Neutral Citation Number: [2012] EWHC 2198 (Ch)

Case No: HC10C01961

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building, Royal Courts of Justice,
7 Rolls Buildings, Fetter Lane, London EC4A 1NL

Date: 27/07/2012

Before :

MR JUSTICE NEWEY

- -

Between :

AVRORA FINE ARTS INVESTMENT LIMITED	**Claimant**
- and -	
CHRISTIE, MANSON & WOODS LIMITED	**Defendant**

- -
- -

Mr Henry Legge QC and Mr Jordan Holland (instructed by **Kerman & Co LLP**) for the **Claimant**
Mr James Aldridge and Mr Anton Dudnikov (instructed by **Stephenson Harwood LLP**) for the **Defendant**

Hearing dates: 25-27 and 30 April and 2-4, 8-11, 14-17, 24 and 25 May 2012

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Judgment

Mr Justice Newey :

1. This case concerns a painting called "Odalisque" which the claimant, Avrora Fine Arts Investment Limited ("Avrora"), bought at auction in 2005. The painting was said to be by the Russian artist Boris Mikhailovich Kustodiev, and the defendant, Christie, Manson & Woods Limited ("Christie's"), which conducted the auction, had sufficient confidence in the attribution to warrant its correctness. Avrora now believes, however, that "Odalisque" was not in fact Kustodiev's work. It therefore seeks to cancel its purchase of the painting pursuant to the warranty it was given. It also makes claims against Christie's for negligence and under the Misrepresentation Act 1967.

Basic facts

2. "Odalisque" shows a nude woman asleep on a bed behind partially-open curtains. On the right-hand side of the painting, there is a stove with a niche containing a vase. In front of the bed, there is a Turkmen carpet on which a pair of green shoes stands. Also in the foreground is a chair on which clothes, including a fur coat, have been piled. A mirror hangs on the wall behind the woman. In the bottom left-hand corner, there is a small inscription reading "B. Kustodiev – 1919".

3. Kustodiev, whose name appears in the inscription, was born in Astrakhan in 1878. Within a year of his birth, his father had died, as a result of which Kustodiev's mother

took him and his three siblings to live in part of the house of a local merchant. In his late teens, Kustodiev arrived in St Petersburg and entered the Academy of Arts there. The city remained his home until his death in 1927 aged 49.

4. Kustodiev began to suffer from spinal tuberculosis in 1909, when he was 31. By 1916 the illness had caused him to be paralysed from the waist down, and he was forced to use a wheelchair for the rest of his life. This, however, did not prevent him from continuing to paint well. In fact, Mrs Alisa Lyubimova, who gave expert evidence, considers that Kustodiev was at his most creative in the period 1915-1921.

5. Kustodiev was recognised as a hugely important artist in his own lifetime. He belonged to (or at least was connected with) the Russian "World of Art" ("Mir Iskusstva") movement. He produced work in a wide variety of genres, including portraits, works with an element of folk art and works echoing the Venetian Old Masters.

6. Kustodiev is much better known within Russia than outside it. Mr Max Rutherston, another of the experts who gave evidence, drew an analogy between Kustodiev and L.S. Lowry. He suggested that Kustodiev "is to the Russians what Laurence Stephen Lowry is to the English in terms of affection in which he is held".

7. There was only one solo Kustodiev exhibition during the artist's lifetime: in Petrograd (formerly St Petersburg) in 1920. Two exhibitions of Kustodiev's work were held in Russia in the years immediately after his death: in Leningrad (as Petrograd had become) in 1928 and in Moscow in 1929. The Moscow exhibition was limited in scope and included only one Kustodiev work from 1919. The Leningrad exhibition, in contrast, was substantial: as many as 1,030 works were gathered at the State Russian Museum.

8. Two friends of Kustodiev, Fedor Notgaft and Vsevolod Voinov, were instrumental in documenting the artist's personal and professional history while he was alive. Notgaft's career included posts at the Commission for the Protection of Artistic Heritage and the Committee for the Popularisation of Art Books; he also played a leading role in overhauling St Petersburg's Hermitage Museum following the Russian Revolution in 1917. He had, however, met Kustodiev well before the Revolution, in 1905, and by 1906 he had taken responsibility for maintaining a record of his friend's works, with the active participation of both Kustodiev himself and Kustodiev's wife Yulia. Notgaft later recalled:

> "[W]ith the help of [Yulia Kustodieva's] notes and exhibition catalogues I was able to compile a quite complete list of all … the principal paintings. Gradually the list expanded as here and there we were able to obtain information about the whereabouts of a painting which had been sold or presented as a gift to someone. All new paintings were recorded without delay. I maintained the list until 1922, when V.V. Voinov, by order of the Committee for the Popularisation of Arts Books, began writing a monograph about [Kustodiev], and from then on the recording of [Kustodiev's] works passed to him".

9. Having worked both before and after the Revolution at the Hermitage Museum, Voinov moved to the State Russian Museum, also in what was by then Petrograd, in 1922. He was an artist in his own right, but he wrote extensively about the history of Russian art and contemporary artists. Voinov's monograph on Kustodiev was published in December 1925. By then, he had been visiting Kustodiev at his home for some five years, often on a daily basis, and committing to his journals accounts of a vast number of conversations with Kustodiev. He further maintained a list of Kustodiev's works as Notgaft had previously done.

10. "Odalisque" was exhibited in Riga, the capital of Latvia, in 1932. Latvia had formed part of the Russian Empire until 1920, but it then gained its independence. In the 1940s, however, Latvia was successively occupied by Russian and German forces, and it was subsequently incorporated into the Soviet Union.

11. The event at which "Odalisque" was exhibited, entitled "Exhibition of Russian Painting of the Last Two Centuries", was curated by a group called "Acropolis" and took place at the Riga City Museum between 4 and 18 December 1932. The catalogue for the exhibition shows that it comprised some 243 works, including four items attributed to Kustodiev. One of these, an oil painting bearing the name "Beauty", was provided by a Leo Maskovsky, who also contributed 42 of the other works on display.

12. The exhibition was covered at the time in the Riga press. A Russian-language newspaper called "Today" published an article on the exhibition on 10 December 1932, and the edition of 18 December included a reference to a "wonderful exhibition of Russian paintings at the Riga museum". An evening sister paper, "This Evening", had contained a review of the exhibition on 7 December. A Latvian-language newspaper, "Pedeja Bridi", featured the exhibition in its 11 December edition, and it also featured in another Latvian-language publication. The German-language "Rigasche Rundschau" covered the exhibition on 12 December. The articles in "Today" and "Pedeja Bridi" were both illustrated with images of a painting called "Beauty", and it is reasonably clear that the painting in question is "Odalisque". Kustodiev was also referred to in the text of the article in "Today", in this passage:

> "Then follows everybody else from the 'World of Art' ('Mir Iskusstva') – Kustodiev, Lancere, Dobuzhinsky, costumes by Bakst, Serovsky and his portrait of Korzinkina, two pictures by Sudeikin and four by Somov (out of which *Nega* (*Bliss*) and *Marquise's Dream* are particularly impressive".

"Rigasche Rundschau" wrote:

> "'Mir Isskustwa' represents the heirloom of the Peredwischniki, one of its pillars has always been [Kustodiev] – amongst his paintings the 'Krassawiza' [i.e. "Beauty"] has to be stressed …".

13. The review in "This Evening" included this:

> "The people from Acropolis owe this passionate collector [i.e. Maskovsky] a very great deal. 50 canvasses from the best Russian artists, forming his entire collection, adorn their

> exhibition. […] And they [the 'Acropolis' people] themselves admit that the main 'giants' upon the backs of which the exhibition rests are the collections of L. Maskovsky, L. Schultz, V. Vasilyev, and D. Kopylovich".

Maskovsky was also referred to in the following passage:

> "Maskovsky, who is originally from Riga, collected Russian paintings for many years. He was buying everywhere – in Moscow, Riga, Paris.
>
> Sometimes he managed to find pictures by Russian artists in a most peculiar way. The exhibition features six Levitans from Maskovsky's collection. One of these Levitans Maskovsky found by pure chance. When being a guest at some house, he saw a picture pinned to the door. The painting was covered with dirt because of flies and was in the poorest condition. Having looked closer at the work, Maskovsky realised that he sees a genuine work by Levitan.
>
> In Moscow, Maskovsky bought pictures at auctions and under the Bolshevik regime he acquired several important works. In fact, Maskovsky was bidding on the big painting by Svedomsky *The Slave Dance* in the style of Semirandsky (also in the exhibition) at one of the auctions in Soviet Moscow. The picture, however, went to another bidder. Maskovsky then left to Riga where he finally acquired the work from his more successful opponent (another bidder) who had already managed to transfer the painting to Latvia".

14. Maskovsky featured in the Riga telephone directory for 1932, and also those for subsequent years up to 1939.

15. Various books on Kustodiev have been published since his death. It is common ground that the most important of these is a catalogue raisonné by Mark Etkind. The first edition of this was published in Russia in 1960, with a second edition in 1982; an English version appeared in 1983. There are also major works on Kustodiev by Victoria Lebedeva, books by whom were published in 1961 (in Russian), 1965 (again in Russian) and 1981 (in English), and Vladimir Kruglov, a book by whom was published in 2007.

16. There are points at which Etkind's writings are obviously a product of their (Soviet) era. For example, after referring to Kustodiev's "major paintings of the early 1920s which elaborated the motif of the festive procession of the people who had won their revolution", Etkind said this in his English book:

> "The artist glorified the rejoicing people, who were raised by the revolution to the crest of the wave of history; the painter of joy and love for life, of festivals and the crowd, Kustodiev wanted to depict the revolution as the historic festival of

> working people, and in fulfilling this task he saw his way towards Soviet art.
>
> The grave illness which has struck him long before, prevented him from observing the new life, and it put a tragic end to his pursuit of new optimistic art, an art of high social significance. The pictures that he did manage to complete, ill as he was and confined to his wheelchair in a badly heated studio, were acts of true heroism and he could do no more".

17. Christie's became aware of "Odalisque" in 1989. In June of that year, Mr Alexis de Tiesenhausen, a member of Christie's' Russian department, visited Mrs Vally Maskovsky at her flat in Germany. Unsurprisingly, Mr de Tiesenhausen's recollection of the meeting is limited, but he was very struck by the collection of Russian paintings in the flat. As he remembers events, Mrs Maskovsky explained that her husband, who had died in 1972, had assembled a large collection of Russian paintings; that she and her husband had lived in Riga (and perhaps also that they had previously lived in Russia); that they had had to leave Riga in a rush; and that she was willing to sell the remaining pictures so that she could afford to move into a nursing home. Impressed by the quality of the paintings, Mr de Tiesenhausen said that Mrs Maskovsky need sell only a few of them and selected three that he thought would between them raise the money Mrs Maskovsky wanted. One of the three was "Odalisque".

18. "Odalisque" (described simply as "Reclining Nude in Bed") was auctioned at Christie's in London on 5 October 1989. The catalogue attributed the painting to Kustodiev and observed that a 1915 drawing in the Brodsky Museum in Leningrad, "Reclining Nude", "appears to be the study for the … painting". The catalogue entry also included this:

> "LITERATURE:
> V. Lebedeva, *Boris Kustodiev* (Moscow, 1981), p. 39-41
>
> This painting is one of the best examples of Kustodiev's idea of the provincial merchant class. The body of this merchant woman is an eloquent image of the sloth and self-satisfaction of the entire merchant class. The blue hues, which prevail in the picture's colour scheme, convey a feeling of stifling warmth, filling the room. The woman's body and accessories which surround her and complement one another, create an integral artistic image, the pale pink form of her body is moved into the foreground and is outlined by soft contours (V. Lebedeva, *op. cit.*)".

As Christie's accept, this part of the catalogue entry was unsatisfactory. It suggested that "Odalisque" was referred to in the relevant book by Mrs Lebedeva, but the pages from which the passage was drawn in fact related to a quite different painting and, for that reason, spoke of "pink hues" rather than "blue hues". When giving evidence, Mr de Tiesenhausen suggested that the word "comparative" had been omitted by mistake and that a proof-reader had erroneously changed "pink" to "blue" without appreciating that the passage was a quotation.

19. An estimate of £12,000-15,000 was given. In the event, "Odalisque" fetched £19,000. It was bought by the Asseily family, who are private collectors.

20. In 2005 Christie's was commissioned to re-sell "Odalisque" for the Asseily family. Mr de Tiesenhausen described the painting in an internal email as "without doubt, a trophy painting for a russian sale".

