

CASE NOTE

THE FRAUD OF ART: MCBRIDE V CHRISTIE'S AUSTRALIA PTY LIMITED

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I INTRODUCTION

'Art forgery', as Chief Justice Bergin points out, 'in the sense of propounding a work as having been painted by a particular artist when it has not, has been going on for centuries.'¹ It also conjures up images of unscrupulous artists and dodgy dealers. From a legal perspective meanwhile it can lead to claims of breach of contract and of fiduciary duties, deceit and negligence, as well as breaches of competition law. This case note will therefore examine the legal ramifications that arose in *McBride v Christie's Australia Pty Limited*, a case involving the alleged forgery of a painting entitled 'Faun and Parrot' attributed to the Australian artist, Albert Tucker.

II MCBRIDE V CHRISTIE'S AUSTRALIA PTY LIMITED

A Background Facts

The plaintiff, Louise McBride, had purchased the painting 'Faun and Parrot' at an auction held on 1 May 2000 by Christie's Australia Pty Limited.² The vendor had been Holland Fine Arts and Cars Pty Limited (HFA) with McBride having retained Vivienne Sharpe as her agent.³ HFA was an art dealership involved in the purchase and selling of artwork between 1982-2004. Its director, Alan Holland, had agreed in late 1999 to buy the painting from Peter Gantz for approximately \$45 000,⁴ Gantz having brought it from Barry O'Sullivan. O'Sullivan claimed it had been his father's and had been in his family since 1980. The painting was one of six that Holland took to Christie's for its next auction, with it being placed in their auction catalogue where it was attributed to Albert Tucker, and listed at \$55-75 000.⁵

McBride had known Sharpe for a number of years and claimed that in April 2000 she had been shown a number of catalogues by Sharpe, including the one for Christie's, with McBride taking a liking to the purported Tucker painting 'because of its brightness and the bird theme.'⁶ On 1 May 2000, Sharpe attended Christie's Melbourne auction rooms and obtained a copy of the Condition Report for the painting,⁷ before signing a Bidding Registration Form.⁸ Since McBride was in

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¹ *McBride v Christie's Australia Pty Limited* [2014] NSWSC 1729, [24].

² *Ibid*, [2].

³ *Ibid*, [3].

⁴ *Ibid*, [28].

⁵ *Ibid*, [30].

⁶ *Ibid*, [33].

⁷ *Ibid*, [42].

⁸ *Ibid*, [45].

London at the time Sharpe made contact by telephone, with McBride authorising purchase of the painting. Although the painting was passed in at auction, Sharpe made a post-auction offer of \$75 000 which was accepted.⁹ McBride then used her company, Laurentine Pty Ltd, to purchase it since Capital Finance would only provide the finance needed to a company.¹⁰ An Equipment Term Purchase Agreement was then made between Capital Finance and Laurentine on 4 June, 2000, the terms of which allowed Laurentine to become the owner of the painting once all the money had been paid.¹¹

A second Tucker painting, 'Faun attacked by Parrots', was meanwhile consigned to Christie's on 21 June by HFA, with it again being alleged it had been purchased from Gantz.¹² This painting was sold to the Australian Club for \$69 165, though the Club became aware a number of years later that it was a possible forgery, with Christie's providing a reimbursement in December 2012, in the form of credit which could be spent at any of its salesrooms.¹³ This second Tucker sale had taken place despite the fact there had been serious concerns within Christie's about the provenance of the painting purchased earlier by McBride.¹⁴

In late 2009 McBride found herself in financial need and therefore met with Sharpe to discuss, inter alia, selling her Tucker painting. Sharpe then had discussions with Geoffrey Smith, Vice-Chairman and National Head of Art at Southby's, who raised concerns about its provenance.¹⁵ In late November 2012, McBride had a discussion with HFA regarding the painting, seeking information documentation, which it was unable to provide.¹⁶ McBride then commenced legal proceedings.¹⁷

B The Claims

McBride's action against Christie's was for misleading or deceptive conduct, unconscionable conduct, and deceit. There was also a claim against HFA for misleading or deceptive conduct, as well as against its director, Allan Holland, for knowingly being involved in HFA's conduct. There was also a claim against her agent, Vivienne Sharpe, again for misleading or deceptive conduct, as well as breach of contract and fiduciary duty, and negligence.

