Neutral Citation Number: [2022] EWHC 3091 (Ch)

Case No: BL-2020-000962

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

7 Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 2 December 2022

Before :

Deputy High Court Judge Simon Gleeson
Sitting as a High Court Judge

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Between :

(1) AMANDA CLAIRE MARIAN FEILDING OR CHARTERIS, COUNTESS OF WEMYSS AND MARCH **(2) VILMA RAMSAY** **(suing as trustees of the Wemyss Heirlooms Trust)**	**Claimant**
- and –	
SIMON C. DICKINSON LIMITED	**Defendant**

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Andrew Onslow K.C and Gretel Scott (instructed by instructed by Reynolds Porter Chamberlain) for the **Claimant**
Henry Legge K.C and Eliza Eagling (instructed by Howard Kennedy) for the **Defendant**

Hearing dates: 3 – 18 October 2022

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APPROVED JUDGMENT

Deputy High Court Judge Gleeson :

1. This is a case about the proper sale price of a painting by Jean-Baptiste-Siméon Chardin (1699-1779) entitled "Le Bénédicité". There is a sale room record of the prices achieved by Chardin's works. However, for this particular painting ("The Painting"), the established work of reference in respect of the artist (known as a *catalogue raisonné)* raises a "red flag", in that The Painting is one of the few works referenced to be described as a "copie retouchée". There is no consensus as to the meaning or significance of this term, and there is no instance of a painting by this artist flagged in this way being sold. The Defendant, charged with the sale of The Painting, sold it for £1.15m. It is agreed that if it had been a mere copy, it would have been worth a fraction of that price; if it had been an entirely autograph original, it would have been worth many times it. The fact which has called this action into existence is that, shortly after the sale for £1.15m, The Painting was resold to an established collector for an ostensible price of $10.5m. The question before me is as to whether the Defendant, acting as agent of the Claimants as owners, was negligent or otherwise in breach of their duty to their principals to sell it for £1.15m.

Chardin

2. Jean-Baptiste-Siméon Chardin ("Chardin") was an 18th C. French painter. He is best known for his genre paintings of domestic subjects. He lived and worked in Paris. In 1728 he became a member of the Académie Royale de Peinture et de Sculpture, and from 1737 onwards he exhibited regularly at the Salon, the official exhibition at the Louvre of the Académie des Beaux-Arts, patronised by the King. His work was recognised during his lifetime as outstanding.

3. Chardin worked in a way which could have been calculated to inconvenience the art trade. He frequently painted replicas of his own works entirely, or almost entirely, by himself, often for the purpose of exhibiting them in the Salons. The Salons were the biennial exhibitions of new work held in the Grand Salon of the Louvre in August, in which it was forbidden to show the same work twice - the production of further versions side-stepped this rule. However, by no means all of his own copies of his own paintings were done for this purpose. Some of the commentary on his work suggests that his motives were simply financial – it appears that the cult of the "authentic original" was not yet fully established in the eighteenth century, and multiple copies of the same painting could be sold to different buyers by the artist himself for full prices. We also know that painting did not come easily to Chardin – contemporary commenters observed that "his paintings cost him a great deal of work". Also, we know that coming into contact with oil paints for an extended period hurt his eyes, to the extent that later in life he abandoned oil painting altogether. It may well have been that replicating existing works cost him less effort, and enabled him to increase his output.

4. A conventional way for any artist to increase his output at the time was to work with a "studio" – conventionally, a group of apprentices who performed the substantial menial work of preparing paints and canvases in exchange for tuition. It is clear that Chardin did have a "studio". It was conventional for artists to set their studio apprentices to work on the initial stages of a painting, applying the finishing touches with their own hands. Artists' studios differed, and nothing is known for certain about how Chardin worked with his studio.

5. Chardin was a popular painter, and many copies of his work exist. Mr Laing observed that although there are only 204 prime originals known to be in existence, in the nineteenth century alone 436 paintings were sold through Paris auction houses as autograph Chardin. There was clearly a flourishing industry in the production of Chardins which extended beyond the replicas made by Chardin himself. To confuse matters further, it is widely suggested that Chardin himself approved (and in some cases signed) such replicas.

The Painting

6. The Painting which is the subject of this action is known as Le Bénédicité ("Saying Grace"). It was one of Chardin's most popular works, and a very large number of copies of it are in existence. However, there are four copies which are accepted as having Chardin's hand in them. The first version (the "Prime Original") is universally agreed to be the most beautiful. It was exhibited at the Salon in 1740, and presented to Louis XV. Chardin also retained a copy of his own, which was used to facilitate the creation of further copies. We have no idea how many of these were created, who created them, or how they were created. However, what is known is that this copy was acquired by Dr De La Caze, and was given to the Louvre in 1869 (the "Louvre Second Version"). A third copy was exhibited in 1746 – it was acquired by Catherine II of Russia, and is now in the Hermitage. The fourth is the subject of this litigation. It is known to have been sold in London by Thomas Major in 1751, and to have been acquired by Francis Wemyss Charteris, an ancestor of the current Earl. The Painting has been in the ownership of the family ever since.

7. The issue before me turned on some fine issues of terminology. The term "autograph" is generally applied to a painting which is perceived to be entirely by the artist concerned. As was noted in evidence, in the period in which The Painting was painted, there is almost no such thing as a painting which has been touched only by the hand of the artist himself - more or less all paintings of the period under discussion would have involved some studio participation. The test proposed by Mr Laing in evidence, which I accept, is that a painting is properly described as wholly autograph where the work of the studio is not apparent. A painting of this kind is attributed simply to the artist – so in this case the attribution would be "Chardin". This, of course, raises the question of what the position is where The Painting displays the hand of the artist, but the work of the studio is apparent. Mr Legge, for the Defendant, sought to distinguish these situations through the use of the terms "wholly autograph" and "partially autograph". Mr Onslow, for the Claimants, resisted this distinction, arguing that the true distinction to be made is only between "autograph" and "non-autograph". As a matter of art market practice this may well be correct. However, for the purposes of this action it will be necessary to work with the concepts of wholly and partially autograph.

M. Rosenberg

8. The parties acknowledge that M.Pierre Rosenberg is the undisputed living authority on Chardin. He is a former Director of the Louvre, and has studied Chardin in depth since at least 1963. Most importantly, in 1999 he published his *catalogue raisonné* which is currently accepted as the definitive work on Chardin, covering the whole of Chardin's known output and in each case expressing a view as to its provenance and authorship. It was accepted by all parties that M. Rosenberg's view as to the quality and authorship of a particular Chardin painting would be unhesitatingly accepted by the entire art market, and would be preferred to the view of any other expert.

9. The 1999 *catalogue raisonné* seeks to distinguish between works which are and which are not by the hand of Chardin ("de la main de Chardin"), and it is necessary to set out the critical framework on which it is based. The *catalogue raisonné* includes not only authentic Chardin works, but also a variety of other material – preparatory sketches, replicas of works which have disappeared and other materials. A clear distinction is therefore made between works which are identified as by Chardin's hand and other works – the former are designated with a capital letter, the latter with a small letter. Thus The Painting is designated as 121B, whereas another version considered to be a copy (the Stockholm version) is designated 121g, and is described as "especially interesting, as it proves that Chardin accepted that copies of his works be made and that they be sold". A further distinction is made between those paintings which M. Rosenberg has actually seen, and those which he has not – for the former, each catalogue number is printed in bold type, for the latter, in ordinary type – the implication being that the attribution is more robust when the painting concerned has been examined directly.

10. In principle, therefore, M. Rosenberg's position is clear – works with capital letters are by Chardin, works without are not. However, there are places where this bright line becomes blurred. In particular, it is quite clear that there are works which M. Rosenberg believes have some elements of Chardin in them, but which are less than wholly original. The clearest example of this is the painting "A House of Cards". This painting exists in two forms – the primary original, and a second version (the "Winterthur version"). The Winterthur version is catalogued as number 103A in bold type (indicating that M. Rosenberg had examined it personally). The fact of the allocation of the capital letter means that M. Rosenberg considers the painting to be "by the hand of Chardin". However, in the accompanying text, he observes that the painting is "a good studio copy" – "une bonne réplique d'atelier".

11. What this tells us is that, in M. Rosenberg's estimation, there is no bright line between "wholly autograph" and "partially autograph" Chardin. He accepts that there are paintings which contain elements of Chardin's work but also other elements. He uses his critical judgement to decide which of these are of sufficient quality to be regarded as "de la main de Chardin", and attributes them accordingly in his catalogue. It seems clear that the *catalogue raisonné* identifies works which have some Chardin in them, but not enough to be catalogued with capital letters - in his discussion of the Rotterdam version of The Painting, he repeats Diderot's observation that "it is a long time since this painter finished anything; he no longer bothers to do feet and hands", which suggests that the reason for the categorisation of that painting as a copy is not that it contains no Chardin at all, but that the amount is so small as to deprive the painting of the quality expected from Chardin's work. Conversely, there are instances where works which are partially by other hands are attributed to Chardin - for example, in the entry for "La Mère Labourieuse", Rosenberg describes his classification of the existing copy as by Chardin (that is, bearing a capital letter in the catalogue) as "un peu généreusement peut-étre". Possibly more significantly, in the entry for "L'Aveugle des Quinze-Vingts" ("the Blind Beggar"), the painting is ascribed the number 90A (in bold). However, in the accompanying text M. Rosenberg observes that "only the figure of the beggar is by Chardin".

12. What is clear is that where M. Rosenberg does have such reservations, he flags them. Thus, again, for La Mère Labourieuse, the allocation of the number 119A (in bold) for the work is followed by the words "copie retouchée" He explains in the catalogue text that this attribution is shorthand for "copie retouchée par Chardin", and was applied to a number of Chardin paintings in 18th century auction catalogues.

13. It should be noted that this sort of borderline judgement is very rare in the *catalogue raisonné*. M. Rosenberg is usually confident in his judgements, and the vast majority of works considered are firmly consigned to one category or the other. It should also be noted that the *catalogue raisonné* identifies a number of works which, although signed, dated, and in some cases accepted, M. Rosenberg is confident are not by Chardin – these are listed on the *oeuvres rejetées* section.

14. In his introduction to the section of the *catalogue raisonné* which describes The Painting, M. Rosenberg says:

> "Furthermore [Chardin] produced multiple repetitions, allowing copies to be created of his most famous paintings (c.f. [The Painting] and [La Mère Laborieuse]), which he would then touch up".

For reasons which will appear, the original French is significant:-

> "En outre, il multiplie les répétitions, laisse faire de ses tableaux le plus célèbres (Cf No's 119 & 121) des copies qu'il retouche".

15. The Painting itself is described in the *catalogue raisonné* as "copie retouchée", and the accompanying text observes that, in the same way as La Mère Labourieuse, it should be regarded as a ""copie retouchée" par Chardin".

16. Our starting-point is therefore that we are dealing with a Painting which has an anomalous status amongst the works of Chardin. As Mr Onslow, for the Claimants, correctly submitted, this court is not in any position to decide the true attribution of The Painting. However the question before me is not as to the authenticity of The Painting, or as to the exact meaning of the words "copie retouchée" in the eighteenth century, but as to the likely price which The Painting would have fetched if it had been sold in a different way in 2014. This question depends largely upon the significance which the art market as a whole would attach today to the "copie retouchée" qualification in the Rosenberg *catalogue raisonné.*

17. Mr Onslow sought energetically and insistently to persuade me that this qualification had – in effect – no meaning, and would be disregarded. His argument was to the effect that (a) his expert – Mr Laing – was of the view that the term "copie retouchée" did not detract from the status of The Painting as wholly autograph Chardin, and (b) that the art market as a whole would divide Chardin paintings as falling into only two classes – autographs and third party copies. There is no dispute that at least some parts of The Painting are by the hand of Chardin, and that fact is recognised by M. Rosenberg. Therefore, he argued, The Painting would have sold for the same price as a Chardin painting which did not carry the minatory wording attributed by Rosenberg. On this basis, he argues, there was no obstacle to The Painting being marketed and sold by the Defendant as a fully autograph Chardin. He therefore argues that since The Painting was not sold as such, its sale must have been negligently conducted.