21. At this stage, Mr de Tiesenhausen, by now head of Christie's' London and New York Russian departments, christened the painting "Odalisque" and it appeared as such in the catalogue. On this occasion, Kustodiev's name appeared in the catalogue in upper case, indicating that Christie's was giving a warranty, and there was reference to "Collection of Leo Maskovskii" in respect of provenance. As before, the notes explained that the painting appeared to have been based on the 1915 drawing, "Reclining Nude" ("the Brodsky Drawing"). The notes also stated that Maskovsky had "left Russia during the revolution and acquired an important collection of Russian paintings in the Baltic countries in the 1920s, including the present painting". An estimate of £180,000-220,000 was given, but Mr de Tiesenhausen expected that the painting might quite possibly make double or triple this. In the event, the bidding went still higher. Avrora ultimately bought "Odalisque" for £1.5 million. A buyer's premium of £220,900 (or £188,000 plus VAT) was also paid.

22. Avrora is incorporated in the British Virgin Islands. Its ultimate beneficial owner is Mr Viktor Vekselberg, a very wealthy Russian. The company set about building up a collection of Russian art, making its first purchase in April 2005, but its activities have been wound down in the last couple of years. Avrora was represented at the auction by Mr Andre Ruzhnikov and Mr Vladimir Voronchenko, both of whom acted as consultants to the company.

23. Avrora first became concerned about the authenticity of "Odalisque" in about May 2006 when Mr Voronchenko invited an art dealer to view Avrora's collection at the warehouse facility it was using in London. In the course of his visit, the dealer expressed doubts about "Odalisque". Very upset, Mr Voronchenko immediately flew to Russia with the painting as hand luggage; it was, Mr Voronchenko explained in evidence, a "very fast and emotional decision". On arrival in Moscow, Mr Voronchenko showed the painting to Mr Vladimir Petrov, who at the time worked as a senior expert for the Tretyakov Gallery in Moscow and whom Mr Voronchenko had known for a long time. Mr Petrov said that his first impression was that the painting was not by Kustodiev, and he later confirmed that opinion in a document dated 21 November 2006. By then, Avrora had also asked for, and been given, the views of the Grabar Centre in Moscow: the Centre had concluded in a certificate of 23 October 2006 that the painting was not by Kustodiev.

24. In November 2006 Mr Ruzhnikov, the senior consultant to Avrora, met Mr de Tiesenhausen and Christie's' international director in the company's salerooms in London and told them that Avrora wished to return "Odalisque". Mr Ruzhnikov explained that Avrora had been advised by Mr Petrov and the Grabar Centre that the painting was a forgery and gave Christie's copies of the relevant certificates. Mr Voronchenko was also present at the meeting.

25. Mr Ruzhnikov was clear that, following his meeting with Mr de Tiesenhausen, he had written to Christie's in December 2006, but Christie's cannot trace the letter. Nothing

turns on the point. For practical purposes, it does not matter whether (a) Mr Ruzhnikov is mistaken and never sent the letter or (b) the letter somehow got lost en route to Christie's or on arrival.

26. In 2009 Avrora obtained two further certificates. One of them, from the State Russian Museum in St Petersburg, had been requested as long ago as 2007. Eventually, on 27 February 2009, the State Russian Museum issued a certificate concluding that Kustodiev had not painted "Odalisque"; Mrs Lyubimova was one of the signatories. On 23 April 2009 the Tretyakov Gallery opined that the painting "belongs to the brush of an unknown artist and represents a deliberate reproduction of a favourite Kustodiev theme".

27. The circumstances in which the Tretyakov Gallery came to be asked to provide a certificate have engendered controversy. I do not think the details are important. By this stage, there was evidently a considerable degree of mutual distrust between the parties.

28. The present proceedings were issued on 11 June 2010.

The warranty claim

29. The catalogue for the auction sale at which "Odalisque" was sold to Avrora incorporated Conditions of Sale ("the Conditions"). Paragraph 6 of the Conditions provided for a buyer to receive the benefit of a "Limited Warranty" from Christie's. The clause states as follows:

> "Subject to the terms and conditions of this paragraph, Christie's warrants for a period of five years from the date of the sale that any property described in headings printed in UPPER CASE TYPE (i.e. headings having all capital-letter type) in this catalogue … which is stated without qualification to be the work of a named author or authorship, is authentic and not a forgery. The term 'author' or 'authorship' refers to the creator of the property or to the period, culture, source or origin, as the case may be, with which the creation of such property is identified in the UPPER CASE description of the property in this catalogue. Only UPPER CASE TYPE headings of lots in this catalogue indicate what is being warranted by Christie's. Christie's warranty does not apply to supplemental material which appears below the UPPER CASE TYPE headings of each lot and Christie's is not responsible for any errors or omissions in such material".

The clause goes on to specify that the warranty ("the Limited Warranty") is subject to, among other things, the following:

> "(ii)
>
> The benefits of the warranty are not assignable and shall apply only to the original buyer of the lot as shown on the invoice originally issued by Christie's when the lot was sold at auction.

> (iii)
>
> The original buyer must have remained the owner of the lot without disposing of any interest in it to any third party.
>
> (iv)
>
> The buyer's sole and exclusive remedy against Christie's and the seller, in place of any other remedy which might be available, is the cancellation of the sale and the refund of the original purchase price paid for the lot …".

30. It is Avrora's case that the Limited Warranty was engaged in the present case; that Christie's thereby warranted that "Odalisque" was "the work of" Kustodiev, "authentic and not a forgery"; that the painting was not in fact by Kustodiev; and that it (Avrora) is therefore entitled to cancel its purchase of the painting and to recover the sums it paid.

31. Two issues arise in relation to this claim:

    i) Has Avrora remained the owner of "Odalisque" (as required by paragraph 6(iii) of the Conditions)?

    ii) Was "Odalisque" painted by Kustodiev?

32. I shall take these points in turn.

Has Avrora remained the owner of "Odalisque"?

33. Christie's stated in its Defence that it put Avrora to proof that, in compliance with the provisos to the Limited Warranty, it had not disposed of any interest in "Odalisque". In his closing submissions, Mr James Aldridge, who appeared with Mr Anton Dudnikov for Christie's, argued that Avrora had not provided the requisite proof.

34. On balance, however, it seems to me that Avrora has done enough. It is fair to say that the evidence on this issue is not as clear as would have been desirable; perhaps Avrora did not focus on the point when preparing witness statements. In the course of his oral evidence, however, Mr Ruzhnikov said that "Avrora is an entity that owns only one painting today", and, in the context, the "one painting" was clearly "Odalisque"; later on, Mr Ruzhnikov said, "Avrora doesn't have any inventory, other than the painting in question". For his part, Mr Voronchenko said that "Odalisque" was owned by Avrora when he took it to Russia in the middle of 2006, and it would have made no sense for Avrora to dispose of an interest in the painting after that, thus precluding a claim under the Limited Warranty even though authenticity was by then known to be in question. Mr Aldridge suggested that Avrora might not have been familiar with the Limited Warranty, but Mr Ruzhnikov referred in a witness statement to telling Christie's in November 2006 that "Avrora wished to cancel the sale of ['Odalisque'] in accordance with the warranty at clause 6 of Christies' Conditions of Sale". Mr Aldridge queried the fact that documentation exists referring to "Aurora Fine Art Investments Fund" rather than "Avrora Fine Arts Investment Limited" (which is the claimant's name), but Mr Ruzhnikov explained that they were "the same

thing". Mr Aldridge pointed out that there is evidence suggesting that Avrora did not insure "Odalisque", but (a) it may not have been thought necessary to insure "Odalisque" either when it was in a secure warehouse (as was the case until May 2006) or once Avrora had been advised that it was not authentic (as happened shortly after the painting had left the warehouse) or (b) the failure to include the painting in Avrora's insurance may simply have been an oversight. At any rate, I do not think the insurance evidence provides any solid basis for doubting that Avrora has remained the owner of "Odalisque" throughout. Had Avrora disposed of any interest in "Odalisque", it would have been bound to disclose any relevant documentation; there is none.

35. In short, I am satisfied on the balance of probabilities that Avrora has remained the owner of "Odalisque" without disposing of any interest in it.

Was "Odalisque" painted by Kustodiev?

36. The evidence relating to authenticity can be considered under three headings:

    i) Connoisseurship;

    ii) Historical issues;

    iii) Technical matters.

Connoisseurship

37. The concern here is essentially with whether "Odalisque" is consistent with Kustodiev's other work. Assessing this involves a consideration of the extent to which characteristics of "Odalisque" are to be found in paintings or drawings that are known to be by Kustodiev or, on the other hand, are atypical of Kustodiev.

38. Expert evidence is of crucial importance in this context. As Buckley J commented in *Drake v Thos. Agnew & Sons Ltd* [2002] EWHC 294 (QB), a judge should not presume to have an expert's "eye". In the course of his judgment, Buckley J said this about evidence relevant to the attribution of a painting (in paragraph 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…".

39. In the present case, I had the benefit of expert evidence from Mrs Lyubimova and Mr Rutherston.

40. Mrs Lyubimova has worked for many years at the State Russian Museum and is now a Leading Research Fellow in its Department of Art of the Second Half of the 19th Century and the 20th Century; in the last 15-20 years she has specialised in the art of the first half of the 20th century. She has been familiar with Kustodiev's work for many years. The State Russian Museum holds a total of 1,116 works by Kustodiev, including 89 paintings, and Mrs Lyubimova was appointed as custodian of 19 of the paintings in 1997. She was also involved with a large exhibition that the State Russian Museum held in 2003-2004 to celebrate the 125th anniversary of Kustodiev's birth.

41. One of the criticisms that Mr Aldridge advanced of Mrs Lyubimova was that she lacked objectivity. Mr Aldridge pointed out that Mrs Lyubimova was one of those who signed the certificate in which the State Russian Museum rejected the authenticity of "Odalisque" in 2009, and he suggested that Mrs Lyubimova had become entrenched in that position. He also noted that, during her oral evidence, Mrs Lyubimova said that she was "almost 200 per cent sure" that "Odalisque" is not genuine and would not change her view even if shown contemporary documents tending to suggest authenticity.

42. These and other criticisms of Mrs Lyubimova notwithstanding, I found her an impressive and compelling witness. I was left in no doubt as to Mrs Lyubimova's belief that "Odalisque" was not painted by Kustodiev and that she was not expressing that view just because it was consistent with the 2009 certificate; moreover, the fact that Mrs Lyubimova first arrived at conclusions about the painting before being asked to give evidence in these proceedings might be argued to give more, rather than less, credibility to her evidence. That Mrs Lyubimova could not conceive of documentary evidence showing "Odalisque" to be genuine does not undermine her evidence but is rather a measure of her confidence that the work is not the sort of thing that Kustodiev would have painted.

43. Mr Rutherston has acquired an in-depth knowledge of Kustodiev only quite recently. While he provides consultancy services to Bonhams on 19th and 20th century Russian pictures, the gallery of which he is a director specialises in Japanese art and he has previously dealt in 20th century British pictures. He explained in his first report that,

prior to the present proceedings, he would not have described himself as particularly expert in Kustodiev's works, as opposed to those of Russian artists generally. In cross-examination, he accepted that he had never really had any contact with Kustodiev before this case.

44. I have nonetheless found Mr Rutherston's evidence very helpful. In his first report, Mr Rutherston observed:

> "It is not necessary to have spent years dedicated to one particular artist to become an expert in him or her: a sustained consideration of their life's work over even a relatively short period by someone … equipped to do so, can allow that person to speak with justified confidence to the artist's oeuvre".

The present case seems to me to bear out the point. Despite the limitations on his knowledge of Kustodiev before being instructed by Christie's to provide expert evidence, Mr Rutherston was able to comment on the connoisseurship issues (as well as other matters) in a persuasive way. His oral evidence in particular was impressively measured.

45. As I have already mentioned, Mrs Lyubimova is confident that "Odalisque" was not painted by Kustodiev. Her thesis is to the effect that the painting is either a compilation forgery, drawing on works of Kustodiev, or a joke, homage or study. In her view, the appearance of the painting shows that it cannot be by Kustodiev.

46. Some of the points Mrs Lyubimova makes about "Odalisque" are less convincing than others. For example, Mrs Lyubimova drew attention to anatomical mistakes in the depiction of the woman in "Odalisque". She commented:

> "Whoever was responsible for creating ['Odalisque'] obviously struggled greatly with depicting the left arm and the left breast of the reclining figure …, as well as the right leg, which appears to grow out of her abdomen. It is inconceivable to me that Kustodiev, who was capable of rendering the female form perfectly from memory, would have faced any such difficulties, and I am not aware of any recognised work by Kustodiev where such basic errors are committed".