Since the basis of the claims was that the painting was a forgery, expert evidence was required to establish whether or not it was.

C Judgment of Bergin CJ

1. The Expert Evidence

Professor Robyn Sloggett, from the Centre of Cultural Materials Conservation at the University of Melbourne, gave evidence regarding the painting, providing a written

⁹ Ibid, [55].

¹⁰ Ibid, [63].

¹¹ Ibid, [74]-[76].

¹² Ibid, [87].

¹³ Ibid, [94].

¹⁴ Ibid, [80].

¹⁵ Ibid, [103].

¹⁶ Ibid, [115].

¹⁷ Ibid, [119].

report entitled 'Report on the Technical Examination of a Painting on Board' in which she described the painting as being 'an abstract figure (faun) with a parrot perched on its head within an abstract landscape.'¹⁸ She then stated that there were anomalies in regard to the materials used since the 'condition and solubility of the paint layer did not show any clear evidence of age.' These inconsistencies in the materials that had been used, together with the known provenance problems led Professor Sloggett to conclude that the painting 'could not, in the circumstances, be attributed to Albert Tucker.'¹⁹

Stylistic anomalies were also found, with Professor Sloggett noting differences in the delineation of the landscape and the sky between this painting and other known works by Tucker. She also considered that the blending of the colours of the sky 'was less complex than in securely provenanced works.'²⁰ Further stylistic differences were observed in the depiction of the parrot, leading Professor Sloggett to conclude that 'there were many anomalies evident in the painting and that by comparison with securely provenanced works' it 'cannot be ascribed to the oeuvre of Albert Tucker.'²¹

Chief Justice Bergin noted that Professor Sloggett's opinion was complemented by the evidence of handwriting expert, Neil Holland, Director of Scientific Document Services Pty Ltd. In a detailed report he 'identified stroke sequences in the signature on the painting that were not common to the signatures on the securely provenanced works of Albert Tucker.' His conclusion, therefore, was that 'it was "highly probable" that the painting was not signed by the same person who signed a number of securely provenanced Albert Tucker works.'²²

2. The Misleading or Deceptive Conduct Claim

It was alleged that HFA has made false representations that were misleading or deceptive, and therefore in breach of s 52 and 53(a) and (eb) of the then *Trade Practices Act 1974* (Cth)²³ as well as s 44(a) and (i) of the *Fair Trading Act 1987* (NSW) (FTA) and/or s 12 of the *Fair Trading Act 1967* (Vic). The representations were in regard to it being an Albert Tucker painting; that it was the unencumbered property of HFA; had been purchased from the Tolarno gallery in 1967-70; had been in the collection of Barry O'Sullivan's family since 1980; that the painting was a study for another painting entitled 'Faun being attacked by Parrots 1967;' and that 'there was no doubt about the provenance of the painting.'²⁴

Bergin CJ held that all these representations had been made by HFA,²⁵ with the exception of the one regarding provenance,²⁶ and that these representations were false.²⁷ The issue then was whether the representations were misleading, with her Honour noting that the liability imposed by s 52 is 'quite unrelated to fault.'²⁸ The

¹⁸ Ibid, [199].

¹⁹ Ibid, [202].

²⁰ Ibid, [203].

²¹ Ibid, [207].

²² Ibid, [209].

²³ Now the *Competition and Consumer Protection Act 2008* (Cth).

²⁴ *McBride v Christie's Australia Pty Limited* [2014] NSWSC 1729, [230].

²⁵ Ibid, [234], [239].

²⁶ Ibid, [240].

²⁷ Ibid,

²⁸ Ibid, [241].

representations were held to have been misleading, or likely to mislead, in contravention of s 52 and s 53(c) of the TPA and s 42 of the FTA and s 12 of the FTA Vic.²⁹

What her Honour then had to decide was whether these contraventions caused loss to McBride, with it being noted that ‘HFA was not a mere conduit’ since it had agreed to be a party with McBride, signing a receipt that conformed ‘as correct the representation that the painting was painted by Albert Tucker.’³⁰ It had also authorised Christie’s to sell it as having been painted by him.³¹ Thus, these representations made by HFA caused McBride’s loss and in those circumstances it was liable for those losses.³²