18. The Defendant's position is that it did not market The Painting as a wholly autograph Chardin because Mr Simon Dickinson, who was in this regard the guiding mind of Dickinsons, did not believe that to be the case. The question before me is therefore as to whether Mr Dickinson was negligent in taking that view. The Claimants say that he was.

Their case is put on one of two grounds. One is that Mr Dickinson, contrary to his own testimony, did in fact believe that The Painting was a wholly authentic Chardin, and that his evidence to the contrary was false (or at least mistaken). It was therefore negligent of him to market and sell The Painting on a different basis. The other is that, in any event, he should have consulted M. Rosenberg, and shown The Painting to him, before deciding how it should be marketed. If they can show that there is a chance that M. Rosenberg might have said something that might have supported the view that The Painting was wholly autograph Chardin, then they can argue that it was negligent of Mr Dickinson not to have shown The Painting to M. Rosenberg in this way.

19. In assessing damages, there are therefore two possible counterfactuals to consider. One is that Mr Dickinson was satisfied in his own mind as to the quality of The Painting, and marketed it with the attribution of "Chardin". The second is that he consulted M. Rosenberg, and M. Rosenberg gave a favourable assessment of The Painting. As regards causation and quantification, some issues were raised as to how the principles of damages calculation relating to "loss of a chance" were engaged. The latter presents some legal complexities which are addressed below.

20. Finally, quantification presents problems of its own in this case. As noted above, there are no directly comparable sales that can be used to assess the impact of the "copie retouchée" designation. The basis of the Claimants' case is that six months after The Painting was sold by the Defendant, it was resold to a noted collector for a declared price of $10.5m. However that sale has a number of very curious characteristics, and it is accepted by both parties that that declared price is significantly in excess of the price actually paid. It is also noteworthy that that price seems to be well in advance of the market value of those Chardin paintings which had been sold at around that time. Determining the quantum of the loss resulting from the negligence is therefore a difficult issue in its own right.

The Facts

21. In 1979 M. Rosenberg curated an exhibition of the works of Chardin which was sponsored by the French Ministry of Culture. As curator, he drafted a comprehensive catalogue which identified all of the major works of Chardin, and which became the foundation for his *catalogue raisonné*. In that document he identified the existence of The Painting, explained that it was known only from photographs, and described it as "a good studio copy" ("une bonne réplique d'atelier").

22. In 1983 M. Rosenberg produced the first edition of his catalogue raisonné. In that document he revised his attribution of The Painting, describing it as a "<<copie retouchée>>" (the inverted commas appearing in the text). He had still not, at that time, seen The Painting itself, and was working from photographs.

23. Mr Dickinson first encountered The Painting in 1990 when, as an employee of Christies, he was tasked with valuing the (extensive) Wemyss collection at Gosford House. He was there for a day, and in that time valued hundreds of paintings. His manuscript notes from that valuation have survived. It appears that he may have been undecided as to The Painting, since he gives three possible valuations – £80-120,000, £2-300,000 and £800,000 to £1,200,000. The last is accompanied by a manuscript note "(could be more if accepted by everyone)". The explanation for this last entry is almost certainly to be found in the fact that these valuations are accompanied by a note "Lit; Pierre Rosenberg, Chardin, 1979, p.268". In the event, the value which he ascribed to The Painting was £1,200,000.

24. In 1992 Mr Dickinson revisited the house along with the current Earl's late father, David Wemyss, and M. Rosenberg. The primary purpose of the visit seems to have been to get Rosenberg's view on another painting, "The Baptism of Christ", which Mr Dickinson was at that time campaigning to have accepted as an authentic Poussin. However, whilst he was there Mr Dickinson took the opportunity to seek M. Rosenberg's view on The Painting. Mr Dickinson's evidence was that:

> "I do not remember the precise words that Rosenberg said, as it has been a long time, but it was words to the effect that the Painting is no good. He spoke bluntly and said he did not think there was any Chardin at all in the Painting, that it was totally studio."

There are no witnesses to this discussion.

25. As noted above, when M. Rosenberg produced the current edition of his *catalogue raisonné* in 1999, he changed the reference number of The Painting from ordinary type to bold type to indicate that he had seen it, and it seems to be agreed that this must have been as a result of this visit. However, he did not change anything else about the entry, and in particular the words "<<copie retouchée>>" (in inverted commas in the text) are retained.

26. In 2009 Lord Wemyss father died and he inherited the estate as liferenter of the settlement. This, as he said in evidence, presented him with a short-term and a long-term challenge. The short-term challenge was that his father had left a number of monetary bequests in his will, and cash had to be raised to meet them. The long-term challenge was that Gosford House was in serious need of maintenance and restoration, and this also required cash. As a result, he and Lady Weymss had a meeting with Simon Dickinson and David Ker to discuss the sale of some of the Gosford art collection.

27. It seems clear from Mr Ker's letter recording the meeting that Lord Wemyss wanted to raise money without injuring the integrity of the collection. Their discussion therefore turned largely on the question of which works might be considered peripheral to that collection and therefore more easily disposed of, and a preliminary list was prepared. This list did not include The Painting.

28. Over the next few years Dickinsons sold a number of paintings for the Wemyss. Notably, for Nicholas Poussin's "the Baptism of Christ", Simon Dickinson, who was convinced the picture was an authentic Poussin, persuaded M. Rosenberg of its authenticity, with the result that that painting sold for $10m in 2010.

29. In 2014 Simon Dickinson had another meeting with the Earl and Countess, and it was agreed that a group of nine paintings – including The Painting – should come to London to Dickinson's gallery to be cleaned and assessed for possible sale. Simon Dickinson wrote a letter to the Wemyss identifying the relevant pictures. In that letter he says of The Painting:

> "Rosenberg claims that your picture has been in England since 1751, and describes it as being a reworked copy. My feeling is that this painting was probably painted by Chardin, but it is very difficult to tell in its present dirty state."

30. The Painting was sent to Dickinsons in early 2014, and insured for £1m. It was almost immediately sent for cleaning to Sarah Walden, a well-known expert. She was instructed to perform a "light clean", as distinct from a "deep clean", on the basis that both the Wemyss

and Simon Dickinson were agreed that that this was the appropriate approach. It was returned to Dickinsons in June.

31. At this point Mr Dickinson was clearly in a state of some uncertainty as to The Painting. He therefore went to the Louvre to look at the prime version of Le Bénédicité in the hope that this would clarify the question of authorship for him.

32. On 9 July, David Ker wrote to Lord Wemyss to tell him that "I understand from Simon that he is very close to finalising a sale on the Chardin", and on the 15 July a sale was agreed to Verner Amell, a Stockholm-based art dealer, for £1,150,000. The question of the attribution at this stage is uncertain – in Mr Ker's letter of 9 July to Lord Wemyss, The Painting is described as "Attributed to Pierre Chardin", and in the draft sale note it is described as "Chardin and Studio". It seems that this latter was the description given to Mr Amell, since it appears on the invoice given to him by Dickinsons.

33. It does not appear that Simon Dickinson discussed the question of attribution or the possibility of improving it with the Wemyss.

34. It should be noted that friendly relations were in place between Mr Dickinson and M. Rosenberg – on 22 August 2014 M. Rosenberg wrote to Dickinson asking for his help in getting a decent quality photograph of another picture in the Wemyss collection.

35. At the time of the sale Dickinsons were in the process of preparing a fact-sheet to accompany The Painting. A text of this fact-sheet was in existence at the time of the sale. It was requested in September 2014 in order to assist Lord Wemyss tax advisers in their discussions with HMRC as to the capital gains tax liability on the disposal, at which point the existing text was printed onto headed paper, without any further changes being made to the contents.

36. Immediately after the sale The Painting appears to have been collected by Amells and shipped to New York and then Stockholm. It was subsequently returned to London, where on the 31 October 2014 an export license for The Painting was obtained in respect of its transmission to Adam Williams Fine Art in New York. The Painting is described in the export license as by "Jean-Baptiste-Siméon Chardin and Workshop". It is common ground between the parties that had The Painting been a fully authenticated Chardin a license would not have been immediately granted, and The Painting would have been stopped for a period to enable national purchasers to come forward.

37. The Painting was sent by its new owner to Simon Howell, a picture restorer at Shepherd Masters, for a "deep clean". This uncovered a signature on the face of The Painting which had previously been undiscovered.

38. The Painting was then marketed by Amells as a "major rediscovery" – the marketing material prepared for it said that "far from a workshop copy, the work is in fact a fully autograph masterpiece by Chardin himself". The explanation provided for the "rediscovery" is that "the years of old varnish, yellowing over centuries, entirely obscured its great quality – even Chardin's signature, now perfectly apparent, was undetectable beneath the film of grime – and so, when it was references by scholars, it was generally as a copy or a lesser product of Chardin's workshop". The fact-sheet was written by Mr Wintermute, a well-known figure in the Old Masters art market, formerly of Christies. The fact-sheet also recorded that the attribution to Chardin was confirmed by Colin Bailey, a well-known art

scholar who was at the time Director of the Fine Arts Museum of San Francisco and the husband of Mr Wintermute.

39. On the 23 January 2015 The Painting was sold by Amells to Michel David-Weill for $7.5m in cash and the delivery of a painting by Watteau. For some reason this was booked as a sale for $10.5m, with the Watteau valued at $3m. However, it is common ground that this valuation is a bizarre overestimate.

40. In early 2015, Emma Ward, who was at the time the managing director of Dickinsons, received a telephone call from a colleague who told her that Adam Williams was marketing The Painting in the US on behalf of Mr Amell on the basis that "the attribution could be improved". This resulted in Ms Ward enquiring of her colleagues in London as to whether M. Rosenberg had suddenly changed his mind. She was reassured by them that – to their knowledge at least – he had said nothing further on the subject.

41. By 2017 rumours were circulating that M. David-Weill had bought The Painting from Amells for $10m – or, more accurately, that Mr David-Weill had been sold The Painting by Mr Adam Williams. As Mr Amell says in his e-mail, "The fact that Adam managed to sell it for such an incredibly high price is why he earned his commission", and indeed the effect of the inflation of the price of the Watteau resulted in Mr Williams receiving a commission of around 15% of the actual sale price.

42. In July 2017 a letter was sent from Lord Wemyss to Simon Dickinson expressing a desire to investigate the sales of the Chardin and the Poussin in order to ensure that "everything has been done as it should have been done." This resulted in a meeting between Simon Dickinson, Lord and Lady Wemyss, and the Wemyss solicitors, of which a detailed attendance note was taken.

43. In that meeting Mr Dickinson made two points. One was as to his own personal view of The Painting. He said that he believed that The Painting was substantially by Chardin himself, with a certain amount of studio work and that, although it was not as good as the Louvre version, it was very beautiful. The other was as to the market for The Painting. He said that the question of whether the art market would be prepared to regard The Painting as an autograph original was largely down to the published views of M. Rosenberg. Rosenberg's published work described The Painting as a copy, and Mr Dickinson did not believe that it would be possible to persuade him to change his mind. As regards valuation, he expressed the view that if The Painting were priced as a studio copy it would potentially sell for around £200,000, whereas if it were sold as fully autograph it might have fetched £3-4m.

