

Case No: 01/TLQ/0681

Neutral Citation No. [2002] EWHC 294 (QB)

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8th March 2002

Before :

THE HONOURABLE MR JUSTICE BUCKLEY

Between :

RICHARD DRAKE	<u>Claimant</u>
- and -	
THOS. AGNEW & SONS LIMITED	<u>Defendant</u>

Joseph Smouha (instructed by **Mishcon de Reya**) for the Claimant
Charles Flint QC & John McCaughran (instructed by **Farrer & Co.**) for the Defendant

Hearing dates : 30, and 31 January, 1, 4, 5, 6, 7, 8, 11 and 14 February 2002.

**JUDGMENT: APPROVED BY THE COURT FOR
HANDING DOWN (SUBJECT TO EDITORIAL
CORRECTIONS)**

**I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken
of this Judgment and that copies of this version as handed down may be treated as
authentic.**

Mr. Justice Buckley

Mr Justice Buckley :

1. This case is about the sale of an oil painting of “James Stuart, 4th Duke of Lennox and 1st Duke of Richmond as Paris” (“the Painting”) by the Defendant (“Agnews”) to the Claimant, Mr. Drake.
2. Mr. Drake maintains that “the Painting” was sold as a painting by Sir Anthony van Dyck, but he has since been advised that it is not and he wants his money back.
3. Three matters arise for consideration: the terms of the contract of sale, in particular, whether it was a sale by description; whether certain comments or representations that were made at the time, were accurate; and, whether “the Painting” is a van Dyck.
4. Mr. Drake is a Texan. He is a very successful businessman and is the majority shareholder of United Structures of America Incorporated (USA), a company that manufactures metal buildings. He is also a keen art collector and is presently building a museum to display his collection.
5. In 1995 Mr. Drake met a Mr. Callan who was then working as a salesman at the Schon Gallery in New Orleans. Mr. Drake and his wife liked Mr. Callan and over the next two or three years bought several moderately expensive paintings through him. They were 19th or 20th century European paintings of the type that the Schon Gallery dealt in, although it occasionally sold or displayed one or two Old Masters.
6. In early 1998 Mr. Callan told Mr. and Mrs. Drake that in June that year he was going to London to attend a sale and an art fair. Mr. Drake, who had decided also to collect some Old Masters, gave Mr. Callan a list of names he had become familiar with through visits to various museums in America and Europe. In particular, he wanted a “big name” such as van Dyck or Rubens for his museum. Mr. Callan said he would visit the major dealers in London and see what was available. They agreed on a commission for Mr. Callan of 5 - 10% to include the costs of transport from London to Mr. Drake’s home in Texas. The arrangement was no more precise and I have seen nothing in writing about it.
7. Thus it was that on 5th June Mr. Callan walked into “Agnews”, Old Bond Street, the well known specialist in Old Master paintings. He met Miss Gabriel Naughton, a director of “Agnews”. In the course of conversation Mr. Callan said he was a dealer in French 19th century paintings but was also looking for Old Masters for a client. Miss Naughton showed him, amongst other items, “the Painting”. She said it was by Sir Anthony van Dyck and told him the price was £2,000,000. Mr. Callan left, saying that he would be in touch. On 8th June Miss Naughton received a message informing her that Mr. Callan had telephoned and asked for a colour transparency of “the Painting” and brochure notes to be sent to him in New Orleans as soon as possible. Miss Naughton duly sent them.
8. So far the matters I have related are not contentious, but it is now necessary to digress and explain an unusual turn of events during the course of the trial. It was always reasonably clear from the discovery of documents in the action and Mr. Drake’s witness statement, that

Mr. Callan had not passed on to Mr. Drake a letter from “Agnews” dated 19th June, which Mr. Julian Agnew had written because he and Miss Naughton had become concerned that Mr. Callan did not appear to be making the enquiries they would have expected of a dealer, nor carrying out any investigations of his own. They had no means of contacting Mr. Drake whose identity remained unknown. I will return to this important letter in due course. However, during cross-examination by Mr. Flint QC for “Agnews”, Mr. Drake had agreed to cause a search to be carried out for the copy of the brochure that Mr. Callan had sent him. Mr. Flint made that request of Mr. Drake because the Claimant’s disclosure did not appear to include that copy of the brochure. To Mr. Drake’s great credit his copy was duly found and produced. Mr. Flint was particularly anxious to see the very copy which Mr. Callan had sent to Mr. Drake because a copy from Mr. Callan’s possession had been disclosed and appeared to have some Tipp-ex marking on it which someone had attempted to scratch off. In cross-examination Mr. Callan had professed no knowledge of the Tipp-ex or its purpose. Sure enough, on Mr. Drake’s copy there were two very important words missing, or to be more precise, a word and a date. Experts were instructed to examine the documents, but Mr. Smouha, Counsel for Mr. Drake, soon conceded that Mr. Callan had covered the two words, photo-copied the brochure and sent to Mr. Drake the photo-copy which, of course, did not show them. By this time Mr. Callan had given evidence and been released. He did not return despite Mr. Flint’s request that he should do so. The doctoring of the brochure by Mr. Callan had removed the words “until 1996” from Mr. Drake’s copy. The original read as follows:

“Sir Anthony van Dyck

(1599 - 1641)

James Stuart 4th Duke of Lennox and 1st Duke of Richmond as
Paris

Oil on canvas 40 x 29 □ inches

(101.5 x 75 cms)

Collection: In the collection of the family of the Marquess of
Bristol
from before 1819 (probably acquired by Frederick Hervey, 1st
Marquess) until 1996.” (My underlining).

9. That deletion was, of course, very material because Mr. Drake’s copy now read as though “the Painting” had been in the Marquess of Bristol’s collection until the sale to Mr. Drake, whereas the original correctly indicated it had left that collection in 1996. In fact “Agnews” had purchased it at Sothebys’ sale at Ickworth. Mr. Callan’s deception succeeded because Mr. Drake accepted, in cross-examination, that he thought he was buying “the Painting” from a country house collection. Mr. Callan’s motive, which I believe Mr. Smouha accepted, but in any event I find, was to avoid any questions on provenance by Mr. Drake the answers to which might have disclosed “Agnews” purchase of “the Painting”, discouraged Mr. Drake and cost Mr. Callan his very substantial commission. Mr. Drake accepted that Mr. Callan appeared to have been dishonest. Insofar as I have mentioned any matter in this account of events which was not admitted, I find it as a fact. The result of this turn of events was that Mr. Smouha finally abandoned any case alleging fraud against “Agnews”, which although pleaded (not by Mr. Smouha) had never looked very promising.