Misleading or deceptive conduct claims were also made against Christie’s in regard to similar representations, namely that the painting was by Albert Tucker; that there were no doubts about the signature; that it had been painted by Tucker around 1967; that it had been purchased from the Tolarno Gallery in 1969-70; that it ‘had been acquired by the father of the present owner circa 1970; and that ‘there was no doubt about the provenance of the painting.’³³

Chief Justice Bergin stated, as she had in regard to HFA, that Christie’s were no ‘mere conduit’ for the information that had been provided to McBride since it ‘made its own representation in respect of the painting in particular that there was no doubt that the signature on the painting was Albert Tucker’s signature.’³⁴ His Honour also held that ‘there was no reasonable basis for claiming in the auction catalogue that the painting was acquired by the father of the “present owner.”’³⁵ Furthermore, differences between letters Christie’s received from Barry O’Sullivan and Alan Holland, ‘should have alerted it to a serious problem of provenance.’³⁶ It was also noted that Christie’s ‘had held real concerns about the authenticity of the painting very soon after the auction.’³⁷ Her Honour held that she was ‘satisfied that the plaintiff by herself and through her agent Ms Sharpe relied upon the representation in making the decision to purchase the painting and then entering into leases to finance the purchase.’³⁸ Her Honour was also satisfied McBride had suffered loss and damage as a result.³⁹

The same claims were made against Vivienne Sharp, with Bergin CJ stating she was satisfied that in the telephone conversation with McBride on 1 or 2 May 2000, she had represented the painting was by Albert Tucker and that ‘it would be a good investment.’ These representations were held to be ‘false and in contravention of the TPA and FTA’,⁴⁰ and the contraventions were a cause of McBride’s loss.⁴¹

²⁹ Ibid, [246].

³⁰ Ibid, [250].

³¹ Ibid, [252].

³² Ibid, [257]. Note that a separate claim against Alan Holland, Director of HFA, was dismissed: [297].

³³ Ibid, [299].

³⁴ Ibid, [319].

³⁵ Ibid, [324].

³⁶ Ibid, [327].

³⁷ Ibid, [331].

³⁸ Ibid, [332].

³⁹ Ibid.

⁴⁰ Ibid, [371].

3. Deceit

Chief Justice Bergin noted that McBride relied on the same facts to support her deceit claim against Christie's,⁴² her Honour stating that 'there was no rational or reasonable explanation' for Christie's conduct in not advising McBride about the authenticity of the painting. This was then held to be 'commercially reprehensible conduct'; Christie's had an obligation to correct the representation,⁴³ and it was therefore 'guilty of the tort of deceit.'⁴⁴

4. Unconscionable Conduct

Unconscionable conduct claims were also alleged against Christie's within the meaning of s 51AA, s 51AB and s 51AC of the TPA, s 43 of the FTA, and s 7 and s 8 of the FTA (Vic). Chief Justice Bergin held that, for the same reasons she had outlined in regard to the deceit claim, 'Christie's conduct was commercially reprehensible and unconscionable in the circumstances.'⁴⁵

5. Negligence Claim

A negligence claim was also made against Vivienne Sharpe in regard to the representation that the painting would be a good investment, and 'in failing to investigate the authenticity of the painting.'⁴⁶

In defending this claim, Sharpe relied on the evidence of Martin Browne, an art dealer with a Master of Arts from the University of Auckland, who had worked in the art industry since 1981.⁴⁷ In his evidence, Browne stated it was 'entirely reasonable' for Sharpe to have been satisfied with the physical condition of the painting, as represented by Christie's in its condition report. It was also his view that there was nothing further that he would have expected 'a reasonably competent and diligent art dealer in Ms Sharpe's position to do in relation to ascertaining the physical condition of the painting.'⁴⁸ Browne expressed a similar conclusion in regard to the provenance of the painting. This evidence was accepted by Chief Justice Bergin who dismissed the negligence claim.⁴⁹

6. Breach of Contract and Fiduciary Duty

Breach of contract and fiduciary duty were also made against Sharpe, though it was noted by Bergin CJ that during cross-examination, McBride had admitted saying to Sharpe that 'I would like to own a Tucker as I like him as an artist.'⁵⁰ Her Honour stated it was 'rather extraordinary' that McBride then claimed Sharpe had 'exceeded her authority or acted inconsistently with her instructions,' and therefore dismissed the breach of contract and fiduciary duty claims in regard to the Tucker painting.⁵¹

⁴¹ Ibid, [372].