However, the anatomical problems apparent in "Odalisque" can also be seen in a drawing in the Yaroslavl Museum referred to as "Nude Model under a Blanket" ("the Yaroslavl Drawing"). More than that, I have been persuaded by Mr Rutherston that "errors" of anatomy can be found in paintings by Kustodiev. Mr Rutherston commented that "one could list any number of other paintings in which Kustodiev's handling of anatomy is (perhaps intentionally) deficient to say the least".

47. Further, I think I must beware of assuming that Kustodiev invariably painted to a high standard. Even fine artists are capable of producing work that is not of museum quality. Of Kustodiev in particular, Mr Rutherston expressed the view that "there are many paintings by Kustodiev which contain some unimpressive passages".

48. On the other hand, Mr Rutherston himself described the visual aspects of "Odalisque" as "problematic". Issues with the painting arise in, among others, the following areas:

i) The curtains: Mr Rutherston accepted that the curtains in "Odalisque" are "lumpy, undynamic, undifferentiated, unsubtle" compared with those in Kustodiev's 1919 painting, "Bride (Merchant Wife by a Chest)" ("Bride"). He referred to the attempt to render damask as "superficial" and not as convincing as in "Bride";

ii) The stove: Mr Rutherston accepted that, while the stove in Kustodiev's "Merchant's Wife with Mirror" lends depth to the painting, that in "Odalisque" can be described as "a fairly undifferentiated block". Mr Rutherston suggested that, whereas Kustodiev had been attempting to create a sense of space in "Merchant's Wife with Mirror", "Odalisque" was intended to be more claustrophobic. As, however, Mr Rutherston recognised, white (the colour of the stove) is not a claustrophobic colour. Had Kustodiev been seeking a claustrophobic effect, he could have been expected to substitute something darker (a wooden chest, say) for the stove, and also to make less use of the colours yellow and blue;

iii) Depth: Mr Rutherston agreed that in both "Bride" and his surviving "Belle" paintings (dating from 1915, 1918 and 1921) Kustodiev indicated depth through his depiction of pillows, chests of drawers and shadows and that these features are not so evident in "Odalisque". For her part, Mrs Lyubimova said that in all three versions of "Belle" "the combination of the numerous puffed-up pillows and the dresser create the spatial depth to the right-hand side of the painting, fulfilling the role that should be played by the curtain and stove in ['Odalisque'], but is not". If, as Mr Rutherston was inclined to think, a shadow can be made out on the wall in "Odalisque", it is nothing like as distinct as those in the "Belle" paintings or "Bride"; Mrs Lyubimova said of the relevant area that "the daubs of dark blue paint behind the figure … simply do not make sense as shadows … because there is no logical source of light". That Kustodiev may have adopted different approaches to depth in his 1920 "Merchant's Wife on the Balcony" and 1922 "Bather" seems of little significance, not least because (as emerged from Mr Rutherston's evidence) (a) "Merchant's Wife on the Balcony" has a folk art quality distinguishing it from "Odalisque" and (b) "Bather" is a landscape;

iv) Pattern: In Mr Rutherston's words, pattern is a leitmotif in the 1915 "Belle". As Mr Rutherston accepted, "Odalisque" does not demonstrate the same degree of articulation of pattern as the "Belle" paintings or "Bride". In those and other works by Kustodiev, it is common to find the colour of, say, a blanket being picked up elsewhere in the composition. In contrast, "Odalisque" tends to involve blocks of colour. Mrs Lyubimova explained in cross-examination:

> "[Patterns or designs in 'Odalisque' are] very localised, because the yellow curtain is seen as just yellow without having any other colour or hue, and we don't see a distinguished pattern or design on this curtain. The blue blanket is just a single colour, single tone; the chest looks green, and red carpet.

> And we never, ever came across such – like that in Kustodiev's paintings. A red colour would always, almost always be shown either on the wall, on the wallpaper, or the curtain. In other words, the colours would have been reflected in each other in different objects, and here they're too local and too pure";

v) The blanket: Mr Rutherston said that the blankets in Kustodiev's drawings and paintings tended to be beautifully done. In contrast, the blanket in "Odalisque" is (in Mr Rutherston's words) "coarse" and "not a great painting". Mrs Lyubimova noted that, whereas Kustodiev succeeded in recreating "the rich iridescence and even the coolness of silk in his paintings of this genre", the blanket in "Odalisque" is of "monochrome blue" and "it is not at all clear from the facile colouring of the blanket … what kind of material is intended". Even to an untrained eye, it is obvious that the blanket in "Odalisque" compares very unfavourably with those in, say, "Bride" and the surviving "Belle" paintings;

vi) Light and shade: Mr Rutherston accepted that the "Belle" paintings, "Bride", "Merchant's Wife with Mirror" and "Wife of a Merchant and a House Sprite" ("Domovoi") all show a use of light and a focus on the way light plays on surfaces. He agreed, too, that the drama attached to light is far less developed in "Odalisque". Mrs Lyubimova observed in the course of cross-examination that Kustodiev "plays with objects and with shadows these objects cast".

49. Several of these points are reflected in this passage from one of Mrs Lyubimova's reports:

> "the extremely limited spectrum of colours used in ['Odalisque'] gives immediate grounds for suspicion: it is completely overwhelmed by the yellow of the curtain, which is lifeless and monochrome, and the uniform blue of the blanket. While in Kustodiev's oil paintings the diverse and carefully selected colours work together to unify the image, these primitive blocks divide ['Odalisque'] into sections, rather like a colouring book for children where defined areas are labelled with the names of the primary colours to be used to fill them in. Furthermore, the lack of tonal variation in the curtain and blanket, which together with the dull blue wall comprise more than half of the surface of the canvas, draws our attention to them and therefore away from the supposed heroine, creating confusion in the viewer's mind as to what story the picture is supposed to be telling".

50. Mr Rutherston's view is that, while not one of Kustodiev's best works, "Odalisque" is a genuine one. For him, "Odalisque" is a bread-and-butter picture quite probably painted to sell quickly. While this may be a possible explanation of the problems with "Odalisque", the more obvious inference is, I think, that the painting was not by Kustodiev. In other words, the connoisseurship evidence seems to me to indicate quite strongly that Kustodiev did not paint "Odalisque".

Historical issues

51. At trial, Mrs Lyubimova and Mr Rutherston dealt with historical issues as well as with connoisseurship. Mrs Lyubimova's evidence was in part based on a report prepared by Mrs Natalia Rybkina, a senior researcher at the Tretyakov Gallery.

52. It is common ground that the inclusion of "Odalisque" in the Riga exhibition (as to which, see paragraphs 10-13 above) establishes that the painting was in existence by then. The parties put forward a number of matters as casting light on the likelihood of someone other than Kustodiev having created the work during the period between the date it bears (viz. 1919) and the date of the Riga exhibition (viz. 1932).

53. I shall consider the issues arising in this context under the following headings:

    i) Access to other works by Kustodiev;

    ii) Archive references;

    iii) The 1920 exhibition;

    iv) the Riga exhibition;

    v) Maskovsky's ownership;

    vi) The inherent likelihood of forgery;

    vii) Possible forgers;

    viii) Homage/joke/study;

    ix) The Voinov/Notgaft materials;

    x) Market reaction;

    xi) Conclusion on historical issues.

(i) <u>Access to other works by Kustodiev</u>

54. It is clear that, if anyone other than Kustodiev painted "Odalisque", he must have had access to certain works of Kustodiev or, at least, to reproductions of those works.

55. The two works that an artist other than Kustodiev would most obviously have needed are the Yaroslavl Drawing and "Bride" (paragraphs 46 and 48(i) above). The woman and blanket in "Odalisque" are plainly derived from the former; even Kustodiev himself could not have painted "Odalisque" without having an image of the drawing (though not necessarily the original) available to him as he worked. The similarities between the curtains in "Bride" and "Odalisque" mean that any artist apart from Kustodiev would also have required an image of "Bride" to produce "Odalisque".

56. There is an issue between the parties as to whether "Odalisque" could have been painted without the artist having seen the original of "Bride". "Bride" is known to have been reproduced in two magazines in the 1920s: in "Firebird", in colour, in 1922, and in "Russian Art", in black and white, in 1923. There is also some reason to think that by 1925 there may have been a postcard of "Bride". Mrs Lyubimova

suggested that "Odalisque" could have been painted on the basis of such a reproduction. Mr Rutherston expressed doubt about this. As he pointed out, "Odalisque" and "Bride" both include a carpet with white spots. However, the reproduction of "Bride" in "Firebird" gives the impression that the relevant spots are red, so someone working from that might have been expected to depict a carpet with red spots. On the other hand, the painter of "Odalisque" could have chosen to paint the spots white because he had seen either the original carpet (in Kustodiev's home) or another work showing it (as a number did). The significance of the similarity in the spots is, moreover, undermined by the fact that the carpets in "Odalisque" and "Bride" differ in certain other respects: for example, the swirls in which the spots feature are blue in "Bride" but red in "Odalisque". In the circumstances, I agree with Mrs Lyubimova that the painter of "Odalisque" need not have seen the original of "Bride".

57. Mr Rutherston was inclined to think that the painter of "Odalisque" would also have had to have seen "Domovoi" (paragraph 48(vi) above), but I agree with Mrs Lyubimova that this was not a necessity. A hypothetical forger could, as it seems to me, have arrived at the composition of "Odalisque" without knowing of "Domovoi".

58. There was discussion as to whether the Brodsky Drawing (i.e. the 1915 drawing "Reclining Nude" now housed in a former home of the artist Isaac Brodsky) had to be available to the painter of "Odalisque", but neither expert regarded this as essential. For his part, Mr Rutherston said that the creator of "Odalisque" would not have needed access to the Brodsky Drawing if he had had the Yaroslavl Drawing; the latter would have sufficed on its own.

59. There was discussion, too, as to how someone other than Kustodiev could have arrived at other features of "Odalisque". For example, "Odalisque" includes a chair of a type also seen in Kustodiev's 1918 "Belle" ("the Tula 'Belle'"). However, Mrs Lyubimova observed that the kind of chair shown in "Odalisque" was mass-produced in Russia at the time and could have been sketched in any number of places in St Petersburg. It is also conceivable that such a chair featured in a miniature version of Kustodiev's "Belle" paintings that the artist sent to Maxim Gorky, the writer, in 1919 and which was displayed in the 1920 exhibition of Kustodiev's works in Petrograd. Alternatively, a copyist could possibly have taken the chair from Kustodiev's 1920 portrait of Ye.I. Grekova; from Kustodiev's 1922 portrait of his son Kyrill, an image of which was in the Voinov monograph and which was also, as I understand it, included in a 1927 exhibition in Leningrad; or from the illustration of such a chair on page 64 of the Voinov monograph.

60. How easy then would it have been for an artist other than Kustodiev to gain access to the Yaroslavl Drawing and "Bride" (or reproductions of them)?

61. The Yaroslavl Drawing is known to have belonged to Yulia Kustodieva and to have been included in the posthumous exhibitions of Kustodiev's work held in Leningrad in 1928 and Moscow in 1929. I agree with Mr Rutherston that it is reasonable to suppose that the drawing had earlier been in Kustodiev's apartment.

62. Mr Rutherston asked rhetorically, "How likely is it that some forger, in 1929, slips into the posthumous exhibition, latches on to the Yaroslavl drawing, takes a surreptitious photograph, and works it up into ['Odalisque']?" However, Mrs Rybkina

observed that photography "had by the 1920s become not only incredibly popular but also affordable in both Russia and the West", and Mr Rutherston himself accepted both that there was the potential for works to be copied on the spot and that there was a real possibility that the Yaroslavl Drawing was photographed at some stage. Further, it is not apparent that a hypothetical forger need have acted surreptitiously. There is no evidence that copying (whether by photography or otherwise) was prohibited at the 1928 and 1929 exhibitions. Many people, moreover, visited the Kustodievs' home: Mrs Rybkina said:

> "Portraying the master's home and studio as some kind of secluded fortress, his art locked away and accessible only to 'immediate friends and family', … seems to me a complete failure to understand how Kustodiev operated, not only as an artist, but also as a human being".

63. Turning to "Bride", this was exhibited in Berlin in 1922 and Brussels in 1924. As already mentioned, however, "Bride" was reproduced in magazines in 1922 and 1923, and a postcard may also have been made of the painting.