He also abandoned all allegations whether pleaded as terms of the contract or misrepresentations, which depended solely upon Mr. Callan's evidence; for example, that Mr. Agnew had said that "the Painting" could be returned against a full refund if there was any problem with it; or that Mr. Agnew had said that he had purchased "the Painting" privately. I should add that Mr. Agnew had always denounced these allegations as lies.

10. I now return to the issues that remain.

A. The Contract Terms

11. Since "Agnews" admit that "the Painting" was variously referred to as the painting or portrait "by van Dyck" or "by Sir Anthony van Dyck" the Claimant still alleges that it was an express term of the contract that van Dyck himself painted the portrait. Further, he alleges that the sale was a sale by description within the meaning of section 13 of The Sale of Goods Act 1979 and therefore it was an implied condition that "the Painting" should correspond with the description as painted by Sir Anthony van Dyck. The Defendant denies the above, essentially asserting that its statements leading to the sale were manifestly statements of opinion, particularly when seen in context and did not become a term of the contract.

12. I now need to give a little more detail concerning the background events and those leading up to the sale.

13. On 11th and 12th June 1996 Sothebys held a sale at Ickworth by direction of the Marquess of Bristol and the Bristol Trustees. Mr. Agnew had previously seen the Sothebys' catalogue for the sale which included as Lot 439 a painting described as:

"After Sir Anthony van Dyck (1599 - 1641)

Portrait of James Stuart, 4th Duke of Lennox and 1st Duke of Richmond as Paris

Three-quarter length wearing a white shirt and holding an apple. Oil on canvas, in a carved wood frame."

14. The catalogue in its description of "the Painting" suggested it was an early version of a half-length portrait in The Louvre. Mr. Agnew had not particularly noticed that item in the catalogue but on viewing the sale the weekend before, he was particularly struck by Lot 439. Although it was hung very high on the wall and obscured by dirt and discoloured varnish, it seemed to him to be of particularly good quality. He had the picture taken down from the wall and on examining it more closely was very impressed and considered it might be the work of van Dyck himself, rather than a studio assistant or subsequent copyist which was suggested by the use of the word "after" before Sir Anthony van Dyck in the catalogue. Mr. Agnew believed he could see a pentiment on the sitter's right shoulder which also interested him. A pentiment is a change made by an artist in the course of painting a picture. In time the top layer of paint tends to thin and the original idea or design shows through the re-painted correction. Pentiments are important because they are often considered to be pointers that the artist himself had painted the work as opposed to a studio assistant or

copyist. Mr. Agnew carried out further research on Lot 439. He went to Kenwood House in order to re-visit a picture of the same sitter in the collection there. He also checked various books available in “Agnews” library on van Dyck portraits and looked at photographs in the Witt Library in London. He discovered that the design of Lot 439 was the same as a painting in The Louvre and that museum had always considered its painting to be an original van Dyck with a provenance dating back to Louis XIV. He also discovered a description of The Louvre painting in a catalogue of an exhibition which had been written by Sir Oliver Millar, perhaps the leading expert on van Dyck’s English Period. Sir Oliver Millar had described The Louvre painting as “unexpectedly disappointing”. Mr. Agnew began to think that Lot 439 might be the first version of this particular portrait and the Louvre painting a later one. Mr. Agnew asked a colleague to telephone Sir Oliver and ask his opinion of Lot 439 only to be told that Sir Oliver had viewed “the Painting” in the past and did not accept that it was by van Dyck.

15. Notwithstanding Sir Oliver’s view Mr. Agnew, having discussed the matter with his colleagues at “Agnews”, decided to bid upto £300,000 for “the Painting”, that being the sort of price at which they considered “the Painting” could be sold if, after it had been cleaned and restored, they considered it was not an original van Dyck. In the event £30,000 secured “the Painting” at the auction. Mr. Agnew had previously agreed with another dealer, Simon Dickinson of Simon C. Dickinson Ltd., that they would buy the painting for their joint account. Mr. Dickinson had also seen “the Painting” and believed it was probably an original van Dyck.

16. Mr. Agnew had “the Painting” cleaned and restored by Sarah Walden, a very experienced picture restorer who had worked on many important pictures for “Agnews”, and who had previous experience of van Dycks. “The Painting” was returned to “Agnews” in late January 1997. Mr. Agnew caused an assistant of his to check the details of provenance and exhibitions referred to in the Ickworth sale catalogue so that these could be used in the brochure that “Agnews” would compile for “the Painting”. He also procured a transparency of “the Painting” and discussed it with various art historians and museum curators in order to gain support for his view that “the Painting” was a van Dyck. Among the experts approached were Sir Oliver Millar and Monsieur Foucart, curator of Dutch and Flemish paintings at The Louvre. Mr. Agnew took “the Painting” to The Louvre in order to compare it with the version there and in due course Monsieur Foucart was to express the opinion that both paintings were by van Dyck himself. Sir Oliver Millar, on the other hand, remained unconvinced. He and Mr. Agnew studied “the Painting” alongside the painting of the same figure in a different composition, at Kenwood House. Sir Oliver’s final view was that “the Painting” “was almost certainly painted in van Dyck’s studio and under his eye.” Mr. Agnew finalised the brochure for “the Painting” and, despite Sir Oliver’s opinion, was sufficiently encouraged by the views he had obtained and was sufficiently clear in his own opinion to put a price of £2,000,000 on “the Painting” and to market it with “Agnews” opinion as expressed in the brochure, which was that it was by Sir Anthony van Dyck himself. I do not believe any of this was really contentious, but I find it to be a factual account.

17. In view of the matters I have already described, it is no longer necessary to refer in detail to the various telephone conversations between Mr. Callan and “Agnews” leading upto the sale itself which, it is agreed, was finalised on 22nd June 1998. However, the brochure, the letter dated 19th June and, to a lesser extent, the sale invoice, are significant documents.