44. Subsequently, various approaches were made to M. Rosenberg to enquire as to his views on The Painting. His responses were admirably consistent – "see my book" – pointing out that The Painting is catalogued with a capital letter, that it is described as a "copie retouchée", and that this term does not have a known definition. Mr Dickinson spoke to him on the 21 March 2018, and his contemporaneous note of Rosenberg's views reads as follows:

> Pierre Rosenberg said that he had seen the picture more than once and said that it is a workshop copy of the Louvre picture and the Hermitage picture and the quality is not as good as either of them. He said that they were probably done in his workshop and very little is known about it and believes it to be a workshop copy of the two originals. He also said that there was no point him putting his opinion in writing because it is in print already but that he had not seen the painting after its cleaning.

This may well be the only note of a conversation that Mr Dickinson has ever taken – its existence is explained by the fact that Mr Ker insisted that he make it. Mr Dickinson made three drafts of this note, all of which were before me. The text above is from the third and presumably last version

45. The final piece of this puzzle is that, when The Painting was catalogued as part of the David-Weill collection, it was described as a "copie retouchée". The catalogue note says as to this:

> "Art historians have commented on the quality of the variants of Le Bénédicité (without discriminating between replicas and copies). Thus, the version given to the king by Chardin and [The Painting] are unquestionably the most beautiful versions known: in both of these works, we find the same meticulous and refined workmanship, the delicacy of the airy brushstrokes, and the soft and delicate colouring. In contrast, the [second Louvre version], although entirely by the hand of the master, is of a lesser quality: the faces appear "inexpressive", and "the mother's hands and the folds of the tablecloth are softer"; and, in general, the execution seems "less elaborate": this is not surprising for a work that was painted, it would seem, above all, "as a record" (Pierre Rosenberg)."

The position of the David-Weill collection is therefore that, regardless of the attribution given by M. Rosenberg to The Painting, it is in their estimation superior to all of the other existing versions apart from the Prime Original.

The Evidence

46. The Earl and Countess of Wemyss gave evidence, and were supported by two experts – Mr Laing, an art historian and scholar of some eminence, and Ms Kaminsky, a professional art dealer. Mr Dickinson was the main witness for the Defendant. Further evidence as to the facts was supplied by two of those working at Dickinsons at the time, Dr Taylor and Ms Ward, along with his business partner, Mr Ker. He was supported by a single expert, Mr Agnew, a former head of art dealer Thos. Agnew & Sons and, like Ms Kaminsky, an experienced art dealer.

The Wemyss

47. I can take the evidence of the Wemyss together, since their evidence did not differ in any material respect.

48. The Earl and Countess were both transparently honest witnesses. The evidence of both was that they had relatively little knowledge of or interest in the art market, although they clearly had strong views about the paintings in their own collection.

49. The assets of the estate were held by a trust of which the Earl was the liferenter, and the Countess and Vilma Ramsay were the trustees. The decision as to whether or not to dispose of any particular trust asset (including The Painting) was therefore in the hands of the Countess and Ms Ramsay. Ms Ramsay did not give evidence, and, although Mr Legge asked me to draw negative inferences from that non-appearance, I can see no basis for doing so.

50. The trust had both substantial valuable assets and some daunting liabilities – notably the reconstruction of Gosford House – and both the Earl and the trustees perceived their task as being the balancing of those asset and liabilities. To that end their strategy was to sell paintings to finance the preservation of the estate. Both the Earl and the Countess were

clear that they had been told very little about the conduct of the sale of The Painting, but did not appear to regard that as in any way unusual.

51. It seemed to me that their approach to the conduct of the sale of The Painting was straightforward – they had employed a respected professional to conduct the sale, and expected him to get on with it. They did not wish to be involved in the process, and did not feel they had anything to add to it – they simply wished the process to be taken care of properly and effectively.

52. There is no record of the discussions between the Wemyss and Dickinsons surrounding the sale. The facts seem to be that the Wemyss sent The Painting to Dickinsons for cleaning, Mr Dickinson had it cleaned, informed the Wemyss of that fact, informed them that he had an offer at a price which he regarded as satisfactory, and sold The Painting at that price as their agent. It is entirely clear at no point did Mr Dickinson suggest to the Wemyss that there was a chance that The Painting might be worth considerably more than the price at which he recommended that it be sold.

53. One issue which was raised with the Wemyss was as to whether they were under any financial pressure to effect the sale – the implication being that if they had been in pressing need of funds, they might have been inclined to disregard the possibility of future upsides in favour of a quick sale. Their evidence was quite clear that they were under no such pressure, and I have seen no evidence which would suggest otherwise. I therefore find that timing was not a factor in respect of the sale of The Painting.

54. In the same vein, it was suggested that desire for confidentiality might materially have affected the Wemyss decisions in respect of The Painting. I accept that Lord Wemyss had had an unfortunate experience as regards a prior sale, which had been aborted after media criticism. However, I accept his testimony that that episode was due to the particular characteristics of that painting – it is unsurprising that the proposed sale out of Scotland of a masterpiece depicting the crucifixion of St. Andrew should have attracted negative comment from the press of a country whose national symbol is St Andrew's cross. I do not think that the Wemyss would have objected to a public marketing of The Painting if they had believed that the result would have been a significant uplift in the price realised for it.

Simon Dickinson

55. Simon Dickinson is the key witness in this case. He is clearly, as he presents himself, a man whose life has been devoted to art. His track-record suggests that he has a formidable eye, and he has an extremely high level of confidence in his own ability to discern quality in a painting. He is not a keeper of notes, and, as he admits, his memory for anything other than paintings is questionable.

56. His approach to the art market is of a piece with this. He professes a grand disregard for notes, scholarship and the finer points of marketing technique. In his mind transactions occur when a collector with an eye sees quality in a painting and acts on that instinct – everything else can be tidied up after the event. It was suggested to me that this approach constituted an arrogant disregard for the norms of market conduct. I therefore note that I did not detect any trace of arrogance in Mr Dickinson's approach to his profession. His view was that his clients expected him to do as he thought best in order to obtain the best available price for their art, and that he applied his judgement as best he could towards that end.

57. In many respects, the key to this case is as to what Mr Dickinson's opinion of The Painting actually was. Mr Dickinson himself was entirely clear on this point. He said that from the moment he first saw it he was of the view that The Painting showed signs of Chardin's hand, and that he believed that at least parts of it were clearly autograph Chardin. However, he also said that he felt that other parts of The Painting were of inferior workmanship, and that The Painting as a whole could therefore not have been sold as an autograph Chardin. Mr Onslow suggested that Mr Dickinson's evidence in this regard was self-serving and should be rejected. I do not think that Mr Onslow suggested that Mr Dickinson was dishonest – however, he clearly did suggest that there was a clear documentary record of Mr Dickinson observing that he thought that The Painting was "by Chardin", and that this should be preferred to Mr Dickinson's own recollections of what he thought that he had thought on the basis of the well-known principle identified in *Gestmin SGPS SA v Credit Suisse (UK) Ltd and Another* [2013] EWHC 3560.

58. I will deal at a later stage with the communications on which Mr Onslow relied to establish this argument. However, in the context of Mr Dickinson's evidence, I did not feel that they in any way undermined or contradicted his testimony. It is entirely clear both from the documents and from his testimony that Mr Dickinson at all times believed that some parts of The Painting were unquestionably by Chardin. His recollection was that M. Rosenberg, when shown The Painting, had dismissed it as "entirely studio" – a view with which he clearly and strongly disagreed. Mr Dickinson consistently believed that the value of The Painting should be considerably more than that attributable to a pure studio copy, and valued it on that basis. However, he was clearly troubled by what he perceived as the weakness of other parts of The Painting. His evidence was that the Walden restoration was in this regard a double-edged sword – it clarified for him the fact that certain elements of The Painting – notably the brazier and the child's dress – were clearly authentic Chardin (this latter fact is also noted in the Shepherd Masters cleaning report). However, he felt that other parts of The Painting – notably the face of the child and the woman's hand – were very weak.

59. It was this combination of strengths and weaknesses which caused Mr Dickinson to conclude that The Painting should be sold as "Chardin and Studio" rather than simply "Chardin", and that its market value was around £1m. Thus, when he received an offer of that amount for it, he could see no reason not to accept it. I think that he was also concerned that if The Painting was marketed as simply by Chardin there was a risk of potential buyers, alerted by the "copie retouchée" designation in the *catalogue raisonné*, consulting M. Rosenberg, and of M. Rosenberg repeating the view which he had expressed to Mr Dickinson when they viewed The Painting. This, he felt, would drop the value of The Painting to a fraction of the £1m valuation which he had placed on it.

Dr Taylor

60. Dr Taylor was responsible at Dickinsons for researching The Painting. The records of the research which she performed are to some extent available in the form of the various drafts of a "fact-sheet" which she prepared. Mr Onslow put it to her with some force that she had failed to use the latest available information in creating the fact-sheet, but I do not think that that is of any relevance in this context. The core of her evidence was that she had read the various available materials, and had felt that the term "copie retouchée" and its various translations all indicated that the correct description of The Painting was "Chardin and Studio" rather than just "Chardin", since it was "not purely Chardin and not purely studio".

61. Dr Taylor was straightforward in giving evidence. Mr Onslow repeatedly put to her (as he did to all the witnesses) that the correct construction of the *catalogue raisonné* was that the work was in fact by Chardin alone, and she was robust in her rejection of that interpretation. Her evidence was that she had read the material relating to Chardin's method of working in the catalogues, and that it described exactly the situation which she felt was alluded to in the *catalogue raisonné*, as informed by her conversations with Simon Dickinson and his report to her of his conversations with M. Rosenberg. Mr Onslow also put it to her that it would have been reasonable to consult M. Rosenberg since the entry in the *catalogue raisonné* was unclear. She responded that she did not consider it to be unclear.

62. Mr Onslow also suggested to Dr. Taylor that she had failed to consult the most up-to-date versions of the available materials or to initiate any further research as to the meaning of the term "copie retouchée", and that her draft fact-sheet was therefore negligently prepared, and was in any event inadequate. I deal with this issue below.

Ms Ward

63. Ms Ward's only significant contribution was her testimony that she, too, understood that the work was a combination of the work of Chardin and of studio artists. It was put to her that she had written in an e-mail that " ... M. Rosenberg wouldn't commit to Chardin and is the opinion that matters most so we wanted to take that into account ..." but "SD [on the other hand] has no doubt that it's Chardin." . Her response was that in e-mails and other communications it is normal to use the name of the artist in a generic rather than a precise form – thus, what she meant was that he believed that a significant part of the work was by Chardin.

Mr Ker

64. Mr Ker perceived himself as looking after the business end of Dickinsons. His role, as he saw it, was to "tidy up" around the art experts. In this particular case he perceived his role as being the maintenance of good relations with the Wemyss, and of ensuring that The Painting was not "oversold". He described himself as more of a businessman than a connoisseur. He reviewed the fact sheet at some point before the sale, but his concern was to ensure that that it did not inaccurately describe the provenance or attribution of The Painting. Again, Mr Onslow put to him with some force that it would have been the ordinary, natural thing to do to consult M. Rosenberg at this point during the sale. However, Mr Kerr did not perceive anything about the proposed sale which would particularly merit such a further consultation.