64. In the circumstances, I have not been persuaded that it would have been impossible for someone other than Kustodiev to paint "Odalisque", nor even that the fact that an artist other than Kustodiev would have needed to see other works by Kustodiev makes it likely that "Odalisque" was painted by Kustodiev. Even if it were the case (which is far from clear) that no one but Kustodiev would have had access to the Yaroslavl Drawing until it was first exhibited (in 1928), that was four years before the Riga exhibition, ample time in which to create "Odalisque".

(ii) Archive references

65. A formidable volume of correspondence and other contemporaneous documents relating to Kustodiev survives. A compilation by B.A. Kapralov of letters, reminiscences by contemporaries and extracts from Voinov's diaries is particularly useful. The materials contain many references to Kustodiev's work: in Mrs Rybkina's words, "the exhaustive documentary heritage left behind by the artist and the very many people with whom he interacted allows art historians today to trace the provenance of the vast majority of Kustodiev's significant works (and most of the minor ones too)". However, Mrs Rybkina has failed to find any reference to any work that could plausibly be understood to signify "Odalisque" despite reviewing the collections housed in the Tretyakov Gallery and also correspondence in archives at the State Russian Museum. Mrs Lyubimova also went through very many pages of the State Russian Museum's archives without finding anything relating to "Odalisque"; she explained that, while the archives are so immense that she could not claim to have looked through every single page, she had examined a "vast amount of documents".

66. Mrs Lyubimova reckoned that it was "simply not feasible that both a genuine painting by Kustodiev, and its former owner, could have disappeared from all contemporaneous records in this way". In contrast, Mr Rutherston likened the search for a reference to a specific collector (such as Maskovsky) to one for a needle in a haystack. Mr Rutherston made the point, too, that the most important single document about Kustodiev's life is Voinov's diary, and Voinov was not in regular contact with Kustodiev in 1919 (the date on "Odalisque"). It seems, moreover, that Mrs

Lyubimova and Mrs Rybkina did not find any references in the archives to "Bride", the authenticity of which is not in doubt.

67. Overall, it seems to me that the fact that no reference to "Odalisque" has been found in the archives is of *some* significance, but that I should not attach all that much weight to it.

(iii) The 1920 exhibition

68. As already mentioned (paragraph 7 above), an exhibition devoted to Kustodiev was held in Petrograd in May 1920. The exhibition comprised 170 of Kustodiev's works, including works dating from 1915 to 1920. Kustodiev and those around him took steps to track down Kustodiev's works for the exhibition, but no painting that could correspond to "Odalisque" was included.

69. On the other hand, the 1920 exhibition did not include *all* the oils Kustodiev had painted in 1918 and 1919, nor even every oil known to have still been in Russia. Mr Rutherston suggested that Kustodiev himself might not have wanted "Odalisque" to form part of the exhibition: he surmised that Kustodiev had painted "Odalisque" quickly, as a bread-and-butter work, and was embarrassed by it. It is also possible to conceive of other reasons for the painting not featuring in the exhibition.

70. In the circumstances, I do not think I can draw any inference as to the authenticity of "Odalisque" from the fact that it was not included in the 1920 exhibition.

(iv) The Riga exhibition

71. The fact that "Odalisque" was included in the Riga exhibition (as "Beauty") confirms that it existed by 1932. It is also apparent that the painting was already attributed to Kustodiev.

72. There was discussion as to whether the inclusion of "Odalisque" in the exhibition tends to suggest that it is genuine. In this connection, reference was made to the fact that the article of 7 December 1932 in "This Evening" (as to which, see paragraphs 12 and 13 above) said:

> "It is worth mentioning, that *Akropoltsy* [i.e. members of the 'Acropolis' group] had to deal a lot with authenticity issues …. Not only *Akropoltsy* themselves but also many other specialists including Prof. Vipper, K. Yuryan, N.P. Bogdanov-Belsky, K.S. Vysotsky were used as specialists. As a result of this collaboration, 15 paintings were not included in the exhibition as the attribution was rejected".

Mr Rutherston suggested that it was "unlikely that an artist of Bogdanov-Belsky's standing would have been fooled by a forgery" and that it was "fair to assume that [Professor Vipper] was better placed than most to detect a forged work masquerading as a work of Kustodiev's". Mr Rutherston also pointed out that the artist Evgeny Klimov, who was a key figure in the "Acropolis" group that organised the Riga exhibition, was interested in Kustodiev: he gave a lecture on Kustodiev in March 1932 and also wrote at least one article about him. In cross-examination, Mr

Rutherston said that he had a "serious suspicion" that Klimov was in a position to know whether "Odalisque" had been painted by Kustodiev.

73. On the other hand, Mrs Rybkina queried both how far people such as Bogdanov-Belsky and Professor Vipper were involved in decision-making and the extent to which they had relevant expertise. She noted that "Bogdanov-Belsky and Vysotsky are referred to once in the Acropolis documents as 'honorary members' and nothing more is said about them". Of Professor Vipper, Mrs Rybkina said that his "principal area of interest was Western European art, and none of his many published works are concerned with the work of the Russian and Soviet artists who were his contemporaries". With regard to Bogdanov-Belsky, Mrs Lyubimova said that it was "hard to believe that Bogdanov-Belsky, who in the 1910s suddenly conceived a passion for impressionist techniques, would have taken an interest in Kustodiev's neoclassical art, or would have studied it well and become an expert in the artist's oeuvre".

74. As for Klimov, he made a diary entry in the following terms in 1941:

> "Several 'Levitans' turned out to be copies! So that's why that swindler went and sold them! (Maskovsky)"

("Swindler" is a translation to the Russian "АРАП". The word is also capable of referring to a dark-skinned person, but Maskovsky does not appear to have been dark-skinned.) Mr Rutherston, however, doubted the significance of the entry. He said:

> "Maskovsky's name is in brackets at the end of the sentence …. Does one assume that the Levitan copies belonged to Maskovsky or that the information came to Klimov from Maskovsky? If the former, then how did Klimov come to form his opinion that they were copies? And if he thinks that Maskovsky sold them *because* they were copies, why does he think that? We do not know".

75. On the other hand, Mr Rutherston accepted that it was not possible to say with certainty that Klimov did not object to "Odalisque". More importantly, perhaps, Mr Rutherston recognised that "if there were doubts about the authenticity of any of the pictures offered by [Maskovsky] for exhibition, it may have proved diplomatically wise for the selection committee not to raise difficulties". Further, Mrs Rybkina said that it was "extremely difficult to imagine that [the organisers] would have risked causing offence to Maskovsky of all people by challenging the authenticity of even a single item within his collection".

76. In the end, I have not been persuaded that the fact that "Odalisque" was included in the Riga exhibition affects the chances of its being authentic (except in the sense that it shows that the painting was already in existence and attributed to Kustodiev).

(v) Maskovsky's ownership

77. There was debate as to the extent, if any, to which the fact that "Odalisque" was owned by Maskovsky bears on the likelihood of the painting being genuine. Mr Rutherston expressed the view that "the quality of the [Maskovsky] collection must

have been reasonably high". He also thought it very unlikely that Maskovsky believed "Odalisque" to be a forgery. He questioned "why, if ['Odalisque'] were a forgery and Mr. [Maskovsky] knew it, he kept [it] till the bitter end, seemingly one of his cherished favourites".

78. In response, Mrs Lyubimova and Mrs Rybkina found "the extreme murkiness of Maskovsky's past … suspicious and troubling". Mrs Lyubimova noted that Mrs Rybkina had been "unable to find a shred of reliable, impartial evidence which supports Christie's' suggestion that Maskovsky was a serious collector". As for whether Maskovsky regarded "Odalisque" as "one of his cherished favourites", Mrs Lyubimova thought it "equally feasible that an owner of a poor forgery might try to hold on to it and hope to gain from the passage of time and the fading of memories".

79. The "murkiness" of Maskovsky's past can certainly be overstated: as already mentioned (paragraphs 13 and 14 above), he was referred to more than once in the Riga press in 1932 and can be found in Riga telephone directories living at what looks to be a good address. Even so, I do not think I can ultimately infer anything important from Maskovsky's ownership of "Odalisque". No one has found any direct link between Maskovsky and Kustodiev, and, whatever the general quality of his art collection, there is no reason to suppose that Maskovsky was not capable of making mistakes. In cross-examination, Mr Rutherston said that he was convinced that Maskovsky owned more than one good work, but went on:

> "even if I could demonstrate fairly satisfactorily … that there were ten great paintings in his collection, that doesn't mean that he couldn't have a fake or forgery in his collection".

(vi) <u>The inherent likelihood of forgery</u>

80. Mr Rutherston queried (a) whether there would have been any financial incentive to forge Kustodiev's work in the relevant period (i.e. between 1919 and 1932), (b) whether a forger would have thought it worth running the risk of discovery in that period and (c) the extent to which Russian paintings were forged at that time.

81. With regard to (a), Mr Rutherston doubted how much a small Kustodiev might have been worth in the 1920s and whether it would have been worth anyone's time to forge one. There is certainly evidence that Kustodiev himself experienced deprivation during this period. The English edition of Etkind's book records in respect of 1919:

> "With the approach of winter the population of revolutionary Petrograd faced a shortage of provisions and fuel. The Kustodievs found themselves hard pressed, forced to exchange, with difficulty, clothing and pictures for food and firewood".

A memoir records that in 1922 a portrait was purchased from Kustodiev for "a sack of flour and a cockerel". In the following year, Voinov recorded in his diary a complaint by Kustodiev about "the incredible lowering of prices for pictures". In 1924, Voinov noted that, despite his fame, Kustodiev "lives in the direst straits".

82. On the other hand, Mrs Rybkina expressed the view that "[t]he wide acclaim enjoyed by Kustodiev at this time would have made him an obvious choice for anyone intent

on forging the work of a master for financial gain". There is force in Mrs Rybkina's observation:

> "to say that the market for such a forgery was not particularly valuable at the relevant time is to ignore the extremity of the personal financial hardship which beset the vast majority of those who lived in what had been Russia after the Bolsheviks unleashed their Revolution, and which in certain circumstances would have made practically any payment 'valuable'".

In similar vein, Mr Rutherston said:

> "even if the payment for the portrait was as prosaic as a sack of flour and a cockerel, who is to say that in the currency of the day that was not a king's ransom (because no sum of roubles could buy such scarce commodities)?"

In the same year that the portrait was sold for "a sack of flour and a cockerel", a work by Kustodiev appears to fetched a relatively high price at an auction. Further, in 1918 Shostakovich had given Kustodiev a baby-grand Blüthner piano for a portrait, and Mr Rutherston agreed that that was, on the face of it, quite a generous fee.

83. Turning to (b), Mr Rutherston observed that, had "Odalisque" been produced by anyone other than Kustodiev in the lifetime of the artist, there would always have been the possibility of the artist seeing the painting, or a photograph of it, and denouncing it. He further suggested that, after Kustodiev's death, there would have been a chance of someone close to him (his widow, for example) denying the authenticity of a forged work. However, Kustodiev died some five years before the Riga exhibition was held, and the chances of someone close to Kustodiev seeing "Odalisque" in Latvia must have been smaller than they would have been in, say, Leningrad. Mrs Rybkina described Riga as being "at a safe distance from the known connoisseurs of Kustodiev's oeuvre". It might, moreover, have been a matter of little concern to a forger if a work of his was unmasked after he had sold it.

84. As for (c), while forgery of Russian art may have been an increasingly common problem in recent years, the evidence does not establish that forgery was unknown, or even rare, in the 1920s. Mrs Lyubimova said that "there was a thriving trade in forgeries both while Kustodiev was alive, and subsequently".

(vii) Possible forgers

85. Mrs Rybkina raised the possibility that the artist Isaac Brodsky might have had a hand in the creation of "Odalisque". Brodsky enjoyed great success in the Soviet Union, being given the honour of producing official portraits of Lenin and Stalin, becoming the director of the Institute of Proletarian Fine Art (formerly the Academy of Arts) in Leningrad and being the first artist ever to be awarded the Order of Lenin. He also, however, seems to have employed others to paint copies of his own works. A poet who visited him in 1926 referred in his diary to one of Brodsky's paintings and went on:

> "some sort of daubsters are making the copies quickly and deftly from this painting, and Brodsky touches these copies up a bit and puts his surname on them".

A couple of years later, a resolution was passed to expel Brodsky from the Association of Artists of Revolutionary Russia on the basis of allegations including that:

> "He exploits a number of comrades, represents their work as his own, using them as hired labour …. Brodsky is an exceptionally gifted artist, but many of his paintings were not painted by him".