The Brochure

18. I have already quoted the heading of the brochure and the first paragraph “Collection”. The brochure then refers to six exhibitions in which “the Painting” appeared between 1854 and 1900. It gives literary references. There follows some historical information concerning the sitter who was a cousin of Charles I and refers to other known portraits of him by van Dyck. There are several references to Sir Oliver Millar’s book “Van Dyck in England”. There is an account of the comparison between “the Painting” and the version at The Louvre. It mentions Sir Oliver’s reference in “Van Dyck in England” to The Louvre painting as “unexpectedly disappointing”. It concludes that The Louvre picture is a subsequent version of “the Painting” and mentions that there are no apparent pentiments in The Louvre painting “while the present picture shows two majors changes made by the artist, revealed by recent cleaning”. That paragraph concludes:

“In the opinion of M. Jacques Foucart, curator of Dutch and Flemish paintings in The Louvre, both paintings are by van Dyck himself, the present picture being the earlier. A final judgment of the quality of The Louvre version would probably only be possible were it to be cleaned. Sir Oliver Millar, on the other hand, considers that both The Louvre painting and the present picture were “almost certainly painted in van Dyck’s studio under his eye” and inclines to the view that the former precedes the latter.”

There follow some comments on the difficulty of dating the portraits of Lennox in which paragraph the following appears:

“The Kenwood painting appears to be the first of the group, given the superlative quality of the sitter’s head, whereas the heads in the Metropolitan and the present picture both appear to be repetitions of this original sitting, though each with considerable variation.”

The final paragraph of the brochure is in these terms:

“The quality of the present painting means that it must be the autograph prototype of this composition, as it was considered in the many exhibitions in which it appeared in the 19th century. The assured and fluent handling of the painting of the eyes, mouth and hair, the soft and vibrant texture of the white shirt and the bravura brush strokes of the red breeches are all clear evidence of van Dyck’s own hand; an opinion reinforced by the two important pentimenti. The present picture is clearly a major rediscovered allegorical portrait of a leading member of the Caroline Court to which van Dyck devoted his as yet undiminished skills as a painter.”

The 19th June Letter

19. The first paragraph of this letter deals with another painting sold at Sothebys on 9th November 1994. Mr. Callan had queried this with “Agnews” and Mr. Agnew here points out that it was catalogued as “after Sir Anthony van Dyck” and that explained the low price it fetched. The second and main paragraph of this letter I will quote in full:

“I believe that you now have the full information on our painting, though I am, of course ready to answer any further questions you may have. As you know, it is “discovery”, or rather a “re-discovery” as it was frequently exhibited in the 19th century and, as such, it does not as yet appear in full in the literature on the artist. I have described in the brochure the very considerable amount of research I have done on the painting and the opinions of M. Foucart at The Louvre and Dr. Malcolm Rogers, formerly at the National Portrait Gallery, London, now the Director of the Fine Arts Museum, Boston. I have not mentioned two other experts on the artist who have both expressed very favourable opinions from colour transparencies; they are Dr. Walter Liedtke, Curator of Dutch and Flemish paintings at the Metropolitan Museum, New York and Dr. Arthur Wheelock who holds the same position at the National Gallery of Art, Washington, D.C. The former is obviously very familiar with the full-length portrait of the same sitter in the Museum’s collection while the latter was one of the organisers of the major van Dyck exhibition held at the National Gallery in 1990-1991. On the other hand, you are aware of Sir Oliver Millar’s opinion of our picture and the way in which he will describe it and The Louvre painting in his forthcoming book on van Dyck’s English Period Portraits, which I have quoted in our brochure. You have also seen the condition report from our restorer describing the work done to the painting shortly after we purchased it. Your client has also asked, in case he or his children might in the future want to sell the painting, whether Agnews would be willing to act on his behalf in doing so and I have said we would be happy to do so.”

The Invoice

20. The invoice was dated 22nd June 1998. Under the heading “Description” there appears:

“To the picture by Sir Anthony van Dyck (1599 - 1641) James Stuart 4th Duke of Lennox and 1st Duke of Richmond as Paris.”

and a description of the canvas together with a reference to the brochure for full details. The price is stated to be £1,500,000. Payment as agreed by 5.00 p.m. June 26th 1998.

21. Payment was duly received and a further copy of the invoice dated 25th June stamped “Received with Thanks” was sent to Mr. Callan. The first invoice had also been sent to him.

22. Mr. Smouha submitted that since “the Painting” was repeatedly described as a van Dyck the sale must fall within the ordinary meaning of the words of Section 13 of The Sale of Goods Act 1979:

“13. Sale by Description.

(1) Where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description.

1(A). As regards England and Wales and Northern Ireland, the term implied by sub section (1) above is a condition.”

Further, that in any event “Agnews” statement that “the Painting” was by van Dyck must have the effect of making that assertion an express term of the contract of sale. In addition to the references I have given, Mr. Smouha relied upon “Agnews” FAX messages dated 17th and 22nd June which referred to “the Painting” as “by van Dyck” and “the van Dyck”. He also relied upon the invoice, although obviously that is only relevant insofar as it may indicate what has gone before. It is here an accurate reflection but adds nothing new.

23. Mr. Flint submitted that the test must be objective and one must construe what was written and said in context and decide whether a contractual term was intended by the parties. He drew particular attention to the brochure and letter of 19th June and submitted they clearly set out argument and opinion, even quoting Sir Oliver’s contrary view, and that all pointed strongly away from a common intention that there should be a warranty or guarantee that van Dyck painted “the Painting”. He reminded me that various extravagant assertions by Mr. Callan, apparently calculated to fix Mr. Agnew with an oral warranty, were no longer relied upon.

24. Both Counsel referred amongst other authorities to Oscar Chess v. Williams (1957) 1 WLR 370 and Harlingdon and Leinster Enterprises Ltd. v. Christopher Hull Fine Art Ltd. (1991) 1 QB 564 to which I shall return. Mr. Flint took me back to 1797 and the words of Lord Kenyon in Jendwine v. Slade (1797) 2 Esp. 571:

“It was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be a matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. What then does the catalogue import? That, in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it.”

25. In general mere expressions of opinion or belief are not contractual; without more they do not become terms of any subsequent contract. Clearly, one party may be so confident in his opinion, for example, as to the authenticity or origin of an object or painting

that he is prepared to contract on that basis. He may have good commercial reasons for doing so. But in such cases an objective assessment of all the circumstances must point to that conclusion. The conclusion must be that the common intention of the parties was that the content of the opinion or belief was to become a term of the contract. The obvious and sensible way to achieve that result is to say so; but the courts are often called upon to resolve cases in which the parties have not so clearly expressed their intention and although it may be tempting, it is not always just to conclude that they did not have the necessary intent simply because they did not express it.