Mr Laing

65. Mr Laing was the first of the two expert witnesses called by the Claimants. He is an Art Historian of some distinction, but is not an art market participant, and his evidence went primarily towards the general state of knowledge of Chardin and his works. He was a careful and well – informed witness. His primary contribution was to confirm that almost nothing is known about the way Chardin worked with his workshop, and that no amount of research would have turned up anything concrete about the meaning of the term "copie retouchée" as used by M. Rosenberg in the *catalogue raisonné.* Mr Laing's position was that the term "copie retouchée" meant that Chardin himself had made a copy of one of his own paintings, and then reworked it to such an extent that it was not identical to the original. However, Mr Legge, for the Defendant, put to him a number of cases where the term was used by M. Rosenberg to mean something different from that. The resulting dialogue went as follows:

> "Q. You say in this catalogue that copy means replica; is that correct?"
> "A. Not in every case. It has two possible meanings. One is a replica; the other is a copy in the way that the art trade uses it. What I would like to point out is that the word "copy" is actually neutral. Any version subsequent to the original version of any picture by the artist himself is still a copy, so the word can be used for a copy by the artist or a copy by somebody else."

66. Finally, Mr Laing confirmed that he was not aware of any work being marketed as "Chardin and Studio", so that a sale on this basis would have no directly comparable pricing information.

Ms Kaminsky

67. Ms Kaminsky initially appeared evasive, since she had a tendency to answer the question which she was prepared to answer rather than the one put to her. However, I think that she was in fact being careful to confine her evidence to areas to which she felt that she could speak accurately. Thus, for example, she simply declined to place any valuation at all on The Painting if Mr Dickinson's assessment of its quality was correct and it was marketed on that basis, since there were no comparators for her to use to guide such a valuation. Her testimony was extensive and detailed. It was suggested that she sometimes strayed into advocacy, but I found her substantive testimony to be thorough (if voluminous).

68. Ms Kaminsky's main conclusion was that the existing documentary scholarship would not have prevented an ambitious dealer from marketing The Painting as a wholly autograph Chardin. She then proceeded to set out in some detail the way in which such a marketing campaign should have been structured if such an attribution had been afforded to The Painting, and what the values achieved might have been.

69. The point that she did not address, and I think could not have done, was as to how an experienced professional dealer should have acted if they genuinely did not believe in the attribution to be applied to a painting.

70. One of the most important issues for Ms Kaminsky – and the area where her evidence and that of Mr Agnew is most at variance – was as to the significance of the headline. In her view, once a painting had an unqualified headline attribution of "Chardin" by its offeror, it was marketable as a full autograph – in effect adoption of the "bright line" approach that all paintings are either fully autograph or copies. Mr Agnew took the view that this was simplistic, and that buyers would read the available literature before making any decision as to The Painting itself, and would take a more nuanced view on attribution.

71. Ms Kaminsky made great play with the idea that a professional art dealer should have undertaken further research and investigation into The Painting, and into the meaning of the term "copie retouchée", before deciding on the attribution to be applied to The Painting. However, it was clear from the evidence of Mr Laing that such further investigation would have produced no useful information.

Mr Agnew

72. Mr Agnew's evidence was very different from Ms Kaminsky's in that it consisted largely of his opinion as a former art dealer as to the relevance of various factors. Mr Onslow drew a very unfavourable contrast between the detailed approach to valuation adopted by Ms Kaminsky and the "broad and unscientific" approach adopted by Mr Agnew, and suggested

in his closing submissions that this in some way disqualified Mr Agnew's opinion from consideration. All I need to say about this argument is that I disagree – I do not perceive the art market as being particularly susceptible to scientific analysis, and the opinion of an experienced art market participant cannot be simply disregarded.

73. Mr Onslow also made great play of what he argued was Mr Agnew's "making up evidence". It is true that Mr Agnew was inclined in his oral evidence to explain events by hypothesising what in his opinion would probably have happened, and in a number of cases these suppositions were unsupported by evidence. However, I do not think that this undermines the evidence which he gave as regards market practice and approach.

M. Rosenberg

74. M. Rosenberg was not, of course, a witness in this trial. However, he was as present as Banquo's ghost. All of the parties agree that he was the Petronius Arbiter in respect of the works of Chardin, and that his view of the quality and authenticity of any purported work of Chardin would be accepted as definitive by the art market. Consequently, the debate before me as to the value of The Painting turned very largely on the question of what M. Rosenberg would, if asked, have said about it.

75. M. Rosenberg was asked questions about The Painting a number of times, and his replies are significant:

    a. As a preliminary point, I was taken to his response to a request made in 2005 by a New York art dealer, Eugene Thaw, who had asked for his opinion on the copy of "La Mère Laborieuse" which appears in Rosenberg's 1983 catalogue raisonné with the designation "copie retouchée", and which Mr Thaw had therefore sold as "attributed to Chardin". In particular, Mr Thaw asks whether M. Rosenberg would be prepared to accept the autograph status of the painting. M. Rosenberg's response to this was, in its entirety, "I have not changed anything in the notes of the latest edition of my catalogue raisonné of Chardin, entry 119 A.".
    b. In 2018, Mr Dickinson had a telephone conversation with M. Rosenberg. His note of the conversation (which I consider to be probably accurate) is set out in paragraph 44 above. The key point for this purpose is that, after reiterating his view on The Painting, he observed that "there was no point him putting his opinion in writing because it is in print already".
    c. In 2018, M. Rosenberg was contacted by Reynolds Porter Chamberlain, acting on behalf of the Claimants. They asked him what views he had expressed to Simon Dickinson before 2014, and whether those views were consistent with this designation of The Painting in the catalogue raisonné as by Chardin. His response to this enquiry – again, in its entirety - was "In my last catalogue of Chardin's work, I publish the painting under number 121B with "copie retouchée" as commentary.".
    d. In 2021, M. Rosenberg was asked by Dickinsons' solicitors, Howard Kennedy, what the meaning of the term "copie retouchée" was in the context of the catalogue raisonné entry in respect of The Painting. He replied "You will note that the words "copie retouchée" are in quotation marks, which means that I have taken them from an 18th century auction catalogue, where they are used without there being a definition to be found anywhere, to the best of my knowledge. To answer your question more precisely, the only way to resolve this is to put your painting side by side with those in the Louvre."

76. Mr Dickinson observed in his evidence that "Rosenberg is someone who once he has made up his mind, he will not change it. His view is that his published works are authoritative and that is that that.". I think that this may be a little ungenerous – we have at least one case where M. Rosenberg does seem to have changed his mind as regards a particular work. In his catalogue for the National Trust exhibition of paintings from National Trust Houses, "In Trust for the Nation", Mr Laing records that M. Rosenberg was prepared to pronounce the Tatton Park version of "la Gouvernante", which also bore the designation "copie retouchée" in his catalogue raisonné, as autograph, once he had seen it. It is notable, however, that in the 1999 edition of the catalogue raisonné he maintains the designation of the work as copie retouchée".

77. What seems to follow from all this is that M. Rosenberg generally takes the view that once he has seen a work, and designated it in his catalogue, that record of his view should be taken as determinative until he has had another opportunity to examine the work concerned – a not unreasonable position.

The Law

78. The fundamental duty owed by Mr Dickinson as regards his appraisal of The Painting is not in doubt – it is that set down in *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582, that the defendant must live up to the standard of the ordinary skilled man exercising and professing to have the special skill which he holds himself out as having. The question before me is therefore what an ordinary skilled professional art dealer having Mr Dickinson's special skills would have done. Dickinsons also owed fiduciary obligations as an agent, but in this regard there is no difference between common law damages and equitable compensation (per Millett L.J in *Bristol & West Building Society v Mothew* [1998] Ch. 1 at 17G-17H).

79. It is clear that the precise details of the duties owed by Dickinsons should be governed by the terms of the contract between them and the Wemyss. Unfortunately the terms of that agreement are forever lost in time, and can only be inferred from the evidence.

80. The case from which both sides started their arguments was *Thwaytes v Sotheby's* [2016] 1. W.L.R. 2143. That case is indeed very close to the case before me. Mr Thwaytes consigned a painting attributed to Caravaggio to Sotheby's for auction. Sotheby's expert considered it to be a copy by a follower of Caravaggio, and placed it in their auction with an estimate of £20-30,000. It sold for £42,000. The buyer was Sir Denis Mahon, the leading authority on Caravaggio. He subsequently announced that in his view the painting was not a copy, but an autograph original, giving it an attributed value of £10m. Mr Thwaytes sued Sotheby's, arguing that their experts had failed adequately to research the painting, and had failed to notice certain features that should have indicated to them that it might be by Caravaggio. In particular, he argued that although in general auction houses were entitled to rely on the judgement of their experts, in the case of this particular painting they ought to have recognised their own limitations in terms of experience and expertise and have sought the opinion of Caravaggio scholars.

81. Mrs Justice Rose said this:

> Mr Thwaytes submitted that the very fact that eminent experts can disagree so starkly over the quality of the Painting must show that it is a borderline case and that of itself means that Sotheby's must have acted negligently in dismissing the Painting on the basis of poor quality alone. I do not consider that that is a fair way to

approach the evidence and it was an approach rejected by the court in *Luxmoore-May v Messenger May Baverstock* [1990] 1WLR 1009. A similar point was rejected by the House of Lords in *Bolitho v City and Hackney Health Authority* [1998] AC 232.

82. She therefore proceeded to consider in detail the various attributes of the painting which Mr Thwaytes relied upon, considering in each case whether the attribute so strongly indicated that the painting was original that Sotheby's had been negligent not to identify it as such. Her conclusion was that the Sotheby's specialists had examined the painting thoroughly and had reasonably come to the view that it was not by Caravaggio; and that, accordingly, they had discharged their duty according to the standards of skill and care properly and reasonably to be expected of them.

83. The difference between the position in Thwaytes and the position before me is that in Thwaytes there was a great deal of evidence before the court as to the actual quality of the work. The court was therefore in a position to analyse in great detail the basis on which the Sotheby's experts had formed their views, and the question of how reasonable it was for them to have formed those views. In this case there is no such evidence. Mr Onslow argues (in a nutshell) that Mr Dickinson must have been negligent in forming his opinion because "Dickinsons are the only people ever to have queried the quality of the Painting", as he put it in his closing submissions. I deal with this in more detail below. However, the basic question as to whether Mr Dickinson was negligent to form the view that he did of The Painting is an extremely difficult one in this context.

84. A more promising line of argument for the Claimants is the argument that, whatever Mr Dickinson himself thought of The Painting, he was negligent in not obtaining the opinion of M. Rosenberg as part of his preparations for the sale of The Painting.

85. As a matter of law this is a simple point of practice – would a professional art dealer of the status of Dickinsons have taken the view that it ought to consult M. Rosenberg in such circumstances? Unsurprisingly, the experts before me took opposing views on this point, with the Claimant's expert arguing that it would be normal professional practice to obtain such an opinion, whilst the Defendant's expert arguing that it would not.

86. Another argument put forward was that, even if Dickinsons were satisfied that it was not necessary to obtain the views of M. Rosenberg, they should have been aware of the fact that consulting M. Rosenberg might have had the effect of improving the attribution of The Painting and therefore increasing its potential sale price. The Claimants therefore argue that Dickinsons owed a positive duty to raise this possibility with the Wemyss, to discuss it with them, and to leave the decision as to how to proceed in their hands.

87. This last argument seems to me to be an articulation of a duty to warn. Mr Onslow argues on the basis of *Barker v Baxendale Walker* [2017] EWCA Civ 2056 that Dickinsons owed a duty to warn Lord Wemyss of the possibility that The Painting might be worth more than he was proposing to sell it for. *Barker* was a case on the obligation of a solicitor advising on a tax avoidance scheme to advise his client that there was a risk of the scheme being challenged by HMRC. It was held that, although the solicitor believed that a challenge would be unsuccessful, he was negligent in not warning his client of the risk of such a challenge. This duty was described as "highly fact-sensitive", and as arising only where the solicitor knew or should have known that there was a significant risk of such challenge. It does not seem to have any bearing on the facts of this case.