86. Mr Rutherston commented that there is no reason to think that Brodsky would have wasted time creating works by other artists: Brodsky was, Mr Rutherston observed, "a busy artist making a good living from his own works, such that he engaged studio assistants to create more of them". As I see it, however, there *is* some evidence of Brodsky forging works by other artists. In 1922 Voinov referred in his diary to a work attributed to Vrubel but in fact "an impudent fake by I. I. Brodsky". Another diary entry from the same year referred to Brodsky copying works by Kustodiev. Voinov wrote:

> "Zolotarevsky believes that Brodsky signs them as Boris Mikh[ailovich], passing them off as originals. I.I. Brodsky is involved in such 'trickery' – everyone is talking about it".

87. It was also suggested that "Odalisque" could potentially have been painted by the artist Ivan Kraitor, who appears to have owned both "Bride" and the Tula "Belle", or Kustodiev's son Kyrill. However, there is no real reason to believe that Kyrill Kustodiev would have committed such a "huge betrayal" (to use Mr Rutherston's words).

88. In fact, the most that can be said of the three individuals identified (Brodsky, Kraitor and Kyrill Kustodiev) is that they might have been in a position to forge "Odalisque". There is no solid reason for thinking that any of them did so.

(viii) <u>Homage/joke/study</u>

89. Mrs Rybkina suggested that the painter of "Odalisque" need not have been a forger even if he was not Kustodiev. She said:

> "[W]hile it is of course a distinct possibility that the object was created specifically with such deception in mind we have no direct evidence of this, and we should not close our minds to other less obvious but equally rational explanations. It is quite possible, for example, that ['Odalisque'] was done as a joke or a parody in the style of Kustodiev's merchant wife series, for which the artist was so well known both in Russia and abroad".

Elsewhere, Mrs Rybkina said:

> "A further possibility is that ['Odalisque'] was painted simply as an educational pursuit, an attempt to learn from the techniques used by an acknowledged master of the interior nude".

90. Mr Rutherston said that he considered "Odalisque" "far too elaborate, and far too much effort has gone into it, for it to have been created as some kind of joke". When it was put to Mr Rutherston that "Odalisque" might have been some kind of study in the style of Kustodiev, he similarly said that, while one had to admit the possibility, it would be an exercise requiring "an awful lot of effort".

(ix) The Voinov/Notgaft materials

91. Voinov's monograph on Kustodiev (as to which, see paragraphs 8 and 9 above) included a list of works by the artist. The "Oil paintings" listed for 1919 include "Спящая" (or "Sleeping"). Christie's maintains that the entry must refer to "Odalisque".

92. Avrora's position is essentially that the monograph contains a mistake in this respect. That there was a mistake can be seen, it is said, by looking at a manuscript list of Kustodiev's works that Voinov prepared, seemingly in 1921-1922. The list in question contains three columns: the first identifies the works, the second states what they are (in particular, oil painting or drawing), the third names the works' owners. In respect of "Sleeping", which is attributed to 1919, a ditto mark appears in the middle column underneath the word "drawing". This, Avrora says, shows that "Sleeping" was a drawing rather than a painting and so cannot be "Odalisque".

93. Christie's contends that it is Voinov's manuscript list that contains the error. This, it says, is apparent from the manuscript list of Kustodiev's works that Notgaft kept. Like the Voinov list, Notgaft's list has columns giving the names of works, what they are and who owns them. Once again, "Sleeping" appears in the list for 1919 with a ditto mark in the column for type of work. An abbreviation for "drawing" ("рис") is to be found immediately above the ditto mark, but the line containing the word "drawing" looks as though it may have been interpolated. Christie's suggests that the ditto mark was meant to refer to the word at the top of the column: "масло" (i.e. oil). What must have happened, Christie's submits, is that the ditto mark led Voinov to misinterpret the Notgaft list when he was preparing his own manuscript list but he realised his mistake in time for the publication of his monograph.

94. Matters are complicated further by entries in the ownership columns. The Notgaft list gives the owner of "Sleeping" as "Stepanov, Peterhof" (preceded by some illegible grey writing). In the equivalent column in the Voinov manuscript list, "Stepanov, Peterhof" has been crossed out, possibly in pencil, and "I I Brodsky" added (again possibly in pencil). The lists thus suggest that the original owner of "Sleeping" was a Stepanov from Peterhof (near St Petersburg) and that the work was subsequently acquired by Brodsky. However, it is common ground that, if "Sleeping" is "Odalisque", Brodsky is unlikely to have owned it. Mr Rutherston surmised that "a much later hand who could not locate ['Odalisque'] (as it was with Mr. [Maskovsky]) preferred to assume that it was a reference to the [Brodsky] drawing".

95. In support of its case that Voinov's manuscript list represents the best evidence, Avrora relies on a passage from Voinov's diary for December 1921. The passage in question reads:

> "After dinner … I, F.F. Notgaft and Y [Kustodieva] took up a final check of the list of works of B [Kustodiev]".

According to Avrora, this means that Voinov's manuscript list was checked by Yulia Kustodieva, Notgaft and Voinov. Mr Rutherston, in contrast, suggests that what was being checked was the list that was incorporated in the monograph. A difficulty with this thesis is that the monograph was not published for another four years, but it is fair to say that as early as January 1922 Voinov is recorded as reading part of his book, albeit only the first chapter, to the Kustodievs.

96. Avrora identifies a number of drawings which, it says, could be "Sleeping". They include the Brodsky Drawing, a drawing listed in Etkind's book as "Sleeping" and a drawing of Yulia Kustodieva asleep. The last of these dates from 1919. The other two date respectively from 1915 and 1917, but, if "Sleeping" were the Brodsky Drawing, that would explain the fact that Brodsky was given as the owner of "Sleeping". That "Sleeping" was a drawing rather than a painting is, Avrora says, further indicated by the fact that no such painting was included in Etkind's book. To that, Christie's says that Etkind's book is not comprehensive: a number of works can be seen to have been listed in the Voinov monograph but not in Etkind's book.

97. Avrora argues that, even if "Sleeping" was a painting rather than a drawing, it has not been established that it was "Odalisque". It is pointed out that the Voinov monograph includes neither a picture of "Sleeping" nor its dimensions; in Mr Rutherston's words, the list of works in the monograph is "somewhat telegraphic". Further, no one knows what has become of the "Belle" given to Gorky; a painting called "Sleeping" could similarly, it is said, have disappeared. Against that, Mrs Lyubimova seemed to describe (though it is not wholly clear what she meant) the chances of there being another oil painting which could be called "Sleeping" as very small.

98. That the list of works in the Voinov monograph is not infallible is, Avrora contends, further indicated by the fact that other errors in it are apparent. Mrs Lyubimova suggested that two works attributed in the list to 1918 ("In a boat (version)" and "Courtyard") in fact dated from 1917. On the other hand, it might naturally be inferred that a published work is more likely to be correct than a manuscript antecedent.

99. On balance, it seems to me that, if the Voinov/Notgaft materials were the only available evidence, I would conclude that "Odalisque" had probably been painted by Kustodiev, principally on the basis that the published monograph was likely to be the most reliable source. However, I do not think the Voinov/Notgaft materials provide strong evidence to that effect.

(x) Market reaction

100. Christie's seeks to place reliance on the market's reaction to "Odalisque" when the painting was put up for auction in 1989 and 2005. The point was put in this way in Christie's' closing submissions:

> "where a sale is conducted in public in circumstances that attract a knowledgeable audience and the work in question sells for a high price in a competitive, open bidding process and yet nobody expresses doubts about … its authenticity or correspondence with the artist's *oeuvre* then that constitutes good evidence that the artwork is indeed what it purports to be".

101. In effect, I am being asked to attach importance to the views that people in the market can be inferred to have taken of "Odalisque". The people in question are not, however, before the Court to explain, for example, their expertise, how far they considered "Odalisque", what opinions they formed of the painting or how far they were influenced by either the misleading catalogue entry of 1989 (as to which, see paragraph 18 above) or, in 2005, the fact that Christie's was warranting that the work was by Kustodiev. Further, doubts *were* expressed about "Odalisque" following its sale in 2005: a dealer questioned the painting's authenticity when he saw it in about May 2006 (see paragraph 23 above) and certificates rejecting the authenticity of the painting were subsequently issued, not only by the State Russian Museum (where Mrs Lyubimova works), but by Mr Petrov, the Grabar Centre and the Tretyakov Gallery (paragraphs 23 and 26 above). The dealer and the authors of the certificates (Mrs Lyubimova apart) not being before the Court, I do not think I should attach importance to their views. It would, as it seems to me, be still less appropriate for me to attach importance to market reaction when "Odalisque" was auctioned.

(xi) Conclusion on historical issues

102. The most significant of the matters discussed above appear to me to be (a) the absence of any known reference to "Odalisque" in the archives and (b) the Voinov/Notgaft materials. The latter point to authenticity, the former in the opposite direction.

Technical matters

103. Evidence on technical matters was given by Mr Denis Lukashin and Dr Nicholas Eastaugh.

104. Mr Lukashin is the founder and general director of Art Consulting, a Moscow-based organisation which provides expert advice on works of art. However, Mr Lukashin does not profess to be an expert himself. His own degree is not in science but in law and economics, and, as he indicated in cross-examination, he employs experts rather than is one. In the course of his oral evidence, he explained:

> "I do not specialise in chemistry. I take a particular interest in everything, and I control all the processes, but I will never allow myself to call myself an expert, or to pass expert judgments in the area of technology or art history, without having special education, although I know quite a lot".

The evidence that Mr Lukashin gave was evidently based on work done within Art Consulting and, in particular, on what he had been advised by two experts, a Mr Borisov and Ms Kireeva. However, Mr Borisov and Ms Kireeva were not before the Court either to explain their views or to respond to Dr Eastaugh's evidence.

105. Dr Eastaugh plainly is an expert. He has both a degree in physics and qualifications from the Courtauld Institute of Art, in particular a doctorate based on work relating to the colour lead-tin yellow. For more than two decades, he has acted as a consultant on the scientific examination and technical art history of paintings, and he is now the director of research at Art Access and Research (UK) Limited, which he co-founded.

106. Where I have a reservation in relation to Dr Eastaugh's evidence is in relation to certain of the inferences he drew from his findings. On occasions, he seems to me to have gone further than the evidence justified and also beyond the scope of his (considerable) expertise. He overreached himself to a degree perhaps.

107. The evidence given by Mr Lukashin and Dr Eastaugh bore on two main issues:

i) Whether the inscription on "Odalisque" (i.e. the name and date in the bottom left-hand corner of the picture) is contemporaneous with the remainder of the painting or was applied much later; and

ii) Whether a comparison between the pigments and techniques used in "Odalisque" and those used in two works accepted to be by Kustodiev tends to suggest that "Odalisque" is genuine.

108. I shall take the issues in turn.

(i) <u>The date of the inscription</u>

109. Mr Lukashin put forward two reasons for concluding that the inscription on "Odalisque" was added to the painting long after it was painted. In the first place, he maintained that paint from the inscription could be seen in cracks in the underlying paint layer, implying that the inscription post-dated the cracking. Secondly, he said that a metal soap compound known as "aluminium stearate" had been detected in the paint of the inscription and that aluminium stearate would not have been used in 1919, when "Odalisque" was purportedly painted.

110. With regard to whether inscription paint is to be found in cracks on "Odalisque", Dr Eastaugh was adamant that he had not seen paint in the cracks, and I found his evidence on this aspect convincing. For what it is worth, I did not myself think that paint was apparent in the cracks when images of them were discussed in Court.

111. Dr Eastaugh also disagreed with Mr Lukashin as to whether there is aluminium stearate in the inscription paint. Dr Eastaugh said that, in his view, there is no evidence pointing to the presence of aluminium stearate. Mr Henry Legge QC, who appeared with Mr Jordan Holland for Avrora, challenged Dr Eastaugh on the basis that the equipment Dr Eastaugh had used was not the most powerful available, and he suggested that Art Consulting, Mr Lukashin's organisation, might have been using a germanium lens and, hence, better equipment. However, there is in fact no evidence that Art Consulting's equipment was better than that employed by Dr Eastaugh. To the contrary, the description Mr Lukashin gave of the equipment in his first report makes no reference to a germanium lens. In the circumstances, I do not think it has been established that the inscription paint contains aluminium stearate.

112. It follows that I am not satisfied that the inscription was added to "Odalisque" much later (as Avrora alleges). In my view, the evidence relating to the inscription is in the end of no real help.