26. Obviously “Agnews” references to “the Painting” as “by van Dyck” or “a van Dyck” were expressions of opinion. No one could sensibly have believed that “Agnews” knew or had some magic formula for establishing, that van Dyck himself had painted the canvas. Insofar as it may be necessary for me to find that Mr. Drake and Mr. Callan both understood that, I do. Mr. Drake was a serious art collector and Mr. Callan a dealer who, although not experienced in Old Masters, had previously been involved in at least two contentious Old Master sales. The question is whether “Agnews” opinion became a term of the contract. There was no express statement to that effect in the documents and Mr. Callan’s suggestion that there was an oral guarantee was abandoned. That leaves for consideration whether the necessary common intention should nevertheless be imputed to the parties on an objective assessment of all the circumstances. On the facts of this case the answer to that question will also, in effect, determine whether the sale was a sale by description. Harlingdon and Leinster Enterprises Ltd. v. Christopher Hull Fine Art Ltd. (1991) 1 QB 564. See the judgments of Nourse and Slade LJ. In particular Slade LJ. at 585 B. I am, of course, bound by “Harlingdon”, but in any event I could not improve on the analysis of a sale by description within the meaning of section 13 by Slade LJ. which I gratefully adopt. As he observed at 585 C, the proper inferences to be drawn from the evidence or facts in such cases as these are matters open to debate. But, so far as I am concerned, the correct approach or question is now settled. Several authorities were drawn to my attention and I have considered the strong dissenting judgments in some of the cases, in particular “Harlingdon” and also “Oscar Chess”. As Nourse and Slade LJ. both emphasised, citing Lord Diplock in Gill and Duffus S.A. v. Berger & Co. Inc. (No. 2) (1984) AC 382 at 394, a sale must be a sale “by description” for section 13 to apply; a sale cannot be “by description” unless the parties intend the description to be a term of the contract. It is only then that the implied condition that the goods must correspond with the description arises. With respect, it seems to me that some of the dissenting judgments in the cases cited to me give insufficient weight to that basic point and proceed from the premise that because some descriptive words were used or written, the statutory implied term comes into effect. It only does so if the proper conclusion from all the evidence is that the parties intended the description to be a term of the contract. That makes good sense if one bears in mind the serious consequences that flow from a breach of the implied term, when the statute makes it a condition that the goods should correspond with the description.

27. I therefore move to consider further the circumstances of this case, to decide what intention can fairly and objectively be attributed to the parties. Apart from the subject matter, the terms of the brochure and the letter, the circumstances including the expertise of the parties are all relevant. Clearly “Agnews” is and holds itself out as a very experienced specialist dealer in Old Master paintings. Its expertise far outweighed Mr. Callan’s, as I am satisfied Mr. Agnew and Miss Naughton came to realise. However, I also find, as emerged in cross-examination, that Mr. Callan was not as ignorant concerning Old Masters as he sought to suggest in his witness statement. He had been the salesman involved in Schon

Gallery's sale of two Old Masters, a van Dyck and a Rubens. Both sales had led to disputes. I need not rehearse the details which "Agnews" or its solicitors had discovered shortly before this trial, but it is clear and I find that Mr. Callan was well aware of the significance of research, provenance and attribution in relation to Old Masters and that the opinions of art experts on attribution were important. He was probably aware of this in any event since he was experienced in selling 19th and 20th century European paintings.

28. Since Mr. Drake chose to rely on Mr. Callan to purchase "the Painting", he cannot pray in aid any greater lack of expertise and, as I understood him, Mr. Smouha does not seek to do so. In any event since he did not know he was dealing with "Agnews" until after the sale was agreed he was not relying on any special expertise of "Agnews". Indeed, he said in evidence he believed Mr. Callan was buying from a country house or estate. Reliance is, of course, very relevant (to borrow Slade LJ.'s words. page 584 H) but only insofar as it throws light on the intentions of the parties at the time of contract.

29. I must return to Mr. Callan's evidence. I have to say I was not impressed, even before his alteration of the brochure was confirmed. His evidence that Mr. Agnew had expressly denied that he bought "the Painting" at auction and asserted he had bought it privately, seemed highly improbable. Mr. Callan was himself in the art business, albeit not versed in Old Masters. Auction sales and prices are recorded in the Art Sales Index and such a lie could therefore easily be exposed. In fact Mr. Callan stated he had certain volumes of the Art Sales Index and from them had discovered the fact of the sale of the other painting attributed to van Dyck in 1994. "Agnews" reputation, as must be the case with most, if not all, leading dealers, is of the greatest importance to them. I am not implying that Mr. Agnew would, in any event, be prepared deliberately to lie to a customer; having listened to his evidence I am satisfied he would not. Also Mr. Callan's evidence that Mr. Agnew assured him that "if there were any problems with "the Painting" I could return it and he would reimburse me or my client the purchase price" always seemed unlikely in view of Mr. Agnew's firm denial and the express terms of the 19th June letter, which shows that a conversation had taken place about a resale of "the Painting" and sets out Mr. Agnew's offer in that respect. I accept Mr. Agnew's evidence that the phrase "any problems with "the Painting" is not one he would use - it is more American usage - and that he did not say any such thing. I note from Mr. Callan's witness statement that he states when Mr. Agnew gave that alleged assurance ". . . I immediately stated that my client was prepared to offer £1,500,000 for "the Painting"." That lends no support to any case based on general reliance by Mr. Callan on "Agnews" expertise or opinion as opposed to the alleged oral guarantee, since abandoned. On the evidence as a whole I am satisfied that Mr. Callan was well able to ask relevant questions and pursue at least some of his own research and did so. He probably did take "Agnews" opinion of "the Painting" into account, but knew full well it was an opinion and that there were other experts with views, in particular, Sir Oliver Millar. His witness statement confirms that Mr. Agnew told him, in answer to his own query about Sir Oliver, that he believed "the Painting" was not by van Dyck but by his assistants in his studio (paragraph 34). Whether that is correct or not Mr. Callan agreed, and I find, that he knew Sir Oliver's opinion was that van Dyck himself had not painted "the Painting".