88. Mr Onslow also suggested that Mr Dickinson might have owed the extended duty identified in *Montgomery v. Lanarkshire Health Board* [2015] AC 1430. I found this surprising. The decision in that case was very firmly grounded in the special features of the relationship between medical professionals and patients, and it was explicitly accepted that the departure from the ordinary rule on duties which the case effected as justified on policy grounds as a "consequence of protecting patients from exposure to risks of injury which they would otherwise have chosen to avoid.". There is nothing in the relationship between art dealer and customer which is any way comparable to this position. However, Mr Onslow's argument that the *Montgomery* duty might apply in this case was based on the decision in *O'Hare v Coutts & Co.* [2016] EWHC 2224 (QB). I agree that this case is authority for the proposition that the duties identified in *Montgomery* might be generalised beyond the medical context. However, the decision in *O'Hare* was based on the fact that the relationship between the adviser and the client was subject to the Conduct of Business Rules of the Financial Conduct Authority, which imposed on regulated advisors exactly the sort of enhanced disclosure obligation which were applied to medical professionals in *Montgomery*. There is nothing of the kind here, and this relationship has none of the characteristics which were held to justify the imposition of the extended duty in *Montgomery*. I am therefore satisfied that the obligations on Mr Dickinson as regards disclosure should be assessed in accordance with the test laid down in *Bolam*.

89. The extent of this duty was set out in *Thomson v Christie Manson & Woods Ltd* [2005] P.N.L.R. 38. That case related to the dating of a pair of vases. The judge at first instance held that Christie's expert valuer was not negligent in his dating of the vases, and had no reason to know of any contrary opinion. However, he went on to hold that Christies had nonetheless been negligent in not warning their client about "the possible existence of other opinions different from theirs" (para 90(2)). The Court of Appeal described this as a "very peculiar result", and I agree. The conclusion of the Court of Appeal was as follows:

> "People, including professional people, who, by giving information in the nature of advice, assume a responsibility giving rise to a duty of care, do not thereby normally undertake to draw attention to the obvious—see Tomlinson v Congleton Borough Council [2004] 1 A.C. 46. What is to be regarded as obvious depends on the characteristics and experience of the person receiving the information. Nor are they obliged to draw attention to risks which are fanciful, although of course some risks which are very small may be anything but fanciful, as, for instance, in cases of medical or surgical treatment."

90. Where the position is, as here, that a professional has properly (i.e. non-negligently) formed a view on a point which is material to his client, and has no reason to believe that there exist other opinions different from his own, he does not have an obligation to warn his client of the theoretical possibility of the existence of such an opinion where that opinion can be regarded as "fanciful". I think in the circumstances of the current case, Mr Dickinson would have regarded the idea that M. Rosenberg would declare The Painting to be wholly autograph as "fanciful".

91. In the context of a case of this kind, it seems to me that a positive obligation to raise a particular issue with a client arises only in circumstances where an advisor has taken a view on a particular point, but knows (or should have known) that that view was potentially likely to be challenged. If Mr Dickinson had taken the decision that The Painting could have been marketed as an autograph Chardin, I think he would have owed a clear duty to Lord Wemyss to warn him that this might result in controversy and allegations of misdescription.

However, I do not believe that there was any factor here which should have caused Mr Dickinson to believe that his view was open to challenge – in his opinion his evaluation was entirely in line with M. Rosenberg's published treatment of The Painting, and there was no other existing authority whose view, even if different, could somehow "trump" that of Rosenberg. For this reason, he equally could not have concluded that a reasonable client would attach significance to the facts being otherwise, since in his view the possibility of that outcome was wholly fanciful.

Was Mr Dickinson's own judgement of The Painting negligent?

92. There are two aspects of the Claimant's case against Mr Dickinson as regards his judgement of The Painting. The first is that his judgement of The Painting was simply negligently wrong. The second is that his judgment of The Painting was correct, but that he allowed extraneous factors – specifically his memory of the conversation with M. Rosenberg in 1992 – to affect his situation to such an extent that he did not act in accordance with his own judgement, and was therefore negligent.

93. The basis of the argument that Mr Dickinson was wrong in his assessment of The Painting as having visible defects is, as Mr Onslow put it in his closing, that Mr Dickinson is "the only person ever to have queried the quality of the painting". In support of this claim he relies on the following:

    a. The observations of David Carritt, a respected critic, when The Painting was exhibited. He said "the quality of the [Painting] is so high, and its surface so much more typical of Chardin himself than the Stockholm version, that it is hard to believe there is more than a small degree of studio intervention".
    b. Shepherds' condition report comments that The Painting showed "small 'beads' of paint" which are "a particular characteristic of the artist's technique".
    c. The Wintermute note that "the work is in fact a fully autograph masterpiece by Chardin himself, of the highest quality".
    d. The David-Weill catalogue note that read "the version given by the king by Chardin and the David-Weill painting are unquestionably the most beautiful versions known."
    e. The comments of Sarah Walden to Dickinsons and Lord Wemyss at the time of cleaning/that "the cleaning had revealed a beautiful painting".
    f. The contention of Mr Laing that the ranking of paintings in the catalogue raisonné are in order of beauty, and that M. Rosenberg must therefore have considered The Painting better than the Hermitage version, which is accepted as autograph.

94. This argument, however, falls a very long way short of its target. It is not in question that Mr Dickinson regarded The Painting as being substantially by Chardin. The question in his mind was as to whether it could be presented to the market as wholly autograph Chardin. The observations at a, b and e above are therefore of no assistance in this regard. The Wintermute note was a marketing document, and the David-Weill catalogue entry was in effect a justification for the acquisition of the work. The true position seems to be that no-one except Mr Wintermute and Mr Bailey have been prepared to assert that The Painting is fully autograph, and the context in which they made the statements that they did suggests that these were not dispassionate assessments.

Was Mr Dickinson inaccurate in his evidence as to his own estimation of The Painting?

95. The alternative basis on which Mr Dickinson's judgement is challenged is that in a number of early documents he expresses the view (or is quoted as expressing the view) that The Painting is "by Chardin". Thus, for example, in his letter to Lord Wemyss on 5 March 2014 he says:

> "Rosenberg… describes it as a reworked copy. My feeling is that this painting was probably painted by Chardin, but it is very difficult to tell in its current dirty state".

Mr Dickinson's evidence on this point is clear. Mr Onslow challenged him in cross-examination on each point where he expresses a view on the authorship of The Painting, and in each case he explained that his view was that The Painting was not totally by Chardin, but had a visible element of studio work in it. Not unreasonably, he found it extremely difficult to articulate the basis of this view with any precision – in this regard Mr Legge, channelling Elvis Costello, noted that talking about art, like talking about music, is like dancing about architecture. However the points that he did make – that when he first saw The Painting the brazier immediately struck him as authentic, but that the weakness of the composition, background and the hands of the mother did not – seemed credible.

96. Mr Onslow, however, asked me to disregard Mr Dickinson's evidence on this point, on the basis that it was inconsistent with such of the contemporaneous documents as we have, and that on the authority of *Gestmin SGPS SA v Credit Suisse (UK) Ltd and Another* [2013] EWHC 3560 the facts as reconstructed from those documents should be preferred to the witnesses' own testimony.

97. I would be happy to take this approach if the position on the documents were clear. However, I think that Mr Onslow places upon them a weight which they do not bear. It is quite correct that in a number of communications Mr Dickinson observes that The Painting is "by Chardin". However, these communications are in the form of e-mails, letters and other relatively informal documents. Mr Onslow argues that if Mr Dickinson had meant "partially by Chardin, with some studio involvement" where he said "Chardin", then he should have said so, and the fact that he did not indicates that this is not what he meant. That would, of course, be entirely correct if we are talking about documents containing any sort of formal, public attribution. But we are not. On this point I accept Mr Dickinson's evidence that at all material times he believed that The Painting was partially by the hand of Chardin, containing certain elements which were unquestionably Chardin, but other elements which a sufficiently good eye would identify as studio work by a lesser hand.

98. In this regard, a great deal of Mr Onslow's challenge to Mr Dickinson is based on his proposed dichotomy that a work is either entirely by Chardin or is a pure copy. If that were in fact the case, then it is clear that Mr Dickinson's belief that The Painting had elements of Chardin with some weaknesses would place it on the "Chardin" side of the line. However, that was simply not the way in which Mr Dickinson saw the world. I do not think that the fact that he perceived The Painting as having elements of Chardin's hand in it renders negligent his conclusion that it could not be marketed as autograph Chardin.

99. This takes us to the second part of the challenge to Mr Dickinson's judgement, that the reason that he acted as he did was because he erroneously recalled M. Rosenberg observing when he saw The Painting in 1992 that it was "wholly studio". Mr Onslow's argument was that M. Rosenberg simply could not have said this, since his giving The Painting a capital letter in its designation in his catalogue raisonné meant that he could not have believed it, and he therefore cannot have said it.

100. I think that this is simply wrong. M. Rosenberg had no difficulty in allocating capital letter designations to paintings which he described as "wholly studio" – see, for example, the Winterthur version of the "House of Cards", which is catalogued as number 103A in bold type (indicating that M. Rosenberg had examined it personally), despite the fact that in the accompanying text it is described as "a good studio copy" – "une bonne réplique d'atelier". I therefore cannot find any basis on which to conclude that M. Rosenberg cannot have made the observation that Mr Dickinson testified that he did in fact make. I must therefore dismiss the arguments based on the idea that Mr Dickinson's memory of this observation was somehow mistaken, since Mr Dickinson's evidence is clear, and there is no other evidence to contradict it.

Was Mr Dickinson's decision not to consult M. Rosenberg negligent?

101. In many respects this question is answered by the answers already given. I think that it is clear that if Mr Dickinson had believed that there was a serious prospect of persuading M. Rosenberg that the attribution of The Painting could be improved, that he should have done so. I note in passing that I do not believe that there was any necessity for him to involve the Wemyss in this decision in any event. If he believed that the likely outcome of such a consultation was that M. Rosenberg would have pronounced The Painting to be wholly autograph, it was his duty to consult M. Rosenberg. If he believed that the likely outcome of such a consultation was that M. Rosenberg would dispute the authenticity of The Painting, it was his duty not to do so. If he was genuinely in two minds about the situation, and had no clear view as to what the outcome of such a consultation might have been, then he cannot have been negligent in failing either to consult, or not to consult.

102. I am, in any event, extremely unattracted by the idea of a "duty to check", such that any art professional may be putatively negligent if he acts on his own assessment of the quality of a work without checking with some expert or other. It is of course the case that a professional dealing with a work which is well outside his existing sphere of expertise may well be negligent if he does not seek such input. However, Mr Dickinson is a recognised expert in Old Master paintings, and this is an Old Master painting. It was suggested at one point that such expertise should be subdivided, such that Mr Dickinson was not an expert specifically on Chardin. I am not sure that Mr Dickinson himself entirely accepted this as being true. However, even if it were, I think that someone in the position of Mr Dickinson who forms a considered and reasonable view as to the attributes of a work which is within his area of expertise and acts on the basis of that view cannot be said to be negligent simply because his view is not universally accepted, or because he does not seek its validation from some other expert.

103. It is also important to note here that we are not talking about the sort of consultation which a doctor might engage in with a more senior doctor for advice as to what should be done. The reason for consulting M. Rosenberg would be the hope of obtaining a more definitive verdict from him on The Painting, and such a verdict, once obtained, would determine the market price of The Painting indefinitely. In particular, if M. Rosenberg were to have responded to the consultation by reiterating the view that Mr Dickinson believed him to hold, the value of The Painting would have been destroyed. Consulting M. Rosenberg was not a request for advice, it was a spin of the roulette wheel. I do not believe that Mr Dickinson's decision not to make that gamble on behalf of his client was negligent.