(ii) Comparative technical analysis

113. Dr Eastaugh compared the pigments and techniques used in "Odalisque" with those found in "Portrait of Peter Kapitza", a painting by Kustodiev in the ownership of the Fitzwilliam Museum in Cambridge, and in another painting by Kustodiev ("the Other Kustodiev"). He summarised his conclusion in these terms in one of his reports:

> "My examination of the *Other Kustodiev*, despite the differences of scale, date and subject, shows very strong material and technical similarities to both the *Kapitza* and the *Odalisque*. Such correspondence of multiple details, many not accessible without sophisticated analysis, would be highly improbable in a work of a copyist, pointing instead to a close correspondence between all three works. While isolated differences do exist, these are spread across the works, indicating variation of artistic practice only. In summary, in my view these paintings all show strong and substantive similarities of materials and techniques; therefore the *Odalisque* can be considered to be by the hand of the same artist".

114. The similarities that Dr Eastaugh identified included these:

i) All three paintings make extensive use of zinc white in the primary paint layers, as opposed to a lead-based white or a combination of the two. According to Dr Eastaugh, "the fact that there is consistent and largely comprehensive use of one type only is significant";

ii) The palette of pigments found in the three paintings represents a "very specific subset" of the pigments that were available to artists in the 1910s and 20s";

iii) Neither "Odalisque" nor "Portrait of Peter Kapitza" has a pencil underdrawing, but both have similar preliminary brushwork sketches;

iv) The colours in the three paintings are frequently quite complex mixtures. In cross-examination, Dr Eastaugh explained that, "[i]n all three paintings, there is a primary pigment plus small amounts of other things".

115. However:

i) While zinc white is to be found in "Odalisque", "Portrait of Peter Kapitza" and the Other Kustodiev, a group of ten paintings by Kustodiev that the Grabar Centre used for comparison purposes included both lead white and zinc white. Mr Aldridge suggested that the lead white might merely have been in the paintings' ground layers, but that is not apparent from the evidence. It seems, therefore, that it is not possible to say that Kustodiev invariably used zinc white rather than lead white, nor even to determine which he used more often;

ii) That leads to a wider point. Dr Eastaugh examined only three paintings, including "Odalisque". On the face of it, that appears a very small sample, and, not being a statistician, Dr Eastaugh was not in a position to vouch for the statistical significance of the exercise he undertook. One of Mr Aldridge's responses to the suggestion that no worthwhile conclusions could be drawn from just three works was that "the only evidence on the subject which can be given real weight is Dr Eastaugh's". It seems to me, however, that Dr Eastaugh's expertise was not such as to qualify him to assess the validity of views derived from so few works;

iii) A meaningful evaluation of the importance of a painter using one pigment rather than another might be thought to call for information as to (a) the extent to which alternatives were available and (b) the likelihood of other possible artists making a particular choice. Were it the case, say, that only one type of red paint had been available, nothing could be inferred as to authorship from the fact that the same red was found in different paintings. Nor could anything worthwhile be deduced if, for example, numerous kinds of red were available, but in practice all the possible artists used the same kind;

iv) In the present case, Dr Eastaugh was not able to help all that much on what paints were available in Russia in the years after the 1917 revolution. He was aware of a Ph D thesis of relevance, but (a) the thesis was not in evidence, (b) he had not himself read it recently and (c) he said that there seemed to have been some fluctuation in the availability of paints (although he said that it was "suggested" that "certain" artists had freer access to Western paints);

v) Nor was Dr Eastaugh in a position to help on the odds of possible painters of "Odalisque" using different pigments. Dr Eastaugh said that "hugely extensive statistical data" bearing on the likelihood of an artist in Russia using one pigment rather than another does not exist at present;

vi) While there are similarities in the pigments used in "Odalisque", "Portrait of Peter Kapitza" and the Other Kustodiev, there are also differences. For instance, Prussian Blue is used in "Odalisque" but not in either of the other paintings. Again, lead chromate is found as one of the yellows in "Odalisque" and "Portrait of Peter Kapitza", but not in the Other Kustodiev; the Other Kustodiev has cadmium sulfide, but neither of the other paintings does. Further, while Dr Eastaugh attached significance to the painter(s) of the three pictures using viridian (essentially, chromium oxide hydrate) for green rather than mixing blue and yellow paints, blue and yellow appear to have been added to viridian in "Odalisque" whereas pure viridian is found in "Portrait of Peter Kapitza" and the Other Kustodiev;

vii) Although "Odalisque" and "Portrait of Peter Kapitza" both have brush drawings, the Other Kustodiev does not. In those circumstances, I cannot see that the correspondence between "Odalisque" and "Portrait of Peter Kapitza" can be of importance;

viii) Other variations of technique can be found even as between the three paintings Dr Eastaugh has examined. Pentimenti can be seen in the Other Kustodiev, but not in "Odalisque" or "Portrait of Peter Kapitza". Varnish is apparent on

> "Portrait of Peter Kapitza" and possibly "Odalisque", but not on the Other Kustodiev. Thin translucent paint layers exist in "Portrait of Peter Kapitza" and the Other Kustodiev, but not in "Odalisque". More generally, a range of practices in terms of paint thickness is evident in the paintings;
>
> ix) Mrs Lyubimova observed that "[t]here is nothing particularly unique about the way Kustodiev mixed his paints, a skill which he would have learned in exactly the same way as anyone else who attended … St Petersburg's Arts Academy at the turn of the century, both before and after him". In cross-examination, Dr Eastaugh accepted that a possible explanation for similarities in mixing could be the fact that artists were taught to mix paints in a particular way at the Imperial Academy in St Petersburg.

116. Avrora's position was summarised in these terms in its written closing submissions:

> "[Avrora] accepts that the process of analysing pigments may allow a painting to be dated (although even then [Dr Eastaugh's] approach based on varying probabilities of different pigments being used at different times presupposes the existence and reliability of enormous amounts of data about use of different pigments by different artists at given times). It is also possible that the technique espoused by [Dr Eastaugh] for comparison of individual paintings might have some force if (a) a large enough set of data were available on a given artist and (b) it was clear that the features identified as points of comparison between the data and the painting under analysis were not just characteristic of the artist but also not characteristic of other artists ….
>
> However, a technical comparison between two 'right' paintings and ['Odalisque'] does not provide enough data to establish the attribution of ['Odalisque'] …. At best, the conclusion which can be reached is that ['Odalisque'] is not inconsistent with the two other works, although even then, there are technical characteristics which are potentially anomalous …".

117. These comments make sense to me. I have not been persuaded that the evidence supports Dr Eastaugh's view that "correspondence of multiple details … would be highly improbable in a work by a copyist". To the contrary, it seems to me that the technical evidence is not such as to allow reliable conclusions to be drawn as to the likelihood of "Odalisque" having been painted by a copyist rather than Kustodiev.

Conclusions on the warranty claim

118. To my mind, the connoisseurship evidence provides the most reliable guide to authenticity. That evidence seems to me to indicate quite strongly that Kustodiev did not paint "Odalisque" (paragraph 50 above). The Voinov/Notgaft materials tend to suggest to the contrary (paragraphs 91-99 and 102 above), but I find the connoisseurship evidence more compelling, and the absence of any known reference to the painting in the archives reinforces the conclusion that "Odalisque" is not by Kustodiev (see paragraphs 65-67 and 102 above). I find, accordingly, that

"Odalisque" was not painted by Kustodiev. I do not think certainty on the point is possible, but my task is to determine authenticity on the balance of probabilities, and the likelihood, in my view, is that "Odalisque" is the work of someone other than Kustodiev. It follows that Avrora is entitled to cancel its purchase of the painting and to recover the money it paid.

The other claims

119. The conclusions I have arrived at in relation to the warranty claim mean that relatively little turns on Avrora's other claims: for negligence and under the Misrepresentation Act 1967. I must nevertheless consider them.

120. There is a good deal of overlap between the negligence and Misrepresentation Act claims. In broad terms, they are to the effect that (a) Christie's was negligent in attributing "Odalisque" unequivocally to Kustodiev and (b) it impliedly represented that it had reasonable grounds for holding the opinion that "Odalisque" was by Kustodiev when it did not in fact have such grounds. Both claims raise issues relating to the "requirement of reasonableness" for which the Unfair Contract Terms Act 1977 ("UCTA") provides.

Did Christie's owe a duty of care?

121. One of Christie's' answers to the negligence claim is that it did not owe a duty of care. This argument is advanced on the basis that Christie's never assumed any responsibility to Avrora other than pursuant to the Limited Warranty. The contention is founded on the terms of the Conditions, which, it is said, negated any wider assumption of responsibility.

122. The main terms of the Conditions that are of relevance are these:

i) Paragraph 2(b), which provided:

> "All statements by us in the catalogue entry for the property or in the condition report, or made orally or in writing elsewhere, are statements of opinion and are not to be relied on as statements of fact. Such statements do not constitute a representation, warranty or assumption of liability by us of any kind …. Except as set forth in paragraph 6 below, neither Christie's nor the seller is responsible in any way for errors and omissions in the catalogue, or any supplemental material";

ii) Paragraph 2(c), which provided:

> "Except as stated in the Limited Warranty in paragraph 6 below, all property is sold 'as is' without any representation or warranty of any kind by Christie's or the seller. Buyers are responsible for satisfying themselves concerning the condition of the property and the matters referred to in the catalogue entry";

iii) Paragraph 5, which provided:

> "We agree to refund the purchase price in the circumstances of the Limited Warranty set out in paragraph 6 below. Apart from that, neither the seller nor we, nor any of our officers, employees or agents, are responsible for the correctness of any statement of whatever kind concerning any lot, whether written or oral, nor for any other errors or omissions in descriptions or for any faults or defects in any lot. Except as stated in paragraph 6 below, neither the seller, ourselves, our officers, employee or agents, give any representation, warranty or guarantee or assume any liability of any kind in respect of any lot with regard to merchandise, fitness for a particular purpose, description, size, quality, condition, attribution, authenticity, rarity, importance, medium, provenance, exhibition history, literature or historical relevance. Except as required by local law any warranty of any kind whatsoever is excluded by this paragraph"; and

iv) Paragraph 6(iv), which is set out in paragraph 29 above.

123. These provisions obviously seek to prevent Christie's becoming vulnerable to any claim other than one under the Limited Warranty. They do so in more than one way. Among other things, they contain straightforward denials of responsibility (e.g. for errors and omissions) and of the availability of any remedy except under the Limited Warranty. They also seek to deny the making of representations and the giving of any warranty apart from the Limited Warranty. What matters for present purposes is whether they show that there was no assumption of responsibility by Christie's and, hence, that no duty of care arose.

124. That a disclaimer of responsibility can potentially prevent a duty of care arising is clear. The claim in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 failed because of such a disclaimer: Lord Devlin explained (at 533):

> "A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not. The problem of reconciling words of exemption with the existence of a duty arises only when a party is claiming exemption from a responsibility which he has already undertaken or which he is contracting to undertake".

Similarly, a disclaimer was held to have negatived any assumption of responsibility in *McCullagh v Lane Fox & Partners Ltd* [1996] PNLR 205. Having noted (at 237) that the trial judge had avoided this conclusion "by approaching the disclaimer as if it were a contractual exclusion", Hobhouse LJ went on:

> "On such an approach it would need to be strictly construed and the argument was available that it did not as such cover an oral statement. But that is not, in my judgment, the right approach. It is not an exclusion to be construed. The right approach, as is made clear in *Hedley Byrne*, is to treat the existence of the disclaimer as one of the facts relevant to

> answering the question whether there had been an assumption of responsibility by the defendants for the relevant statement. This question must be answered objectively by reference to what a reasonable person in the position of [the plaintiff] would have understood at the time that he finally relied upon the representation."