30. I am afraid I conclude that Mr. Callan was primarily concerned to earn his very large commission and "Agnews" attribution was but one of several factors he considered in deciding to proceed with the sale. Apart from the brochure saga, this is also illustrated by the fact that he never told Mr. Drake about Sir Oliver's opinion. Mr. Drake said in evidence

that he and Mr. Callan had both pondered the words of the brochure concerning Sir Oliver's opinion and had concluded they meant that van Dyck had painted the picture. Clearly Mr. Callan deliberately allowed Mr. Drake to continue in that belief. In the light of those two very serious deceptions of Mr. Drake, I conclude that the failure to pass on the letter of 19th June was also a deliberate decision in order to avoid any questions from Mr. Drake and thus facilitate the sale.

31. In all, this sale was a very long way from one where an ignorant member of the public says to an expert dealer:

“I am afraid I can't judge whether this is a, b or c but if you say
so”

and to which the dealer replies:

“I do say so.”

32. My conclusion is that there was no term of the contract that “the Painting” was by van Dyck and it was not a sale by description. A summary of my main reasons follows:

a. “Agnews” references to “the Painting” as being by van Dyck must be construed in context that is, in the light of the fact that no reasonable buyer could suppose “Agnews” could know, as opposed to hold that opinion, and in conjunction with the brochure and the letter of 19th June;

b. A fair reading of the brochure and letter make it plain that “Agnews” attribution was an opinion, that it was based on their research and expertise but there was a contrary opinion from Sir Oliver Millar;

c. Mr. Callan was well aware of a and b;

d. The fact that “Agnews” investigated and answered Mr. Callan's query concerning another painting attributed to van Dyck, offered to answer any other questions he may have had and gave the views of other experts does not support a contract term. If there was to be a contract term, none of those would have been necessary;

e. Mr. Callan's reliance on “Agnews” was limited. In any event it was not a reliance in the sense that he believed he had any guarantee of authorship, rather that he thought “Agnews” may well be right and if he could close the deal, he would secure his substantial commission. Mr. Callan based his assertion of reliance squarely on Mr. Agnew's alleged oral guarantee which was, rightly, abandoned.

33. As Mr. Flint pointed out it would be a remarkable outcome if a buyer, informed at the time of such a sale of another expert's contrary view, could later set aside the sale or claim

damages based on that same expert's views. I shall have to deal with the vexed question of authorship later, but since Sir Oliver Millar is Mr. Drake's expert in this case, that is precisely what has happened. It was always possible that Sir Oliver was right; Mr. Callan knew that at the time.

B. Misrepresentation

34. The remaining case based on misrepresentation is founded on the documents, save where "Agnews" admit an oral statement. From the latest proffered draft Re-Amended Statement of Claim, for which I gave leave, and Mr. Smouha's clarification of it, an exercise which I must say became increasingly difficult as each new version appeared, I glean the following:

- i. Mr. Callan is said to have relied on certain representations;
- ii. Those representations are:
 - a. That Miss Naughton said "the Painting" was by Sir Anthony van Dyck.
 - b. That in a FAX message of 17th June Miss Naughton said, referring to the brochure, "this contains all the information we have on the picture but if you need anything else or have any questions, please do let us know."
 - c. That in the letter of 19th June Mr. Agnew stated "I believe that you now have the full information on our painting, though I am of course ready to answer any further questions you may have."
- iii. Contrary to ii a "the Painting" is not by van Dyck;
- iv. Contrary to ii b and c Mr. Callan was not given the "full information" or "all the information" in that:
 - a. "The Painting" had been purchased at auction by "Agnews" for £30,000;
 - b. "The Painting" was described in Sothebys' catalogue for that auction as "after Sir Anthony van Dyck";
 - c. Mr. Agnew did not disclose that Dr. Brown, Chief Curator at the National Gallery had told him that "the Painting" was largely the work of van Dyck's assistants, although van Dyck may have completed the face and hands.

Despite Mr. Smouha's assistance I remain unclear as to precisely what representation, if any, is said to arise from Mr. Agnew's reference in the 19th June letter to the sale of a picture in 1994 as "not relevant" to "the Painting", but I will assume this is still maintained. Similarly, the pleading referred to the reference in the 19th June letter to Dr. Wheelock and Dr. Liedtke having expressed "very favourable opinions". I take it this implies their views could not fairly be so described. There is also a reference to Sir Oliver Millar's letter to "Agnews" dated 24th January 1998 in which he explained his opinion that "the Painting" was not by van Dyck himself.

35. I will deal with these allegations in the order I have identified them above:

i. Miss Naughton's oral statement clearly falls to be construed in the overall context. It was opinion and honestly held. This allegation fails;

ii. The auction allegation: I have already described how Mr. Agnew purchased "the Painting" at Sothebys' Ickworth sale for £30,000 and that it was catalogued as "after van Dyck". The fact that Agnews did not mention the details of its purchase of "the Painting" in 1996 does not in my judgment make the references to "the full" or "all" the information on the picture, a misrepresentation. I consider that the natural meaning of "Agnews'" statement is that they are passing on relevant information they have about the picture itself, that is essentially the type of information in the brochure, not information as to how "Agnews" acquired it, less still for how much. In any event since it was manifest that information had not been given, it should have been obvious to the reader that "Agnews" did not regard it as falling within "full information on our painting/picture". The reader was told on each occasion that he could ask any further questions. Further, I can see no basis for the suggestion that Mr. Callan was reasonably entitled to infer that "Agnews" had purchased "the Painting" in any particular circumstances. It is after all not unusual for dealers to buy items at auction, which by virtue of their own expertise, they recognise as an object or painting better and far more valuable than the catalogue description suggests. Since Mr. Callan did not ask for this information, it is very hard to see how it can be said he relied on any particular aspect of it. These allegations were really founded on Mr. Callan's evidence that he did ask and was lied to by Mr. Agnew, which allegation was withdrawn. It cannot convincingly be said that dealers of any variety can be expected to give this type of information. In fact, Mr. Agnew said that he did not volunteer it because it would simply have given Mr. Callan a bargaining counter, but if he had asked he would of course have told him. It was after all in the public domain, through the medium of the Art Sales Index to which I will return.

iii. As to Dr. Brown, the position is unfortunately unclear in that Dr. Brown's and Mr. Agnew's recollection of their meeting differs. Mr. Agnew refers to the meeting in his witness statement and simply states that Dr. Brown thought "the Painting" of good quality but would defer to Sir Oliver Millar's opinion on English van Dyck portraits.

