* (1985) 158 CLR 661, dispatched).

The Rees was not by Lloyd Rees. The Fairweather was not by Ian Fairweather. The apparently expert defendant was not expert at all. The allegedly misled and deceived purchaser was in the business of selling his expertise to the defendant and had not relied on the knowledge of the defendant which he actually knew to be inexperienced. But then, the expert purchaser was apparently not as expert as he and the defendant thought.

The important feature of the case is the ground upon which it was fought. The plaintiff did not base his claim in contract but rather chose *Trade Practices*. The choice of grounds may have been influenced by the obvious advantage of speed offered by the Federal Court over the District Court but it may also have been because the *Trade Practices Act* allows a plaintiff to avoid total reliance upon the vagaries of the representation-warranty-condition debate that has so plagued such disputes when based in contract.

The problem arises because most vendors of fine art do not reduce their representations to writing and few purchasers insist that they do so. Readers will be well aware of the value of correspondence seeking and obtaining such material, even if such statements are not reduced to a formal contract. To facilitate this process of clarification, lawyers who are advising clients in the purchase of fine art (or barristers who are considering accepting artworks in lieu of fees) should address the following questions. The list was prepared by the Art Committee of the Bar of the City of New York.

QUESTIONS REGARDING AUTHENTICATION FORMULATED
BY THE ART COMMITTEE OF THE BAR OF THE
CITY OF NEW YORK

PAINTINGS AND DRAWINGS

The following check-list may help elicit critical data for authentication.

1. The name of the artist and basic biographical data.

2. A description of the painting (including its title, its dimensions, the medium used, and a statement of its conditions and any special physical characteristics).
3. The date of its execution. If the painting is said to be old, have any tests been made with respect to its age?
4. Are there historical records relating to the picture, such as a chain of ownership (provenance) which traces the picture to the present owner?
5. What collateral evidence of authenticity is available (catalogues, advertisements, museum and gallery records, etc.)? What steps has the dealer taken to establish the authenticity of the painting?
6. What evidence is available to prove that the artist's signature is genuine? If the artist is alive, will he corroborate the authenticity of the painting? Will the dealer represent that the artist's signature is genuine.
7. What rights, if any, has the artist reserved in the painting, whether by copyright protection or otherwise?
8. Are there any available records of cleaning, restoration or other treatment?
9. Is it possible to obtain from the artist or his representative a certificate of authenticity?

PRINTS

Against this summary of the problems in the area of prints, the following check-list may be helpful:

1. The name of the artist and basic biographical data.
2. A description of the print (including the size of the total edition, the serial number, and the condition and state of the print).
3. The date of the execution of the plate (or stone, or wood block, etc.), the date of the impression, and the date of the artist's signature.
4. The process used in making the print (woodcut, etching, lithography, silk screen, etc.)
5. Has the seller represented that the product is not a reproduction, that it meets the tests of an "original print" as defined by the Print Council of America, and the artist's signature is genuine?
6. How many editions of the print were made? Have editions been made in different colours? How many prints in each edition? Are there any outstanding prints, such as artist's proofs, which have not been included in any edition?
7. Was the artist also the printer? If not, was the print made under the artist's supervision? Who besides the artist participated or collaborated in the production of the plate and the print?
8. Who has possession of the plate (or stone, or wood block, etc.) from which the print was made? Has the plate been marked or cancelled to show that the original edition has been completed? Has the plate ever been substantially reworked?
9. Did the print ever serve as a book illustration or was it ever a page or an insert in a magazine?
10. What rights, if any, has the artist reserved in the print, whether by copyright protection or otherwise?

11. Is it possible to obtain from the artist or his representative a certification as to any of the foregoing items which the purchaser deemed relevant?
12. Are there historical records relating to the print to establish a provenance?
13. What collateral evidence of authenticity is available, such as catalogues, advertisements, museum and gallery records, etc.?
14. Are there any available records of cleaning, restoration or other treatment?

SCULPTURE

The following check-list for the purchaser of sculpture may help disclose factors relevant to aesthetic and monetary values:

1. The name of the artist and basic biographical data.
2. A description of the sculpture (including the title of the piece, its dimensions and its material, and the total number of casts made). If cast, the manner of its construction.
3. The date of the execution of the cast and the prototype. Has there been more than one edition of the sculpture?
4. Was the cast made by the artist or by a foundry? Who authorised the making of the cast (the artist, his heirs, a dealer, etc.)? Was the cast done posthumously? If made by a foundry, will the founder certify the total number of casts made by him?
5. Who has possession of the prototype (the artist, his heirs, a dealer, etc.)? Have extra casts been made by the possessor of the prototype? What is the condition of the prototype? Are there any limitations on its use?
6. Have enlargements or reductions of the prototype been made or authorised? Have casts been made in any other media? Have reproductions been made or authorised?
7. Has the seller represented that the artist's signature on the cast or on a certificate of authentication (see below) is genuine and that all other data inscribed on the cast is accurate? Does the seller have any knowledge of unauthorised casts?
8. What rights, if any, has the artist reserved in the sculpture, whether by copyright protection or otherwise?
9. Will the artist furnish a certificate of authenticity (to be attached to a photograph of a sculpture) stating that the sculpture was cast under his supervision, and containing the title of the piece, its dimensions, the date it was cast, the material used, the serial number, and the total number of casts?
10. What collateral evidence of authenticity is available such as catalogues, advertisements, museums and gallery records, etc.?
11. Are there historical records relating to the sculpture to establish a provenance?
12. Are there any available records of cleaning, restoration or other treatment?

ANTIQUES

1. The name of the civilisation, tribe, culture or group which produced the work.

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2. The stylistic identity of the work: this may be the name of a specific region, people, or sub-culture, dynasty, or the like: "Chou Dynasty"; "Benin"; "Navaho"; "Luristan", etc.
3. A description of the work: dimensions, materials, condition, use, and other identifying characteristics.
4. The approximate date of execution.
5. Are there historical records relating to the work to establish a provenance?
6. What collateral evidence of authenticity is available, such as catalogues, advertisements, museum and gallery records, etc.?
7. Are there any available records of cleaning, restoration or other treatment?

Frauds Forgeries Fakes and Misattribution

It may also be useful to clarify some of the common terms. They are frequently misused and such misuse leads only to confusion. A fake is the imitation of an artist's style.