125. Consideration was given in *De Balkany v Christie Manson & Woods Ltd* (1997) 16 Tr LR 163 to whether a previous version of Christie's' terms and conditions precluded an assumption of responsibility. In *De Balkany*, Morison J decided that Christie's was liable under the guarantee it had given, but he also commented, obiter, on whether liability existed in tort. He said the following (at 182) about whether Christie's had assumed responsibility:

> "I first look at the question generally without reference to the conditions.
>
> The special features of this case are that Christie's themselves have sole discretion over how they describe a lot. This fact is made known to buyers, in the sense that Christie's disclose to potential bidders some of the terms on which they are acting for the seller. Christie's employ skilled personnel who take considerable trouble to satisfy themselves as to the accuracy of the catalogue entries. This is well known. Buyers will know, therefore, that Christie's have satisfied themselves as to the authenticity of a Lot, and the cataloguing practice which is disclosed, gives considerable latitude for appropriate qualifications where Christie's are of the opinion that such is called for. The buyer is required to pay a substantial premium to the auctioneer. If the auctioneer assumes no responsibility to him, one might ask what the payment is for. On the other hand, in normal circumstances, a buyer has no reason to believe that an auctioneer has assumed any responsibility to him. The auctioneer is the seller's agent. The buyer only becomes contractually bound by the conditions when his bid has been accepted.
>
> On balance, and primarily because Christie's take responsibility for the catalogue description which is an important feature from the buyer's point of view, and because the buyer pays a premium, I would be inclined to the view that there was an assumption of responsibility such that Christie's become liable to a buyer for negligent misstatement in the catalogue entries.
>
> Do the Conditions affect this conclusion? Condition 3(a) says that statements in the catalogue are statements of Christie's opinion. Condition 11(a), under what might be thought to be an inappropriate heading 'Guarantee', excludes responsibility for the 'correctness' of any such statement but it does not, in terms, exclude responsibility for negligence. Condition 3(c) says that buyers must satisfy themselves as to the opinions expressed in

> the catalogue. I am, somewhat reluctantly, forced to the conclusion that Christie's have made it reasonably clear that they have not assumed any responsibility to the buyer for the way in which the statements in the catalogue are prepared.
>
> In my judgment, a buyer at Christie's, as a buyer at a car auction, must satisfy himself about the goods and cannot, in law, rely upon what Christie's have said. The only right which a buyer has is that given to him by clause 11(b) where there is a forgery or where Christie's have been guilty of deceit. I do not regard this conclusion as satisfactory because it means that a buyer has got nothing of substance for his premium."

126. The *De Balkany* case was discussed in *Morin v Bonham & Brooks Ltd* [2003] 2 All ER (Comm) 36, which concerned an auction conducted by Bonhams & Brooks SAM (referred to as "B&B Monaco"). In that case, Mr Jonathan Hirst QC, sitting as a Deputy High Court Judge, said (at paragraph 53):

> "Plainly this authority provides substantial ammunition for B&B Monaco to contend that they owed no duty of care to [the claimant] but, if English law applied, I would hold that he had surmounted the fairly low threshold of showing a reasonable prospect of success on this point for the following reasons. (a) But for the conditions of sale, there could be little doubt that B&B Monaco owed a duty of care. (b) The decision in *De Balkany*'s case on whether Christie's owed any duty in tort was expressly obiter and moreover it would appear that the court was not addressed on the impact of s 2(2) of the Unfair Contract Terms Act 1977. (c) The conditions of sale in this case are not the same as Christie's in the case. (d) In particular, cl 3 is prefaced with the following: 'whilst every effort has been made to ensure the accuracy of the description'. I think it is arguable that the exclusions of liability which ensue proceed on the assumption that every effort has indeed been made by B&B Monaco and that if every (reasonable) effort has not been made the exclusions are not to be effective to exclude a duty of care. It is right to bear in mind that these are B&B Monaco's conditions of sale, and they should be construed contra proferentem …".

On appeal ([2004] 1 All ER (Comm) 880), Mance LJ, with whom the other members of the Court agreed, said this (in paragraph 24):

> "As to English law, the judge also concluded, obiter, that Mr Morin had a reasonable prospect of showing that [B&B Monaco] owed him and were in breach of a duty of care, despite cll 3 and 27 of the conditions of sale. He distinguished statements of Morison J in *De Balkany v Christie Manson & Woods Ltd* (1997) 16 Tr LR 163 as obiter and as concerned with differently worded conditions. The present conditions are at pains to exclude any warranty or guarantee, and to refer to

> catalogue statements as matters of 'opinion'. But cl 3 is prefaced by the words 'Whilst every effort is made to ensure the accuracy of the description of each Lot in any Catalogue' and cl 27 says that the description and information in the catalogue 'are given for guidance'. It is a usual implication in relation to any expression of opinion by a professional person that due diligence has been exercised in preparing and expressing the opinion, and the opening words of cl 3 are entirely consistent with this".

127. *Morin* was, however, concerned with (a) terms different from those at issue in the present case and (b) whether a claim had a reasonable prospect of success rather than arriving at a final determination. Leaving aside for the moment the impact of the UCTA (to which, as Mr Hirst noted, there is no reference in the *De Balkany* case), I would on balance take the view that the Conditions had prevented a duty of care from arising in the present case. In *De Balkany*, Morison J (reluctantly) concluded that the terms with which he was concerned had made it reasonably clear that Christie's was not assuming responsibility. To my mind, the Conditions are clearer.

128. It follows that Avrora's negligence claim must fail unless the parts of the Conditions on which Mr Aldridge relies can be attacked under UCTA. Before, however, considering that question, I shall turn to the claim under the Misrepresentation Act.

The Misrepresentation Act

129. Section 2(1) of the Misrepresentation Act 1967 is in these terms:

> "Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true".

130. In its written submissions, Christie's argued that section 2(1) could not be in point as the representations alleged would not have been made by "another party" to the relevant contract (viz. the contract for the purchase of "Odalisque"). The only parties to that contract were, it was said, Avrora and the seller of "Odalisque", not Christie's. During closing submissions, however, Mr Aldridge explained that Christie's had chosen not to pursue this point in the present case.

131. Avrora's claim under the Misrepresentation Act is based on the proposition that Christie's impliedly represented that it had reasonable grounds for attributing "Odalisque" unequivocally to Kustodiev. The authorities to which I was referred in this context included *Smith v Land and House Property Corporation* (1885) LR 28 Ch D 7 and *Thomson v Christie Manson & Woods Ltd* [2004] EWHC 1101 (QB), [2004] PNLR 42. In *Smith v Land and House Property Corporation*, Bowen LJ said (at 15):

> "if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of material fact, for he impliedly states that he knows facts which justify his opinion".

In *Thomson v Christie Manson & Woods Ltd*, where urns had been auctioned as "a pair of Louis XV porphyry and gilt–bronze two-handled vases", it was common ground between the parties that Christie's had impliedly represented that it had reasonable grounds for its opinion. Jack J said (at paragraph 199):

> "The representation is not simply that the urns were Louis XV because that is a matter of opinion. The representation is that that was Christie's opinion and that Christie's had reasonable grounds for that opinion. This approach was not in issue between Ms Thomson and Christie's and in my view is sound in principle".

132. Mr Aldridge nonetheless took issue with the proposition that Christie's had made any implied representation that it had grounds for believing "Odalisque" to be by Kustodiev. He argued that there is no need to imply such a representation where a warranty is given. He accepted that he was not aware of authority to that effect, but suggested that that was because the point was obvious.

133. It is plain, I think, that a person making a promise will not necessarily be expressing any opinion. Were I to warrant that it would snow next Christmas, that might not mean that I believed that that would happen, let alone that I had reasonable grounds for so believing. In effect, the warranty would represent a bet. On other occasions, a warranty might serve to allocate risk without any representation of opinion being made. If, on the other hand, the person giving a warranty is to be taken to have expressed an opinion on the relevant point, I do not see why the fact that he is also giving a warranty should preclude an implied representation that he has reasonable grounds for that opinion. The fact that he is prepared to back up his opinion with a warranty might be thought to reinforce the impression that he has a basis for it rather than to negate it.

134. In the present case, it is clear that Christie's not only warranted that "Odalisque" was by Kustodiev but represented that that was its opinion: for example, a page of the catalogue headed "Important Notices and Explanations of Cataloguing Practice" explained that where, as was the case with "Odalisque", the catalogue gave the name of an artist without any qualification, that meant that the work was "[i]n Christie's opinion a work by the artist". Since Christie's was giving its opinion as well as a warranty, it seems to me that it impliedly represented that it had reasonable grounds for holding that opinion.

UCTA and the misrepresentation claim

135. As already mentioned, the Conditions were designed to prevent Christie's from being exposed to any claim apart from one under the Limited Warranty. However, section 3 of the Misrepresentation Act 1967 states:

> "If a contract contains a term which would exclude or restrict—

> (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
>
> (b) any remedy available to another party to the contract by reason of such a misrepresentation,
>
> that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does".

Mr Aldridge accepted that, in the circumstances, the provisions of the Conditions which, if effective, would preclude Avrora making a claim under the Misrepresentation Act are subject to the "requirement of reasonableness" set out in section 11(1) of UCTA.

UCTA and the negligence claim

136. Do the Conditions also fall to be tested against the "requirement of reasonableness" in so far as they would, if effective, preclude a negligence claim? This question turns on whether the Conditions are within the scope of UCTA itself. The fact that section 3 of the Misrepresentation Act bites on the Conditions in the context of misrepresentation reduces the importance of the point, but I still need to address it.

137. Section 2 of UCTA limits the extent to which it is possible to exclude or restrict liability for "negligence". "Negligence" is defined by section 1(1) to mean:

> "the breach—
>
> (a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;
>
> (b) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty);
>
> (c) of the common duty of care imposed by the Occupiers' Liability Act 1957 or the Occupiers' Liability Act (Northern Ireland) 1957".

138. It is Avrora's case that, were it not for UCTA, the Conditions would exclude or restrict Christie's' liability for "negligence" insofar as they negate an assumption of responsibility as well as in other ways. In support of this submission, Mr Legge relied on *Smith v Eric S. Bush* [1990] 1 AC 831, where the Court of Appeal had held that UCTA had no application because a disclaimer of liability would at common law have prevented any duty to take reasonable care arising between the parties. The House of Lords decided that UCTA applied. Lord Griffiths said (at 856-857) that the construction of the Act adopted by the Court of Appeal failed to give due weight to sections 11(3) and 13(1). He explained:

> "I read these provisions as introducing a 'but for' test in relation to the notice excluding liability. They indicate that the existence of the common law duty to take reasonable care, referred to in section 1(1)(b), is to be judged by considering whether it would exist 'but for' the notice excluding liability. The result of taking the notice into account when assessing the existence of a duty of care would result in removing all liability for negligent misstatements from the protection of the Act. It is permissible to have regard to the second report of the Law Commission on Exemption Clauses (1975) (Law Com. No. 69) which is the genesis of the Unfair Contract Terms Act 1977 as an aid to the construction of the Act. Paragraph 127 of that report reads:
>
> 'Our recommendations in this part of the report are intended to apply to exclusions of liability for negligence where the liability is incurred in the course of a person's business. We consider that they should apply even in cases where the person seeking to rely on the exemption clause was under no legal obligation (such as a contractual obligation) to carry out the activity. This means that, for example, conditions attached to a licence to enter on to land, and disclaimers of liability made where information or advice is given, should be subject to control. . . .'
>
> I have no reason to think that Parliament did not intend to follow this advice and the wording of the Act is, in my opinion, apt to give effect to that intention."

139. Mr Aldridge, however, submitted that UCTA is not in point. There is, he maintained, a fine but important distinction to be drawn between, on the one hand, terms that exclude or restrict the relevant obligation or duty and, on the other, terms that define the basis on which the defendant provides its services and prevent the obligation or duty accruing in the first place. According to Mr Aldridge, paragraphs 2(b), 3(c) and 5 of the Conditions merely defined the scope of the task undertaken by Christie's and so were not caught by UCTA.

140. Mr Aldridge relied in support of his submissions on *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep 264 and *Titan Steel Wheels Ltd v Royal Bank of Scotland plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep 92. In the former case, one of the claims advanced depended on the defendant having owed a duty to provide information. As to this, Toulson J said (at paragraph 71):

> "[The claimant] relies on the publication of the SIM [i.e. a Syndicate Information Memorandum] to give rise to the alleged duty of care. The relevant paragraphs of the SIM are not in my view to be characterised in substance as a notice excluding or restricting a liability for negligence, but more fundamentally as going to the issue whether there was a relationship between the parties (amounting to or equivalent to that of professional

> adviser and advisee) such as to make it just and reasonable to impose the alleged duty of care".

In the *Titan Steel* case, the claimant sought damages from the defendant bank for losses arising from the alleged mis-selling of derivative products. David Steel J accepted a submission on behalf of the bank that contractual terms on which it relied "merely defined the basis upon which the bank was providing its services" and so fell outside the ambit of UCTA. Of *Smith v Eric S. Bush*, David Steel J said (at paragraph 104):

> "The focus of course was the issue of liability for poor service rather than the scope of the service to be provided. Further the decision may have been somewhat overtaken by later decisions in regard to the assumption of responsibility and the move away from any 'but for' test in regard to the existence and extent of any duty."