What Should Dickinsons have said to the Wemyss?

104. That takes us to the next element of the Claimants' case, which is that Dickinsons should not have taken that decision on their own initiative, but should have put it to the Wemyss.

105. Mr Onslow's starting point here was that the decision as to how The Painting should be sold was rightfully that of the Claimants, and that what Mr Dickinson should have done was to present all the facts to them and let them take the decision, and that by not doing so he had acted negligently.

106. The question of what duties are in fact owed by an agent to his principal, or by a fiduciary to a beneficiary, are primarily determined by the terms of the arrangement between them. The terms of the arrangement between the Wemyss and Mr Dickinson were – typically – undocumented. However, the evidence of the Wemyss themselves was that they did not have any particularly sophisticated understanding of the art market, and that they employed Mr Dickinson precisely because he had that knowledge. His mandate from them was simply to obtain the best price reasonably obtainable for The Paintings given to him for that purpose. I formed the view that they would have been astonished and somewhat irritated to receive a communication from Mr Dickinson of the form "here are the facts – you decide". Lord Wemyss made the entirely sensible point that if Mr Dickinson had told him that there were steps which could have been taken which would improve the likely selling price of The Painting by several million pounds, he would of course have urged that those steps be taken. However, it seems to me to be equally clear that if Mr Dickinson had informed him that there was an accompanying risk that the £1m sale price would be significantly negatively affected, he would have explained to Mr Dickinson – possibly somewhat brusquely – that the making of judgement calls of this kind was exactly what Mr Dickinson was being paid to do.

107. Mr Onslow based much of his argument on this point on the undisputed fact that The Painting was originally sent to Dickinson's for cleaning and review. He argued that there must necessarily have been an obligation on Dickinson's to report back on The Painting, once cleaned, and to give Lord Wemyss an opportunity to decide whether or not to sell it. His argument was that since Dickinsons do not seem to have provided the Wemyss with any sort of report on The Paintings condition, or to have asked him at any time whether the price for which they proposed to sell it was appropriate, that they must therefore have failed in their duty. This was supported by the evidence of Ms Kaminsky, who set forth in her expert report a detailed inventory of the communications which she would expect a specialist art dealer to have with their client prior to the conclusion of a decision to sell at any particular price.

108. It is clear that there is nothing in the evidential record which identifies any decision point between the dispatch of The Painting to Dickinsons and its sale. However, it is also clear that on 9 July, David Ker wrote to Lord Wemyss, saying that "I understand from Simon that he is very close to finalising a sale on the Chardin". I think I can reasonably infer from this that Lord Wemyss must have at that point known that that The Painting was to be sold at roughly the value that he had been given for it. If Lord Wemyss had at any time wanted more information, he could have asked for it. However, he did not, and the reason that he did not seems to me to be, as I have said, that he had employed Dickinsons to conduct the sale, and trusted them to deal with it appropriately and professionally. In circumstances of this kind, I think that it is entirely reasonable for Dickinsons to accept and discharge a

mandate of this kind on a discretionary basis without detailed and regular recourse to their principals.

109. In this regard I should deal briefly with Ms Kaminsky's account of the behaviour she says she would expect from a specialist art dealer. She gives a detailed account of the conversations which she says that she would have had with a client if she had been dealing with The Painting, and I have no doubt that she is correct in that as regards her own procedures. However, she seemed to me in many cases to be describing the discussions which a well-advised dealer might seek to have with their client if they sought to minimise their own potential liability. I do not think it is negligent of a dealer who has been given authority by his principal to proceed on the basis of his own discretion, to do so without further reference to that principal. Mr Dickinson does not dispute that he took upon himself the responsibility to employ his own skill and judgement to conduct the sale and to obtain the best price reasonably available for the Wemyss, and at no point did he seek to limit that liability by throwing decision-making responsibility back on his client. In that regard, he was doing exactly what his clients wanted him to do, and trusted him to do. He cannot be faulted for assuming this liability – the only question is as to whether he properly discharged it.

Should Dickinson's have Marketed The Painting as "Chardin" rather than "Chardin and Studio"?

110. This is in some respects a trick question, since there is no evidence that Dickinsons did in fact market The Painting in this way. The sale to Mr Amell was a sale to another art professional, and Mr Amell was adamant, in correspondence put before me, that he had relied only upon his own judgement in deciding to make the purchase at the specified price. However, the question can be to some extent unpacked, as one as to whether Dickinsons should have set what Mr Onslow described as the "fudged" price of £1.15m that they did set on the basis that the sale price for The Painting should be somewhere between a Chardin copy and a Chardin autograph, a concept embodied in the attribution "Chardin & Studio".

111. It was made clear to me by counsel for both sides that a "headline" attribution of this kind is of the greatest importance in the art market, and is critical in underpinning the estimated price of a work. In *Thwaytes v Sotheby's* [2016] 1. W.L.R. 2143, Mrs Justice Rose (at pp 2149-50) set out a taxonomy of attributions which both sides agreed were accepted technical terms in this regard. The highest form of attribution is the name of the artist alone, and thereafter there is a hierarchy of terms ("attributed to", "studio of" and so forth) which indicate a diminishing degree of involvement of the artist with the work. The term "and studio" does not appear on this list. It does, however, capture more or less exactly what Mr Dickinson's view of The Painting actually was – that it was a combination of Chardin's own hand with some studio work.

112. It was suggested to me that the application of this description to The Painting was in some respect wrong *per se* – the argument being that since there is no record of any Chardin being sold as "Chardin and Studio", that it was wrong to ascribe that designation to The Painting. It was further suggested that any contrary finding would disturb the established practices of the art market.

113. I do not think that this can be right. The established auction house attributions set out in *Thwaytes* are:

g. Name alone – an autograph work by the artist
h. "attributed to" – probably, but not certainly, a work by the artist
i. "studio of" – a work by an unknown hand, possibly executed under the direction of the artist

(at para [11]).

None of these are of any help at all in designating a work which the seller believes has substantial input from the artist, but where other parts of the same work are perceived to be of inferior quality. It seems to me that "artist and studio" is the obvious and logical attribution of a work of this kind, and I cannot fault Dickinson's for applying it in a case where they genuinely believed that it was the most accurate description of the work. This takes us to the nature of the work itself.

114. Mr Dickinson says that his opinion on the attribution of The Painting did not significantly change when he saw it in its cleaned state. That may well be true. However, since his opinion prior to cleaning was that The Painting was partly Chardin, it is hard to see how that opinion could have been changed by viewing the cleaned work. However, once he had seen the cleaned painting, he took himself off to the Louvre to have another look at the Prime Original. Some suggestion was made in cross-examination that this was in some way vitiated by the fact that he had not taken a photograph of The Painting with him. I do not think this is a valid point. Mr Dickinson's entire career has involved looking at paintings, and I have no more doubt that he would be able to carry the salient features of a painting in his head than I do that a chess-master would have been able to carry a complex chess-game in his head.

115. If Mr Dickinson's visit to the Louvre had convinced him of the autograph status of The Painting, it would have been entirely open to him to market it on that basis. We know that he was not unwilling to fight to improve the market attribution of a work when he believed in it – he had fought for the Wemyss Poussin in the teeth of the opinion of established art scholars, and there is no reason to believe that he would not have done so again if he had believed in The Painting. I also note that he would have been strongly financially incentivised to do exactly that. The question is therefore as to why he did not do so.

116. Mr Dickinson's answer on this point is clear. When asked what his views were on seeing The Painting in its cleaned state, he replied:

> "when I first saw the picture, I thought the brazier, that looked to be by Chardin. I didn't know about the rest. Then, when she'd cleaned it, the white dress has a feeling of Chardin…But the rest of the picture was pretty mundane".

117. The only possible conclusion that can be drawn from this set of facts is that he did not market The Painting as an autograph Chardin because he did not believe that it was, and that he proposed to market it as "Chardin and studio" because he believed that that was an accurate description. I find that that belief was honestly held. I also note that it was a belief about an Old Master painting held by a man who was a recognised expert in Old Master paintings. I think that Mr Dickinson – who did not accept that M. Rosenberg had a significantly better eye than his own – was convinced that if The Painting was submitted to a three-way comparison at the Louvre with the other two versions, M. Rosenberg would have concluded that it was inferior to both, and that it had significantly more studio input than either. Such a determination, if it became public, would harm the valuation and marketability of The Painting.

118. I can find no negligence in any of this.

Was Mr Dickinson negligent in concluding that £1.15m was the right value for The Painting?

119. That does, however, take us to the next question, which is as to whether the fact of the conclusions which Mr Dickinson drew from his assessment of The Painting justified his conclusion that £1m was the right value for it.

120. Mr Dickinson's case is – in short - that what he had to deal with was an asset pregnant with risk. If M. Rosenberg were to announce publicly that The Painting was a fully autograph Chardin, its value would be – in his view - £3-4m. If M. Rosenberg were to announce publicly that The Painting was "wholly studio", then its value would be £200,000 or so. Corroboration of this latter view can be obtained from the fact that in 2002 we know that Mr Thaw sought a valuation for a replica of La Mère Laborieuse, which also bears the designation "copie retouchée" in the Rosenberg catalogue (as 119A). The valuer concerned (Mr Habolt, a respected art dealer in his own right) assessed it as "attributed to … Chardin" and valued it at $225,000. Ms Kaminsky observed that this was an inheritance tax valuation, in which the valuer and the client would usually be looking for the lowest possible valuation. However, even given that constraint, it seems unlikely that Mr Habolt would have given such a valuation if he thought that the true valuation was in the millions. Consequently, the starting point is that the valuation for a painting considered to be less than wholly autograph is at least an order of magnitude lower than a painting which is identified as wholly autograph.

121. M. Rosenberg, if asked, could, in theory, go either way. However, Mr Dickinson, on the basis of his previous conversation with him, had an unwelcome premonition as to which way he would, if compelled, go. In these circumstances, it must have been clear to Mr Dickinson that, if he was selling an asset pregnant with risk, it would be a very bad idea to sell it directly to a "retail" buyer, since if the risk turned out badly there was a very significant likelihood that the retail buyer would be aggrieved and seek recompense. He therefore must have reasoned that such an asset could most safely be sold to a professional who could not plausibly claim to have been relying on anything other than his own judgement. Such a professional would accept the downside risk in order to secure the potential upside gain, and would pay an appropriate price. It is therefore not at all hard to understand how it was that when Mr Dickinson, presented with a bid by a professional buyer at a price which fully reflected the valuation which he had put upon it, decided that the best option was to accept that bid.

122. I think that it is reasonably clear that the £1.15m valuation was a best guess solution to a complex pricing problem. Mr Onslow criticises this valuation as a "fudge", and points out that there was market precedent both for the value of Chardin copies and for the value of fully autograph Chardin works, but nothing at all for paintings with the sort of partial authorship which Mr Dickinson believed characterised The Painting – indeed the evidence of his own market expert, Ms Kaminsky, was that in the absence of any such data she was not able to put a value on a painting of this kind. However, Mr Dickinson could not in practice sell a painting without setting an asking price, and he set that price at around the £1m valuation which he had previously ascribed to The Painting.

123. I cannot find this pricing determination to be negligent. The reason for this is that neither side's experts were prepared to dispute it, observing that the complete absence of

any market precedent for a sale of a work with this particular combination of attributes were simply not available. Even if I agree that the price decided on was a "fudge", I cannot, in the absence of evidence, determine that setting of that price at that level was negligent.

124. In this context, however, it is necessary to deal with the fact that shortly after Dickinsons sold The Painting for £1.15m it was on-sold for $10m (the "David-Weill sale"). Can this fact be squared with a finding that the decision to ask £1.15m for it was not negligent?