Dr. Brown frankly stated in evidence that he did not have a clear recollection of the meeting, which was prior to the sale to the Defendant. He did not recall references to Sir Oliver Millar, but did say that Mr. Agnew could have had no other view afterwards than that he believed the picture to come from van Dyck's studio. He did say that van Dyck himself may have completed the face and hands in accordance with his studio practice. He would not have wanted any opinion of his to be used in a sale or dealer's catalogue or brochure. Mr. Agnew said that he did not refer to Dr. Brown in the brochure because since he deferred to Sir Oliver it took the matter no further. It was not suggested to either witness that he was lying and I conclude there is room for either faulty recollection or misunderstanding, more likely the latter. Dr. Brown is satisfied that Mr. Agnew must have understood his view from their meeting, Mr. Agnew says he did not understand more than Dr. Brown stated. Mr. Dickinson said in evidence that Mr. Agnew told him that Dr. Brown was noncommittal. In all the circumstances I am not satisfied on the evidence that a misrepresentation is established. Further, I find that a reasonable reader of the brochure and letter would not expect that "Agnews" had mentioned every single conversation or piece of research on "the Painting", and could not expect a reference to someone who had not wished to be mentioned. I also bear in mind that "Agnews" twice expressly invited Mr. Callan to ask for any further information he required and that Mr. Agnew's letter of 19th June stated "I believe you now have". (My emphasis).

iv. The 19th June letter: it seems clear to me that since "Agnews" enquiries had revealed that the picture in the 1994 sale was catalogued as "after Sir Anthony van Dyck", it was not relevant to "the Painting" which in their opinion was by van Dyck himself. As to the reference to Dr. Liedtke and Dr. Wheelock; Mr. Agnew's evidence was that Dr. Liedtke had told him that he considered "the Painting" very likely to be by van Dyck and Dr. Wheelock had said he had a very favourable impression of the quality of "the Painting". I accept that evidence, which was not challenged. The letter states that their views were expressed on the basis of a transparency and again I can find no misrepresentation here.

v. As to Sir Oliver Millar's letter, both the brochure and the 19th June letter made plain his opinion.

36. There is a further important aspect of any misrepresentation claim, namely, reliance. Mr. Flint rightly laid emphasis on this in his closing submissions. As he pointed out, the pleaded claim is based on reliance by Mr. Callan. That is almost inevitable since Mr. Drake was in America, he very largely left the matter in Mr. Callan's hands and, as I have described, did not know that "Agnews" were the sellers until later. Mr. Flint's general submission was that since reliance can only be established by Mr. Callan's evidence, the case in that respect is "fatally flawed". I do not accept that entirely, but I do accept that Mr. Callan's evidence on reliance needs to be carefully scrutinised and considered in the light of what is now known about his actions. Further, I do find that Mr. Callan's assertions

concerning oral statements made to him by Mr. Agnew, upon which the misrepresentation case was originally based, were untrue. The most important of these were the allegations concerning the alleged private purchase of “the Painting” by “Agnews” and Mr. Agnew’s alleged oral guarantee. I make those findings having heard Mr. Agnew and Mr. Callan give evidence and not just because Mr. Smouha withdrew the allegations.

37. In addition to the findings I have already made about Mr. Callan’s motives and state of mind concerning “Agnews” opinion on “the Painting”, I also find that Mr. Callan knew that “Agnews” had purchased “the Painting” at auction in 1996 for £30,000. I make that finding essentially for the reasons Mr. Flint set out in his closing submissions: Mr. Callan, in evidence, admitted that he knew he could readily obtain information about sales that had taken place through Sothebys and Christies, but had not bothered to enquire because he was told by Mr. Agnew that “Agnews” had acquired “the Painting” privately; that explanation can no longer stand since the allegations against Mr. Agnew have been withdrawn and I have found it to be untrue; further, Mr. Callan’s doctoring of the brochure demonstrates his interest in the date, 1996, and it is improbable, to put it at the lowest, that he would check the Art Sales Index for some earlier years, as he admitted, but not for 1996; I do not accept the account in his witness statement that he did not have the 1996 Edition; it had been published in October 1996, was a standard reference work, was readily available for about £120 and he had earlier editions. If contrary to that finding he did not look at the 1996 Edition, having checked the 1994 Edition and discovered the other sale, the irresistible conclusion would be that he chose not to because he was determined that the sale should go through and earn him his commission. Thus, either way, reliance could not be established in relation to the auction allegation.

38. Since Mr. Callan deliberately chose not to explain Sir Oliver Millar’s adverse opinion to Mr. Drake, I cannot imagine he relied upon or would have passed on Dr. Brown’s view, whether it was as Dr. Brown recalls or simply a non-committal deference to Sir Oliver’s opinion. Mr. Callan had clearly decided that this was a deal he would complete and trust that Mr. Drake would not investigate after the event, or if he did, that Mr. Agnew and M. Foucart and others who had been impressed by “the Painting”, were right. In short, it would have taken information far more dramatic than Mr. Agnew had at his fingertips to have put Mr. Callan off this sale.

39. Mr. Smouha in closing, valiantly tried to bring in reliance by Mr. Drake. I cannot see that it would add anything, even if it had been particularised in the pleading. Mr. Drake only had the brochure. He relied on what Mr. Callan told him. “Agnews” cannot be responsible for the deceptions of Mr. Drake’s own agent. In any event, from Mr. Drake’s evidence as a whole it is clear that he thought and relied upon the belief that he was buying a van Dyck guaranteed by the seller who turned out to be “Agnews”. That belief was wrong but was engendered by Mr. Callan not “Agnews”.

40. There remained a pleaded claim that “the Painting” would be of satisfactory quality and fit for the purpose for which it was sold, namely as an Old Master fit for collection by the Claimant. Mr. Smouha did not seek to support this claim in his closing submissions, rightly in my view. If the section 13 claim had succeeded he would not have needed it. As it is, it cannot stand as an independent claim. The only criticism of “the Painting” is that it is not a van Dyck. If it was not a sale by description and there is no term of the contract to that

effect, no other criticism could be sustained. It is, on any view, a fine painting as both experts agreed. It is suitable for display and appreciation in its own right.