141. These cases indicate that documents that define the relationship between parties can fall outside UCTA. On the other hand, *Smith v Eric S. Bush* provides authority for the proposition that where, but for a notice excluding liability, a duty of care would exist, UCTA applies. There is surely scope for argument as to what distinguishes the two situations.

142. In the context of the present case, I find the decision of Christopher Clarke J in *Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), [2010] 1 Lloyd's Rep 123 helpful. One of the issues Christopher Clarke J had to consider in that case was whether certain provisions fell within section 3 of the Misrepresentation Act. In the course of doing so, he referred to a passage from the judgment of Gloster J in *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm) in which she had said (at paragraph 602):

> "terms which simply define the basis upon which services will be rendered and confirm the basis upon which parties are transacting business are not subject to section 2 of UCTA. Otherwise, every contract which contains contractual terms defining the extent of each party's obligations would have to satisfy the requirement of reasonableness."

In his judgment, Christopher Clarke J said this:

> "313 In *Springwell* Gloster J took the view that terms which simply defined the basis upon which the parties were transacting business did not fall within section 2 of UCTA; otherwise, as she said, all contractual terms that did so would have to satisfy the test of reasonableness. It is obviously advantageous that commercial parties of equal bargaining power should be able to agree what responsibility they are taking (or not taking) towards each other without having to satisfy some reasonableness test. At the same time there is a danger that the '*ingenuity of the draftsman*' will insert into a

> myriad of contracts a clause to the effect that the basis upon which the parties are contracting is that no representations have been made, are intended to be relied on or have been relied on, as a means of evading liability which is intended to be impregnable.
>
> 314 In this respect the key question, as it seems to me, is whether the clause attempts to rewrite history or parts company with reality. If sophisticated commercial parties agree, in terms of which they are both aware, to regulate their future relationship by prescribing the basis on which they will be dealing with each other and what representations they are or are not making, a suitably drafted clause may properly be regarded as establishing that no representations (or none other than honest belief) are being made or are intended to be relied on. Such parties are capable of distinguishing between statements which are to be treated as representations on which the recipient is entitled to rely, and statements which do not have that character, and should be allowed to agree among themselves into which category any given statement may fall.
>
> 315 Per contra, to tell the man in the street that the car you are selling him is perfect and then agree that the basis of your contract is that no representations have been made or relied on, may be nothing more than an attempt retrospectively to alter the character and effect of what has gone before, and in substance an attempt to exclude or restrict liability".

143. This part of Christopher Clarke J's judgment was cited when the *Springwell* case reached the Court of Appeal. Aikens LJ, having referred to a provision stating "no representation or warranty, express or implied, is or will be made … in or in relation to such documents or information", said:

> "However, as Christopher Clarke J trenchantly put the point in the *Raiffeisen* case, '… to tell the man in the street that the car you are selling him is perfect and then agree that the basis of your contract is that no representations have been made or relied on, may be nothing more than an attempt retrospectively to alter the character and effect of what has gone before and in substance be an attempt to exclude or restrict liability'. I would therefore be inclined to regard that part of clause 6 … as falling within section 3 [of the Misrepresentation Act] and therefore subject to the UCTA regime".

(See *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221, [2010] 2 CLC 705, at paragraph 181.)

144. Aikens LJ's focus was on section 3 of the Misrepresentation Act rather than section 2 of UCTA and on whether representations had been made rather than on whether there had been an assumption of responsibility. Nonetheless, it seems to me that the passages from his judgment and that of Christopher Clarke J cast light on

circumstances in which a provision seeking to deny an assumption of responsibility will come within section 2 of UCTA. Whether or not UCTA applies more widely (as *Smith v Eric S. Bush* suggests), a provision which purports to prevent an assumption of responsibility will, in my judgment, be subject to UCTA if it attempts "retrospectively to alter the character of what has gone before" or "to rewrite history or parts company with reality".

145. In my view, the Conditions do "[part] company with reality" insofar as they negate assumption of responsibility. The reality was that Christie's had taken responsibility for the attribution of "Odalisque" to Kustodiev. It stated that that was its opinion; it gave Avrora a warranty to that effect; it indicated that its views reflected research (for example, by presenting itself as a centre of excellence and, more specifically, by explaining in the "Important Notes and Explanation of Cataloguing Practice" that more qualified catalogue entries – e.g. "Attributed to …" - were "based upon careful study" and represented "the opinion of experts", tending to suggest that an unequivocal attribution would be too); and it was intending to charge the buyer a substantial premium. That Christie's may not have wanted to assume tortious liability in respect of the attribution cannot, I think, be determinative. It is noteworthy in this context that in *White v Jones* [1995] 2 AC 207 Lord Browne-Wilkinson said (at 273) that "the assumption of responsibility referred to is the [defendant's] assumption of responsibility for the task not the assumption of legal liability".

146. In the circumstances, I consider that UCTA applies.

Reasonableness

147. On the basis of my conclusions so far, the "requirement of reasonableness" is relevant for two reasons:

i) because section 3 of the Misrepresentation Act prevents the Conditions from barring a claim under that Act unless the relevant parts satisfy the "requirement of reasonableness"; and

ii) because Christie's' ability to curtail liability for negligence will have been limited by section 2 of UCTA. That provides as follows:

> "(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.
>
> (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.
>
> (3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk."

148. The "requirement of reasonableness" is explained in section 11 of UCTA. Section 11(1) states:

> "In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act [and] section 3 of the Misrepresentation Act 1967 … is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made."

It is for those claiming that a term or notice satisfies the requirement of reasonableness to show that it does so: section 11(5) of UCTA and, to the same effect, section 3 of the Misrepresentation Act.

149. Section 11(2) of UCTA states that, in determining whether a term satisfies the requirement of reasonableness for the purposes of sections 6 or 7 of UCTA, regard is to be had in particular to the matters specified in schedule 2 to the Act. In practice, the Courts have referred to schedule 2 when considering the requirement of reasonableness more generally, not merely in the context of sections 6 and 7 (see *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep 273, at paragraph 10(2)).

150. The matters to which the Court's attention is drawn in schedule 2 are:

> "any of the following which appear to be relevant—
>
> (a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
>
> (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
>
> (c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
>
> (d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
>
> (e) whether the goods were manufactured, processed or adapted to the special order of the customer".

151. There was discussion as to (a) and (c) in particular. So far as (a) is concerned, Mr Legge pointed out that Christie's contracts only on its own standard terms. However, it is also fair to say – as Mr Aldridge did – that Avrora is a vehicle for a particularly rich man and that it was under no economic imperative to deal with Christie's if it did not wish to. With regard to (c), Mr Ruzhnikov confirmed in cross-examination that he was aware that Christie's gave a warranty in relation to lots described in upper case type; as he explained, Avrora did not buy anything else. That suggests some familiarity with Christie's' terms. In any case, Mr Ruzhnikov and Mr Voronchenko both referred to legal matters being handled by other people, and those people could be expected to have known of the disclaimers.

152. Looking at matters more widely, I have been persuaded by Mr Aldridge that the relevant terms of the Conditions satisfy the requirement of reasonableness in this case. My reasons include these:

i) There was no question of Avrora being left without a remedy if "Odalisque" proved not to be by Kustodiev. Since Christie's was giving a warranty, Avrora was to be entitled to cancel its purchase of the painting and recover what it had paid without having to establish any fault on Christie's' part;

ii) Mr Legge argued that the disclaimers could have denied Avrora the ability to make a claim against Christie's in circumstances where it could show that Christie's had been negligent but not that "Odalisque" had not been painted by Kustodiev. There is room for argument as to what rights Avrora would have had against Christie's in such a situation even had there been no disclaimers. Be that as it may, it does not strike me as unreasonable for Christie's to have excluded any liability it might otherwise have had. In my view, Christie's could reasonably take the position that it should not be exposed to a claim in circumstances where the likelihood was that it had been correct that "Odalisque" *was* painted by Kustodiev;

iii) Mr Legge pointed out that the Limited Warranty provided for a purchaser to be repaid in sterling without interest. This, Mr Legge said, was likely to mean that a buyer would not be put back in the position it would have been in had it not purchased. In this connection, Mr Legge noted that Avrora conducts its affairs in dollars and that other bidders were unlikely to conduct their affairs in sterling either. To my mind, however, the fact that a refund would be in sterling and without interest did not render the disclaimers unreasonable, the more so since the warranty was conferring a right to a refund where there might otherwise be no such entitlement;

iv) As already noted, while Christie's contracts only on its own standard terms, Avrora is a vehicle for a particularly rich man and it was under no economic imperative to deal with Christie's if it did not wish to;

v) Avrora appears to have had some familiarity with Christie's' terms, and in any event could reasonably be expected to know of them;

vi) It was suggested in Avrora's Reply that, were the disclaimers effective, Christie's "would suffer no financial penalty" even if it adopted "a negligent (or even potentially a dishonest) approach to the attribution of a picture".

However, (a) regardless of UCTA, the disclaimers would not protect Christie's from liability for fraud (see e.g. Chitty on Contracts, at 14-136), (b) Christie's would be liable to refund the purchase price pursuant to the Limited Warranty if a picture proved not to be by the person to whom it was attributed and (c) the concern of the civil courts is for the most part with compensation for loss rather than exacting penalties;

vii) It is true that Avrora was required to pay a large buyer's premium to Christie's, but upholding the disclaimers would not mean that this had been paid for nothing. Apart from anything else, Avrora received the benefit of the Limited Warranty in return, and it stood to recover the buyer's premium pursuant to the Limited Warranty if it transpired that "Odalisque" had not been painted by Kustodiev;

viii) Were Christie's vulnerable to claims for negligence or under the Misrepresentation Act, it was liable to find itself in a situation where it had to compensate Avrora but yet did not recover "Odalisque". I can see why Christie's would not have considered that a satisfactory outcome.

153. In the circumstances, it seems to me that the relevant parts of the Conditions are not invalidated by either section 2 of UCTA or section 3 of the Misrepresentation Act and so will have served to bar Avrora's claims for negligence and under the Misrepresentation Act.

154. I should perhaps add that I am not to be taken to be expressing a view as to whether the Conditions would have satisfied the requirement of reasonableness if Christie's had not given a warranty. It is also noteworthy that Christie's' current terms and conditions differ somewhat from the Conditions.

Other points

155. The conclusions I have arrived at above are of themselves fatal to Avrora's claims for negligence and under the Misrepresentation Act. I shall nevertheless comment briefly on what the position would have been had I considered the Conditions ineffective. It seems to me that the claims would still have failed, in particular because:

i) There is no reason to suppose that consulting the Voinov monograph or Mr Kruglov's book would have caused Mr de Tiesenhausen to doubt the attribution of "Odalisque" to Kustodiev. The monograph would, if anything, have increased Mr de Tiesenhausen's confidence that the painting was by Kustodiev. Mr Harry Smith, the expert called by Avrora to give evidence on auctioneering practice, agreed that Mr de Tiesenhausen might have taken encouragement from the entry in the Voinov monograph for "Sleeping";

ii) Mr Smith did not identify any other historical research that Christie's ought to have undertaken that could have been expected to alter its view of "Odalisque";

iii) Nor did Mr Smith identify additional technical tests as necessary;

iv) The key question is whether Christie's can be criticised for not having consulted an outside (in practice, Russian) expert. On the particular facts of this case, I have not been persuaded that it can. While Mr Smith was critical of Christie's in this respect, his evidence did not seem to me to be securely rooted in actual auctioneering practice. On this aspect, I found evidence given by Mr Rutherston compelling. He said in one of his reports:

> "Had I found myself in Mr. de Tiesenhausen's shoes in 2005, confident of the authenticity of ['Odalisque'], I would not have actively sought out a Kustodiev expert to confirm what he believed himself. There was sufficient reason to be confident of the attribution to Kustodiev. In the absence of a universally acknowledged expert on Kustodiev in 2005 a specialist in those circumstances would not, acting reasonably, have consulted an expert about ['Odalisque']".

Conclusion on the negligence and Misrepresentation Act claims

156. Avrora's claims for negligence and under the Misrepresentation Act fail.

Overall conclusions

157. I can summarise my conclusions as follows:

i) The likelihood is that "Odalisque" was not painted by Kustodiev. That means that Avrora's claim under the Limited Warranty succeeds. It is accordingly entitled to cancel its purchase of the painting and to the return of the money it paid;

ii) The claims for negligence and under the Misrepresentation Act fail.