125. The David-Weill sale is hard to understand on many levels. The disclosed price of $10.5m would have been equal to £6.9m at the date of the invoice (I am converting GBP/USD values using the exchange rate as at the date of the invoice for the sale). This would have been well above the most optimistic valuation that could have been arrived at by looking only at historic Chardin sale prices prior to the sale. It seems from the fact-sheet that Mr Williams and Mr Amell prepared in respect of this sale that their sales pitch was that the value of The Painting was substantially enhanced by the deep clean and the discovery of the signature. This latter point was rejected by all of the experts who testified before me – it was pointed out that Chardin is known on at least some occasions to have signed works prepared in his studio, and there are a number of signed paintings which M. Rosenberg identifies in his catalogue raisonné as "Oeuvres rejetées", having no element of Chardin's own hand in them at all. As far as I am aware, none of the parties or experts before me have had the opportunity to see The Painting after its deep clean, so it is not possible to say whether the result of that process was a work which was so substantially different as to merit a radical reappraisal. However, it does seem unlikely – The Painting had already been subject to a light clean whilst in the hands of Dickinsons by an experienced professional cleaner, and it seems unlikely that she would have failed to notice the true condition of The Painting whilst engaging in that process. Importantly, the opinion of M. Rosenberg was not sought by M. David-Weill at any point during this process – it was suggested in evidence that this was because M. David-Weill "did not get on" with M. Rosenberg, but that suggestion is unevidenced. I note in passing that it would be to some extent paradoxical if the Claimants' case that Mr Dickinson was negligent in failing to obtain the opinion of M. Rosenberg before selling The Painting were to succeed on the basis of a subsequent sale in which M. Rosenberg's opinion was not sought. Finally, there is the curious fact that the $10.5m price quoted appears to be a very significant overestimate – the actual price paid seems to have been $7.5m in cash, along with a Watteau painting which, although valued at $3m, was agreed by all the witnesses before me to be worth several hundred thousand dollars at best. However, commission was paid to Mr Williams on the basis of the notional $10.5m value, leaving the net proceeds at around £4.4m. This is very considerably more than £1m. The question before me is as to what conclusions I should draw from these facts.

126. Mr Onslow's argument is that the fact of the sale proves that M. David-Weill was prepared to pay this much for The Painting, Mr Dickinson knew that M. David-Weill was a potential buyer of a Chardin painting, and that he was therefore negligent in not offering it to him. Mr Dickinson's response to this is that he would not have dreamed of offering The Painting to M David-Weill since, in his view, it was not nearly good enough for him.

127. This comes back to the question of attribution. I think that Mr Dickinson is correct that if The Painting had been offered to M David-Weill as "Chardin and studio" he would not have considered it. I find that in order to make the sale to M David-Weill it was absolutely essential for The Painting to be offered as fully autograph, and, as it was described to M.

David-Weill, "the finest of the known versions" other than the Prime Original. Mr Dickinson could not have sold The Painting on that basis, because he did not believe it to be true. The question is simply one as to whether that belief was negligently wrong.

128. It also seems to be the case – although the evidence is slight – that Mr David-Weill is one of the few buyers who would not have been impressed by an endorsement of the work by M. Rosenberg.

129. I therefore do not believe that the mere fact of the David-Weill sale is sufficient to demonstrate that Mr Dickinson was negligently wrong in forming his conclusion that £1m was an appropriate price to set on The Painting.

Was Mr Dickinson Negligent in selling The Painting to Mr Amell?

130. The idea that a dealer who sells a client's painting to another dealer may be negligent on that basis alone has, if nothing else, the charm of novelty. However, the Claimants say that Mr Dickinson should have known that Mr Amell would not be buying The Painting unless he was reasonably sure that could sell it on for a substantially higher price, and might well already have a buyer in mind. Therefore, the fact that Amells were seeking to buy it should itself have constituted a warning to Mr Dickinson that a better price could be obtained somewhere.

131. There is absolutely no evidence to support this beyond the fact that Mr Amell was a professional art dealer. If there were any evidence of any facts which should have caused Mr Dickinson to believe that this might be the case then the position might be different, but no such evidence was advanced.

132. Mr Amell, when asked about this, responded robustly as follows:

> "When I bought the painting by Chardin and Studio, I took an enormous risk. Every single monongraph, Pierre Rosenberg, Phillip Conisbee at the National Gallery, Marianne Roland Michell, the Wildenstein Institute, and others all said the painting was an old copy or wrong. Not by the Artist…..But, I liked the painting and I thought it had a chance of being right….please remember, if we had not found the signature, we would have spent the rest of our lives arguing about the attribution and would probably have lost half our money…As you know, I have always been a gambler on paintings, and presumably that is why you offered me the Chardin, as it was a gamble"

The communication by Mr Amell to Mr Dickinson from which this is extracted is explicitly exculpatory, and it should not be treated as if it were sworn evidence. However, I think it provides an entirely plausible account of how Mr Amell presented his position to Mr Dickinson, and, if this was in fact the case, then Mr Dickinson's sale of The Painting to Mr Amell is entirely explicable within the bounds of the expected behaviour of a specialist art dealer.

133. In short, 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. There is no evidence to suggest anything of the kind here.

134. It was also suggested that it was negligent of Mr Dickinson not to suggest to Mr Amell and Mr Williams that, rather than buying The Painting, they should sell it as sub-agents for Mr Dickinson. This argument has the same flaw as the previous argument – that the only reason that Mr Dickinson would have done anything of the kind would have been if he had believed that Mr Amell and Mr Williams had a pre-arranged client who was so desperate for The Painting that he had some bargaining power in order to obtain this outcome. There is no evidence of any facts that would have supported any such belief by Mr Dickinson.

135. It was also suggested that the fact that Mr Dickinson had been approached by another dealer should, in itself, have caused him to warn the Wemyss of this fact, and that he was negligent in not doing so. I think this argument is another variation on the theme that there is something inherently suspicious about a sale of a painting to a professional art dealer. I do not agree.

Was the fact-sheet relevant to any of this?

136. The short answer to this is no. The fact-sheet was not relied on by Mr Amell, or indeed by anyone else. It is agreed that if, in a counterfactual world, a public marketing campaign were to have been conducted, a very different fact-sheet would have been prepared. The fact-sheet itself was not a contributor to any of the beliefs held by any of the parties – in the case of Dickinsons, it recorded their view. It is also clear that no further research, even if done, would have turned up any relevant information not already reflected in the fact-sheet.

Summary on negligence

137. The specific allegations of negligence in the statement of claim are as follows

a. The Defendant failed to appreciate that The Painting appears in Rosenberg's catalogue raisonné as a work by Chardin. This argument is based on the attribution of a capital letter to it. For the reasons given above, this cannot stand.
b. The Defendant acted under the misapprehension that The Painting was an anonymous copy (not by Chardin). This is also clearly wrong.
c. The Defendant decided to sell The Painting as by "Chardin and Studio" (rather than by Chardin alone). This implies a decision by the Defendant that identifiable parts of The Painting were painted by Chardin, but others were not. Making a determination of this kind requires a high level of specialist expertise in the work of the artist concerned. Mr Dickinson did not have this level of expertise, and it was therefore negligent of him to make such a determination without obtaining external expert assistance. This argument was unsupported by any evidence, and I can find no other basis for it. It was also – unsurprisingly – strongly rejected by Mr Dickinson in his evidence.
d. The Defendant, regardless of their level of expertise, should in any event have consulted an independent expert since, if they did not feel able to sell The Painting with an attribution to Chardin alone they should have sought a second opinion. The problem with this argument is that Mr Dickinson was not in any doubt in his own mind as to the correct attribution of The Painting. He believed that there was a significant risk that if The Painting were referred to M. Rosenberg he would deliver a negative verdict, thereby significantly harming its marketability and value, and he did not believe that there were other experts whose views alone would be sufficient to affect the value of The Painting.

e. The Defendant failed to note the potential significance of the provenance of The Painting. It is hard to believe that this was either true or of any consequence. Mr Dickinson, as a professional art dealer, was clearly aware in broad terms of the significance of provenance, and the provenance of The Painting – that it had been acquired by Lord Wemyss ancestor in the Major sale, and had been in the family ever since – was a matter of public knowledge, since it appears in the Rosenberg Catalogue Raisonné.

f. The Defendant failed to give any or any adequate consideration to the marketing of The Painting or to alternative means of selling it other than by selling it outright to Amells/Mr Williams, who were the only potential buyers to approach (or be approached by) the Defendant. Here again, this appears unlikely. Mr Dickinson's view was that a public marketing campaign might achieve a higher price, but might well achieve a lower one. If The Painting were publicly offered, the response of any putative buyer would have been to turn up the Rosenberg *catalogue raisonné* where they would have found the words "copie retouchée". Mr Dickinson simply had no way of knowing how this designation would affect the market reception of The Painting, and was concerned that the outcome might be a very public failed sale – a process which would have damaged the value of The Painting and rendered it unmarketable for some time to come. Conversely, if it was possible to deal with the issue by a trade sale to a buyer who was prepared to take on these risks at a price which Mr Dickinson believed was the correct price of The Painting, that seemed to him to be a preferable course of action.

Damages

138. Since I heard a great deal of evidence on the subject, I should therefore turn to the issues that would arise if I were wrong in my finding that there is no negligence shown by the facts before me.

139. If Mr Dickinson had been negligent in selling The Painting to Mr Amell for £1.15m, the question which would arise would be as to what compensation would be due to the Claimants as a result of that negligence.

140. The basic principle of compensation in negligence is that the innocent party should be put in the position in which he would have been had there been no negligence.

141. There are two aspects to this. One is as to what the position would have been had the Defendant not been negligent. The other is as to the value of the benefit which would have accrued to the Claimants in that case. The first of these is simply a question of what price might have been obtained for The Painting. I address this question below. However, answering this question is only a first step in determining what the compensatory entitlement of the Claimants in fact is. Assessing this amount entails a number of complexities, which stretch from uncertainties such as the amount of commission which might have been charged through to the impact of inheritance tax. For reasons which are entirely beyond the scope of this hearing, the impact of Inheritance Tax on disposals of art by the trust is substantial – Lord Wemyss "ready reckoner" in the witness box was that "if you sell a painting for £100, you probably end up with £40 in your pocket". However, there are a wide range of factors which would go into a calculation of this kind. Thus, once the theoretical sale price of The Painting has been determined, a further enquiry of some complexity would have to be conducted in order to determine what the actual money value of the damages claim would be.

142. The only thing that I can do to progress matters on the facts before me is therefore to try and establish what the potential sale price of The Painting would have been, and how the calculation of compensatory entitlements might be approached.

The Law

143. Mr Onslow, for the Claimants, argues that this question should be approached on a "loss of a chance" basis. His argument is that because of the sale of The Painting to a buyer who (it appears) will not allow it to be inspected by M. Rosenberg, the opportunity to establish M. Rosenberg's opinion has been forever lost. The Claimants have therefore lost the chance that that opinion would have been favourable, and are entitled to be compensated on that basis.

144. This situation raises a well-known tension as to who has to prove what. The general rule is that where a claimant seeks to demonstrate that they would have done a particular thing, they must prove it on the balance of probabilities, whereas if the issue is as to what a third party would have done, "damages should be addressed proportionately according to the chances" (Per Andrew Burrows KC in *Palliser Ltd v Fate Ltd* [2019] EWHC 43 (QB) at para 27). The position is that "the law treats the loss of a chance of a favourable outcome as compensatable damage in itself" (per Hoffman LJ in *Barker v Corus (UK) Ltd*, [2006] 2 A.C. 572 at [36]). The loss of a chance is, in some circumstances, compensatable *per se*.