⁴² Ibid, [334].

⁴³ Ibid, [344].

⁴⁴ Ibid, [346].

⁴⁵ Ibid.

⁴⁶ Ibid, [374].

⁴⁷ Ibid, [395].

⁴⁸ Ibid, [402].

⁴⁹ Ibid, [421]-[422].

⁵⁰ Ibid, [362].

⁵¹ Ibid, [365].

A breach of duty was, however, held to have been committed by Sharpe in relation to the selling of a Jeffrey Smart painting owned by McBride.⁵² This was in regard to a secret commission Sharpe had received from another auction house, Menzies, in relation to this Smart painting. Bergin CJ stated that while art agents and auction houses ‘must be free to negotiate the best commercial deal possible’, an agent takes on a fiduciary duty to a vendor and cannot ‘make a profit by use of that fiduciary position.’⁵³ This had occurred when Sharpe kept a share of a guaranteed price arrangement from McBride who, as principal, ‘was entitled to know that the agent had negotiated for herself the very share...that the principal had wanted.’⁵⁴

7. Proportionate Liability

Having established that Christie’s, HFA and Sharpe were all liable for McBride’s \$118 788 loss, Chief Justice Bergin then had the task of apportioning that liability. Christie’s was held to be the most liable with its responsibility for the loss being 85 per cent,⁵⁵ with HFA’s being ten per cent,⁵⁶ and Sharpe’s five per cent.⁵⁷

III CONCLUSION

Perhaps the most surprising aspect of this case was that it actually went to court, considering the amount in dispute was only a little over a hundred thousand dollars, even more so considering the sale of another questionable Albert Tucker painting had seen Christie’s make an out of court settlement. It is suggested that the costs of the nine day Supreme Court trial would have easily surpassed the \$118 788 awarded to McBride.

What the case does confirm is that, given the potential money involved, art forgery will always take place, and occasionally the matter will end up in court. While those actually involved in the forgery will be liable in fraud, if ever proven to have forged a painting, *McBride v Christie’s* illustrates that auction houses, vendors and agents can also all be held legally liable if representations are made that are false, and which result in losses to a purchaser. Misleading or deceptive conduct, it is suggested, is the most likely successful claim for all those involved in bringing a forged work of art to auction, one reason being is that under the relevant legislation, liability is not linked to fault.

The case also indicates that auction houses can be held liable for the tort of deceit and unconscionable conduct, if like Christie’s, they becomes aware post-purchase of serious concerns regarding the authenticity of a piece of art, and fail to inform the purchaser. It also confirms that agents owe a fiduciary duty to their clients, and will be in breach of that duty if they keep secret any deals that are made.

While the case involved an action taken in the NSW Supreme Court over a work of art sold in a Melbourne auction, its outcome is of significance for all other Australian

⁵² Ibid, [444].

⁵³ Ibid, [437].

⁵⁴ Ibid, [438].

⁵⁵ Ibid, [458].

⁵⁶ Ibid, [459].

⁵⁷ Ibid, [461].

jurisdictions, including Queensland. The reason is that the most significant law in the case was Commonwealth competition law, which also applies in the state jurisdictions,⁵⁸ while common law deceit and equitable fiduciary duty were also successful.

Despite the legal consequences of the case, it is still not going to prevent art forgery from occurring, and is therefore not going to be art's last court appearance.

⁵⁸ Note that the state and territory legislation now states that: 'The *Australian Consumer Law* text, as in force from time to time – (a) applies as a law of this jurisdiction; and (b) as so applying may be referred to as the *Australian Consumer Law (name of jurisdiction)*; and (c) as so applying is a part of this Act. See *Fair Trading Act 1987* (NSW), s 28; *Australian Consumer Law and Fair Trading Act 2012* (Vic), s8; *Fair Trading Act 1987* (SA), s 14; *Fair Trading Act 1989* (Qld), s 16; *Fair Trading Act 2010* (WA), s 19; *Australian Consumer Law (Tasmania) Act 2010* (Tas), s 6; *Fair Trading (Australian Consumer Law) Act 1992* (ACT), s 7; *Consumer Affairs and Fair Trading Act 1990* (NT), s 27.