C. Van Dyck or not ?

41. In seeking to resolve this issue I am immediately confronted by another very unusual feature of this case. Both experts, namely Sir Oliver Millar instructed by the Claimant and Julian Agnew by the Defendant have both been involved in the affair and thus gave factual as well as expert evidence. Further, although their integrity was not challenged, it was put to each of them in cross-examination that they could not be wholly objective because of their prior involvement. Sir Oliver had expressed an adverse opinion on “the Painting” in the past and had been approached for his opinion by Sothebys before the Ickworth sale. He had also given his opinion to “Agnews” after its purchase of “the Painting” and after it had been cleaned. It could be said that an acknowledged expert would not be too ready to change his opinion and thus acknowledge an earlier misjudgement. In particular, Sothebys had catalogued “the Painting” as “after Sir Anthony van Dyck” (i.e. not by Sir Anthony van Dyck) after seeking Sir Oliver’s advice. It sold for £30,000. Quite soon afterwards “Agnews” was, in effect, marketing it for £2,000,000. Obviously, there was, and perhaps remains, scope for embarrassment if “the Painting” were then to be acknowledged by Sir Oliver as by van Dyck. On the other side, Julian Agnew is Chairman of “Agnews”. It is essentially a family firm in that almost all the shares are held by or on behalf of the family. It was Julian Agnew who discovered “the Painting” and bought it on “Agnews” behalf and it was upon his opinion or conviction that it was marketed as by van Dyck. It would be inaccurate, but not wholly inappropriate, to describe him as the Defendant.

42. No point was taken by either side as to the admissibility of the other’s evidence as “expert evidence”, but the obvious points as to weight and objectivity were politely canvassed. Having heard the evidence, I say at once that I found no reason to doubt the integrity of either witness. Clearly each was convinced he was right. In this case, it was agreed that the authorship or attribution of “the Painting” depended upon the eye of the beholder, consequently, it was unfortunate that an expert with no prior involvement with “the Painting” was not available to the court. That is not intended as any criticism of the two experts, it is a reflection of the fact that the number of acknowledged experts on van Dyck is limited and most had some involvement with “the Painting” or were in posts at museums which would not wish them to be involved in such a case. The fact remains that it is a common and accepted phenomenon that if an individual has a reason or motive for wishing to see or not see something in a situation or an object he is more likely to see or not see it as the case may be. Psychologists would explain it. I accept it. Sir Oliver and Mr. Agnew would respond that their professionalism enables them to overcome any such psychological phenomenon. I bear all the above factors in mind in approaching this part of the evidence.

43. Attribution of an Old Master can depend on various matters, including: provenance, historical research and the experienced eye of an expert, usually a trained art historian. In this case neither provenance nor history gives an answer or even very much help. The knowledge of van Dyck’s studio practice which art historians have acquired is certainly of some assistance, but in the end, both Sir Oliver and Mr. Agnew agreed the matter was to be resolved by “eye”. From listening to them both I understood that to mean rather more than just observation. Whilst it is vital to have keen observation it is also necessary to have

knowledge of an artist's methods and style and to be sufficiently familiar with his work to be able to recognise his artistic "handwriting". Even that is not all. It involves also a sensitivity to such concepts as quality, emotion, mood and atmosphere. To an extent "eye" can be developed but, like many other human attributes it is partly born in a man or woman. Were it otherwise there would be many more true experts. This is not a digression. It is rather important to my function in this case. A judge is not bound by expert opinion. A judge may presume to find that an expert's final opinion is based on illogical or even irrational reasoning and reject it. But a judge should not himself assume an expertise he does not possess. Thus here, if the question had turned on analysis of historical data or inferences to be drawn from surviving documents, I would have been entitled, with such assistance from the experts as I had received, to have drawn my own conclusions; but it does not. It turns on "eye". However I may regard my own taste or appreciation of things artistic, I must not presume to have an expert's "eye" for a van Dyck. It is against that background that Mr. Smouha was able to submit that unless I considered Sir Oliver was destroyed in cross-examination I was, in effect, bound to accept his view because he was acknowledged to be the greater expert on van Dyck.

44. It is unnecessary to review the respective CV's of the two experts. They have both spent their lives in the art world. Mr. Agnew, as I have mentioned, is Chairman of "Agnews", the renowned dealer in Old Masters. He has a special interest in van Dyck and has over the years acquired a great knowledge and expertise concerning his paintings. Sir Oliver, who is the Surveyor Emeritus of the Queen's Pictures has spent a lifetime studying and writing about van Dyck, in particular, among painters working in England in the Stuart Period. He is currently compiling the relevant part of the forthcoming Catalogue Raisonne on van Dyck. It is agreed that Sir Oliver is one of, if not the leading expert on van Dyck's English Period. Without in any way bowing to Sir Oliver's opinion on "the Painting", Mr. Agnew did acknowledge that on questions of attribution of van Dyck's English Period paintings Sir Oliver is the acknowledged expert.

45. In this particular case, which turns on the subjective assessment or "eye" of the two experts, there is considerable force in Mr. Smouha's submission. However, I cannot entirely shirk the issue. I felt bound to listen to the experts' reasons for reaching their respective views on "the Painting" and much enjoyed the visit to Kenwood to which I was treated in order to view "the Painting" hanging alongside another of the same sitter in a different pose, but which is acknowledged to be by van Dyck himself. The head is almost identical and it was agreed that it was reproduced, at least, in "the Painting" and The Louvre version of the same composition as "the Painting". As Mr. Agnew appropriately observed, I was treated to a masterclass on van Dyck, these two paintings in particular. Sir Oliver pointed out the differences between the two paintings with particular emphasis on the head, the neck, collar and jewel and explained why he felt "the Painting" "unsatisfactory" or of lesser quality and not displaying van Dyck's "handwriting" albeit "the Painting" as a whole was of fine quality and clearly painted by a very competent assistant in van Dyck's studio. Mr. Agnew, in turn, pointed to particular features including the hand, inevitably holding an apple, the shirt, breeches and background, which to him clearly displayed van Dyck's own hand. He conceded the head was of lesser quality than the head in the Kenwood picture but pointed out that since all were agreed that Kenwood was the prototype for the head and "the Painting" would probably not have been done "ad vivum", the subtle difference was almost inevitable. Mr. Agnew said he simply could not see the differences to which Sir Oliver had referred, a point on which Mr. Smouha relied. However, I did not take him literally. I think he meant they were not significant or could be accounted for by the fact that "the Painting" was a

