

Markets and Responsibilities: Forgeries and the Sale of Goods Act 1979

Janet Ulph*

University of Leicester

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Introduction

Shaun Greenhalgh was jailed in 2007 for conspiracy to defraud because he had created forged copies of art and antiquities which were sold to public museums and other buyers. It is thought that Greenhalgh had been engaged in producing copies for 17 years before he was caught. Police experts have estimated that at least one hundred of his works, with a potential value of £10 million, will be circulating in the market for many years to come.¹ His work was diverse and therefore difficult to detect. He had produced copies of Roman serving plates, Assyrian reliefs, statues in the style of Henry Moore and Barbara Hepworth and paintings in the style of L.S. Lowry and Thomas Moran. Although he had made hundreds of thousands of pounds in selling his forgeries, it was reported that money was not the main motivating factor: his intention had been to embarrass the art world.²

Subject to any copyright restraints, it is legal to sell reproductions, which are often made in response to a revival of interest in a particular genre. In contrast, copies of original works are sometimes created with the express intention of deceiving the unwary purchaser. Terminology is loose in this field but these false imitations are often referred to as “forgeries”. Another form of deception is where the appearance of an existing work, which has been created with honest intent, is altered. For example, an artist may produce a copy of a great work but with his own signature to indicate that it is a copy. A fraudster may subsequently acquire that copy and conceal that signature and falsely add a new signature of the master himself.³ Similarly, Peter Ashley Russell altered silverware by adding false hallmarks to enhance their value. These types of objects are often described as “fakes”. Whatever form the deception takes, the criminal law is engaged. But,

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¹ “The Counterfeiters: Inside the World of Art Forgery”, *Independent*, December 10, 2007.

² “Octogenarian art-forgers brought to justice”, *The Times*, November 16, 2007.

³ See J.H. Merryman and S.K. Urice (eds), *Law, Ethics, and the Visual Arts*, 5th edn (The Hague and London: Kluwer, 2006), p.1056.

apart from copyright law, there is no special law which deals with fakes and forgeries.⁴ Instead, the forgers and accessories will be prosecuted for conspiracy to defraud or under the Fraud Act 2006, or for a money laundering offence in relation to the proceeds of sale.

This article will consider civil law principles where a fake or forgery is innocently sold to another. Like the criminal law, there is no special civil law statute governing cultural property. Instead, the courts will refer to contract principles and the Sale of Goods Act 1979. From a civil law perspective, regardless of whether the object is technically a fake or forgery, the policy issues and the effect of the provisions of the Sale of Goods Act are the same. Moreover, any contractual references to “forgery” may well include fakes as well.⁵ Consequently, for the purposes of simplicity, this article will refer to all of these forms of deception as “forgeries”.

This article will focus upon the Sale of Goods Act,⁶ and will discuss how the law does and should respond where a seller innocently transfers a forgery to a purchaser. In particular, it will be argued that the special status of cultural property deserves more explicit judicial recognition and that a special statute or code of practice would be desirable to provide guidance to buyers and sellers.

Cultural property

The special status of cultural property

Every cultural object possesses intrinsic values which may not always be easy to discern to the uninformed observer. They are concerned with the creative force and skill with which the object was created and its social and historical context.⁷ Furthermore, some objects are treated as possessing spiritual qualities.⁸ The existence of these values have been recognised in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (the UNESCO Convention), which the United Kingdom ratified in 2002. Article 1 of the Convention contains a very broad definition of cultural property which includes objects of importance for “archaeology, prehistory, history, literature, art or science”, such as antiquities, paintings and drawings, sculptures, documents, stamps, fauna, flora, minerals and objects of palaeontological interest. The problem with forgeries is that, even if they are aesthetically pleasing, they distort mankind’s knowledge. For example, Max J. Friedlander has observed that:

⁴ The Forgeries and Counterfeiting Act 1981 is only concerned with false “instruments” such as cheques, passports and share certificates: s.8.