145. The question for me is therefore whether I should accept that the chance of obtaining M. Rosenberg's opinion has been lost, estimate that chance, and award compensation on that basis, or whether it is necessary for the Claimants to prove on the balance of probabilities that M. Rosenberg's opinion would have been favourable to them before I can find that they have suffered compensatable loss.

146. Authority for the first position can be found in *Allied Maples v Simmons & Simmons* [1995] 1 W.L.R. 1602 CA, where a solicitor's client was compensated for the loss of a chance to negotiate a particular term into a contract, without regard to whether he would have succeeded in negotiating the term had he sought to do so.

147. Authority for the second position can be found in *The Law Debenture Trust Corporation plc v Elektrim SA* [2010] EWCA Civ 1142 at paragraph 45, where Lady Justice Arden said:

> "It does not follow that merely because the court has to assess what a third party would be likely to have done that the case must be regarded as a "loss of a chance" case and a percentage of damages thus be awarded."

This position was advanced in an article by Helen Reece "Losses of Chances in the Law" (1996) 59 MLR 188, which was approved in *Gregg v Scott* [2005] 2 A.C. 176 at paragraphs 79 and 220.

148. I do not think that this is an appropriate case to apply the "loss of chance" analysis. In this regard, I think the position is much closer to that described by Lady Arden in *Elektrim* at para 46, where she said:

> "Dr Harvey MacGregor QC has pointed out (Damages 16th ed para 8-032) that the "loss of a chance" concept has been extended well beyond the kind of case in which it was originally developed. In the present type of case the court has to assess what a banker would have concluded as to the valuation of certain shares. That may not be easy but if

> something of value has been lost, the court must do its best to estimate that value and should not too readily decide that it is a matter of chance what the true value of something as concrete as a share is likely to be."

The fundamental message – that the court should not toss a coin where it can decide on the facts - seems clear.

149. However, I do not think that that conclusion assists the Defendant in this case. 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 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.

150. The question is then as to what M. Rosenberg might actually have done or said. Mr Onslow, in his closing submissions, helpfully listed the possible outcomes. He says M. Rosenberg could have:

(1) confirmed the autograph status;
(2) interpreted the term "copie retouchée" par Chardin" as meaning wholly autograph,
(3) directed the dealer to the capital letter without more;
(4) observed that the term "copie retouchée" par Chardin" meant something other than wholly autograph Chardin" or workshop copy, i.e. not autograph.
(5) declined to give any response at all.

It is clear that these are all possibilities even on the basis of a finding that Mr Dickinson was negligent not to identify The Painting as autograph.

151. In this regard, Mr Onslow, for the Claimants, relies on the "fair wind" principle, or the "principle of reasonable assumptions". This is, at heart, a simple application of the principle that a tortfeasor should not benefit from the consequences of his tort. In *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 Lloyd's Rep 526at [188], Leggatt J described this as being that " it is fair to resolve uncertainties about what would have happened but for the defendant's wrongdoing by making reasonable assumptions which err, if anything, on the side of generosity to the claimant where it is the defendant's wrongdoing which has created those uncertainties.". Mr Onslow seeks to apply this principle in the current case, arguing that because the Defendant has, by selling The Painting, put it beyond the capability of man to secure M. Rosenberg's actual opinion on The Painting, thee Claimants should therefore have the benefit of the doubt as to what that opinion might have been. Mr Legge, however, for the Defendant, points to the observations of Leggatt J in *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm) to the effect that:

> "These principles can help a claimant to overcome evidential difficulties in proving damages. There is a limit, however, to how far they can be taken. They may assist in resolving uncertainties where evidence is not reasonably available but they do not enable the court to conjure facts out of the air and they have little role to play where evidence could reasonably have been obtained (See e.g. *Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas* [2012] EWCA Civ 1417, paras 80, 122-3) or has in fact been adduced (See e.g. *Force India Formula One Team Ltd v Aerolab Srl*

> [2013] EWCA Civ 780; [2013] RPC 36, paras 92-93). They may give the claimant a fair wind, but not a free ride."

152. In the case before me, the question which I have to answer is as to whether, on the assumption that The Painting is not in fact visibly inferior to the other versions, M. Rosenberg, upon seeing it, would have been prepared to go beyond his usual "see my book" response, and to deliver a positive verdict on the autograph status of The Painting. On the facts I consider this to be unlikely. However, it is by no means impossible, and I note that he appears to have done exactly that as regards "La Gouvernante". I think that this is therefore a case where Mr Onslow's fair wind sends the overall conclusion to the point that we assume that M. Rosenberg gives The Painting his public endorsement – that is, that he delivers one of the first two responses identified above.

153. This takes us to the question of quantification – if M. Rosenberg were prepared to give such an endorsement, what would the resulting sale price of The Painting have been.

154. The discussion of quantification begins with *South Australia Asset Management Corporation Respondents v. York Montague Ltd* [1996] UKHL 10 ("SAAMCo"). The basic principle laid down in SAAMCo is that where a professional provides negligent advice, and the client acts on that negligent advice and suffers a loss, the professional's liability cannot be higher than the loss which would have been incurred had correct advice been given. This decision has, however, been recently reviewed by the Supreme Court, who held in *Manchester Building Society v Grant Thornton* [2021] 3 WLR 81 that where advice was given in respect of particular issue, and that advice proved to be incorrect, the costs of rectifying positions taken as a result of the incorrect advice fell within the scope of the duty of care and were therefore compensatable.

155. Ms Kaminsky's position on this was straightforward – that in this position Mr Dickinson could simply have approached M. David-Weill, and secured the same price that Mr Amell secured from him. This does not seem to me to be likely. It is clear that Mr Amell, Mr Williams and Mr Wintermute engaged in an aggressive marketing campaign whose aim was to convince M. David-Weill that the deep clean which The Painting had received had completely altered its perceived quality and value. I do not believe that either Mr Dickinson or the Wemyss would have undertaken the deep clean or been prepared to market The Painting as a result in the way that it was in fact marketed.

156. I think it is much more likely that in such a case the marketing campaign would have unfolded much as Ms Kaminsky explained in her expert report – The Painting would have been exhibited at the TEFAF fair in Maastricht, a marketing campaign would have been undertaken amongst an identified group of possible buyers, and the result would probably have been a sale.

157. The fact that The Painting was fresh to the market, was the only copy of the work likely to be available on the private market (the other copies being in museums), and was one of Chardin's best-known compositions would all have militated in its favour. The question before me is therefore as to what price such a sale might have realised.

158. I note in passing that this is an exercise of the most unscientific and speculative nature imaginable. However, as noted in *Drake v Thos. Agnew & Sons Ltd* [2002] EWHC 294 (QB), I am required to engage in precisely this speculation.

159. For reasons which should be clear, the only values with which I am concerned are sterling vales. Sterling has fluctuated very significantly against the US dollar in the period with which this case is concerned. However, I am satisfied that Lord Wemyss was selling paintings to discharge obligations in respect of the repair of the estate which accrued in sterling, and there is no counterfactual in which he sold assets in some other currency and held those assets in that currency for any material period of time. He is a public figure, not a currency speculator.

160. As at the time of the sale to Mr Amell, Mr Agnew observed that only three paintings sold at auction, all catalogued in full by Rosenberg as autograph works by Chardin, had fetched more than £1m. The highest price achieved was the $4,002,500 paid for "The Embroiderer" sold at Christie's New York in 2013 (roughly £2.5m). The second highest was a still life sold at Sotheby's New York in 1992, for $2,200,000 and the third "Le Chien Barbet", sold by Ader in Paris in 1992, for $1,495,047. Of these auction prices, the only one relevant to The Painting is "The Embroiderer", as animal paintings and early still lives by Chardin are generally considered as separate and less desirable categories than his much rarer subject paintings. Ms Kaminsky points out that although “The Embroiderer” is a direct comparator for The Painting (since it is also a replica of an earlier original), it is smaller, earlier and less well-known than Le Bénédicité. She therefore suggests that the value of The Painting, if it were undisputedly wholly autograph, should have been considered to be at least double that of “The Embroiderer”. In support of this she also cites a Financial Times report of a private purchase by Jacob Rothschild of “Boy Building a House of Cards” for £5m in 2007.

161. For this purpose, it is also reasonable to consider the prices realised by accepted fully autograph Chardin works at points after this date. We will leave aside for the time being the sale of The Painting itself to M. David-Weill. However, what we do know is that a number of acknowledged Chardin autograph works have been sold subsequent to the sale by Mr Dickinson. The first of these was one of three variants of "La Fontaine", sold in November 2021 for EUR 7,110,000 (around £6m at then current exchange rates). On March 23rd this year an acknowledged masterpiece among Chardin’s late still lives, “Le Panier de Fraises des Bois” was sold for just under $27m. However, it is acknowledged that this is amongst Chardin’s very finest works (it was the cover illustration for the 1979 catalogue for the exhibition at the Grand Palais), and this price is probably not of any great relevance to the issue before us.

162. This brings us to the question of what weight – if any – should be given to the David-Weill sale. It sems to be agreed by all parties that the $10.5m purchase price (roughly £9.1m as at the date of the invoice) specified for The Painting in the purchase price is grossly inflated. The price which it is claimed was paid is $10.5m, composed of $7.5m in cash (roughly £4.9m as at the invoice date) and a painting by Watteau (“Le Rendez-vous”), valued for this purpose at $3m. Ms Kaminsky argued strenuously that the market price of this work might have been as high as $1m, and was not less than $850,000, whereas Mr Agnew places it between $250,000 and $650,000. This discrepancy casts a very significant shadow over the entire valuation, to the extent that, in the absence of any evidence on the point, I cannot even be certain that the cash amount of $7.5m identified in the invoice was paid in full in consideration. In terms of its probative value, I am inclined to say that *falsus est in unum, falsus est in omnibus,* and to disregard it.

163. I am therefore of the view that the sale price of The Painting, if it were a clearly acknowledged autograph Chardin, would have been in the vicinity of £5m.

164. There is, however, one further issue which must be considered. It was accepted by Mr Laing that if The Painting had been clearly and unquestionably attributed as an autograph Chardin, an export license would not have been granted immediately. In particular, Mr Laing and Ms Kaminsky accepted that the Painting would have been stopped, but not that a licence would not have been granted once the period for others to purchase the Painting had passed. Put another way, Mr Amell was only able to sell The Painting to M David-Weill immediately because the export licence application described The Painting as "Chardin and Studio". There was no agreement between the experts as to the extent to which this would have harmed the sale price eventually obtained for The Painting, but there seems to have been agreement that it could have had a negative impact. Ms Kaminsky's evidence was that overseas buyers do occasionally buy works which are in the UK but subject to export restrictions in the hope that the restriction may subsequently be released. However, this is unusual. Such a restriction would also, as Ms Kaminsky accepted, constitute a major obstacle to the marketing of The Painting to European, Middle Eastern and Far Eastern buyers.

165. I think that this issue would reduce the likely sale price of The Painting – not least because, although Lord Wemyss was under no immediate financial pressure to complete a sale, he did have a requirement for money to finance the restoration of Gosford and would I think have been likely to accept a reasonably timely offer at a good price.

166. It is almost impossible to quantify the probable consequences of this situation. Ms Kaminsky's testimony was that the lack of an export license would impact the value of the painting, but that it was not possible to provide any meaningful estimate of its economic consequences.

167. In all the circumstances, therefore, and in the absence of any evidence, I think that the probable sale price for The Painting in this situation would have been £4m, reflecting the fact that some potential buyers would have been deterred by the uncertain export licensing position.

168. Finally, I should like to thank counsel on both sides, both for the high quality of their submissions and questioning throughout the hearing, and also for the expertise which they demonstrated in helping me navigate the art market. I derived tremendous assistance from both.