“repetition” (as opposed to a copy which would be by someone else). I say that because, once pointed out, I could see the differences to which Sir Oliver referred me. They were not so subtle as to be invisible to the inexpert. The expertise lies in spotting them in the first place and assessing their significance. Vitality, brushwork, spontaneity, mood and atmosphere were talked of. Once back in court other matters were canvassed with the experts, in particular van Dyck’s studio practice. I do not propose to go into detail, but I believe it was effectively agreed that due to the demand for van Dyck’s portraits during his stay in England it was necessary for him to set up a studio with assistants. It is probably fair to assume that later in the period his assistants did more of the work, possibly to the extent of painting most of a portrait and leaving just the head and perhaps a hand or hands for the Master himself. However, even in the earlier years it appears to have been common for patrons or sitters to require more than one portrait. In such cases further copies or repetitions would be produced. Sometimes van Dyck himself would do the work in which case it is referred to by art historians as a repetition. If it was done by another artist, that is one of van Dyck’s assistants, it is called a copy. Sometimes a different composition would be produced for the same sitter but using the head from an earlier picture. Again the later version may be by van Dyck himself or an assistant. I need not delve further into the more subtle combinations of work by van Dyck and his assistants that were canvassed in evidence, but it is in this context that pentiments are important to the experts. My conclusion from listening to them is that a discovered pentiment is usually regarded as some evidence that the Master himself as opposed to an assistant or later copyist, completed the work. It is assumed to be unlikely that a copyist would make a change in the work whereas the Master may well do so. The more significant the change or pentiment the more likely it is that the artist himself was at work. Here Mr. Agnew placed considerable stress on the two pentiments that I described earlier. Sir Oliver was not persuaded that they were of sufficient importance to outweigh his judgment on “the Painting” as a whole. Clearly, a change could be made by an assistant in van Dyck’s studio in different circumstances. For example, he might make a change simply correcting a minor mistake. Van Dyck himself, under whose eye the work was being done, might suggest a small change to the assistant or, conceivably, one of the more competent assistants might make some change of his own initiative. On such matters as these even the experts are speculating.

46. I was impressed by Mr. Agnew’s expertise and obvious love of his subject. On the other hand, Sir Oliver was able to lead me to at least some of the aspects of “the Painting” which he believed to be of lesser quality than van Dyck himself would have produced. Whilst I could in some cases see for myself the difference between the Kenwood picture and “the Painting”, the significance of these matters is for the experts. For example, whether the Ickworth painting appears less good because it is a repetition, through over cleaning or because it is not by van Dyck’s own hand, are matters where real expertise comes into its own. Mr. Flint sought to undermine Sir Oliver’s evidence because his opinion that “the Painting” was the work of a studio assistant under van Dyck’s eye implied that there must be an original, painted by van Dyck himself, of this particular composition; since no such original has been found, despite all the research into van Dyck’s works, it is unlikely that such an original ever existed and hence the implied premise of Sir Oliver’s opinion must be wrong. I do not accept the argument as detracting from Sir Oliver’s view. As Sir Oliver pointed out there are several examples of lost originals. That is examples of copies or repetitions where it is agreed amongst experts that an original must exist but has not been found. As he stressed, his view is based firmly on his own assessment of the quality of “the Painting” drawing upon a lifetime’s study and experience of van Dyck’s work and the advantage of having seen all bar one of the Master’s known English Period works. Sir

Oliver's experience, knowledge and general expertise concerning van Dyck's English Period are unrivalled. In the end I am satisfied that I should accept his evidence and conclude that "the Painting" should not be attributed to van Dyck. In fairness to Mr. Agnew, to whom I am grateful for all his assistance, I should say that in reaching that conclusion I have been significantly influenced by the acknowledged greater expertise that Sir Oliver possesses in relation to these works. My decision is a legal one based upon the evidence and the circumstances of the experts that I have described. I hope I have resisted the temptation to use the "eye" for van Dyck that I have now acquired from two such distinguished and patient teachers.

D. Quantum

47. I heard evidence from the expert valuers; Mr. Rollo-Smith for the Claimant and Mr. Harry Smith for the Defendant. I shall deal shortly with this topic for the sake of completeness, notwithstanding my findings. Counsel were, I believe, agreed that the appropriate measure of damages would be the difference between £1,500,000 and the present value of "the Painting". The approach of the experts was to look for "comparables", for which purpose they referred to such sales data as was available to them. They also had to make various assumptions about the attribution of "the Painting" and give their best estimate of value for those assumptions. Since there was no very close recent "comparable" it was a difficult and inexact exercise. Although I have factual evidence of the views of several other van Dyck experts, not all of those would be prepared to be quoted in the commercial market. It thus becomes a speculative exercise to attempt an assessment of what a seller could reasonably realise for "the Painting". I also bear in mind that Mr. Agnew and Mr. Dickinson were prepared to bid up to £350,000 for "the Painting", slightly more than Mr. Agnew had agreed with his colleagues at "Agnews". Mr. Agnew's evidence was that "Agnews" had decided that £300,000 was the price they all thought "the Painting" could realise if it was not a van Dyck. The premise on which I proceed is that "the Painting" is not a van Dyck but is in good condition and a fine early studio copy. It could perhaps even be marketed on the basis that its quality might suggest that van Dyck himself could have contributed something to it. I do not regard the sale to Mr. Drake as any safe indicator, given the peculiar circumstances that Mr. Callan brought to that sale. The only other fact I have is that it sold for £30,000 at the Ickworth sale. However, it has since been cleaned, the pentiments have been discovered and it is always possible that a speculative buyer might be found. By speculative buyer I mean someone who would be aware of "Agnews'" own opinion and that there are other more or less favourable views on "the Painting". Such a buyer might be prepared to pay a premium in the hope that at some future time "the Painting" might be accepted as a van Dyck. I place no great weight on this last factor. I do not overlook the fact, as I take it to be, that it will in the near future be catalogued as a studio work in the forthcoming Catalogue Raisonne.

48. In all the circumstances the best assessment I can make is £275,000.

E. Conclusions

49. I have found that "the Painting" is not by van Dyck. It is a fine early studio work. However, since I held that there was no term in the contract of sale that it was a van Dyck,

that it was not a sale by description and that there were no misrepresentations; the claim must fail.

50. I have some sympathy for Mr. Drake's straight forward view that despite Mr. Callan's strange part in all this, he considers he was sold a van Dyck but he hasn't got one. However, Mr. Drake's perception of the sale was the one Mr. Callan dishonestly gave him. There never was any guarantee; there never was an undertaking that if there were any problems with "the Painting" "Agnews" would take it back; that was the basis on which Mr. Drake had dealt with Mr. Callan in New Orleans; it was not the basis upon which Mr. Callan dealt with "Agnews".

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