⁵ *Marie Zelinger de Balkany v Christie Manson & Woods Ltd* (1997) 16 Tr. L.R. 163 QBD; N. Palmer, “Misattribution and the Meaning of Forgery: the De Balkany Litigation” (1996) 1 *Art Antiquity and Law* 49, 50.

⁶ Both the law of misrepresentation, and the position of agents, such as the auction houses, are beyond the scope of this article.

⁷ Thus, even if one could make exact copies of the Elgin Marbles using the same marble, they would not possess the value of the originals. If this were not the case, the repatriation debate would not exist. This association of the Elgin Marbles with a great culture has been described as “special” value: S. Guest, “The Value of Art” (2002) 7 *Art Antiquity and Law* 305, 313.

⁸ For example, the Williamette Meteorite: S. Vincent, “Indian Givers” in K. Fitzgibbon (ed.), *Who Owns the Past?* (New Brunswick NJ: Rutgers University Press, 2005), p.33 at p.35.

“A forgery done by a contemporary is not infrequently successful from being pleasant and plausible, precisely because something in it responds to our natural vision; because the forger has understood, and misunderstood, the Old Master in the same way as ourselves.”⁹

The market in cultural property

Museums, dealers and private collectors all purchase art and antiquities. But how do they regard the objects which they are buying? Many buyers see a cultural object as a repository of information relating to the human condition, society and history. But this is not true of all those involved in transactions. Some people see the cultural property market as similar to other markets. They take risks and hope to make a fine profit.¹⁰ Indeed, markets do not generally operate in a neutral way¹¹: they encourage participants to see the goods being bought and sold in financial terms. There are huge profits to be made in the market in cultural objects. In 1999, the United Kingdom enjoyed 26 per cent of the global market and exports accounted for £629 million.¹² The price paid for art and antiquities has continued to rise throughout the 20th century and the early 21st century. For example, on May 5, 2004, Picasso’s *Boy with a Pipe* was sold for US\$93 million (together with the auction house’s US\$11 million commission). It is calculated that the increase in capital value earned the seller the equivalent of 64 per cent interest per annum over 54 years.¹³

Unfortunately, there are various characteristics of this market which helped to create a fertile ground for fraud. First, a clever forgery may realise a huge sum for a relatively modest outlay. Centuries ago, the price of a work of art would depend to an extent upon the raw materials from which it was created, such as whether it was painted in oils or watercolours.¹⁴ But, in modern times, the sale price of an object rarely reflects the cost of the raw materials or time spent on its production. Secondly, the market is difficult to penetrate by newcomers: if there is no one willing to buy an object, its characterisation as a work of art may be thrown into question.¹⁵ The difficulty of breaking into this market has had the unfortunate effect of encouraging some talented individuals to infiltrate the market covertly by creating forgeries. Thirdly, professional sellers have been wary of revealing their sources because, as middlemen, they were afraid that their customers might cut them out of subsequent dealings.¹⁶ In a business culture where few questions were

⁹ *On Art and Connoisseurship* (London: Bruno Casirer, 1942) p.262, discussed by R.D. Spencer, “The Expert and the Object” in Fitzgibbon (ed.), *Who Owns the Past?*, 2005, p.159 at p.160. See further, J.H. Merryman, “Counterfeit Art” Ch.19 in *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law*, 2nd edn (The Hague and London: Kluwer, 2009), p.469, who observes that forgeries “vandalize the human record”.

¹⁰ In relation to antiquities, see N. Brodie, J. Doole and P. Watson, *Stealing History: The Illicit Trade in Cultural Material* (Cambridge: McDonald Institute for Archaeological Research, 2000), p.9.

¹¹ See M. Sandel, “Markets and Morals”, Reith lectures 2009: A New Citizenship.

¹² Department for Culture, Media and Sport (DCMS), “Creative industries mapping document 2001” (2001) citing *Market Tracking International (MTI)*, 2000: *The Art and Internet Report*. See further, House of Commons Culture, Media and Sport Committee, *Sixth Report of Session 2004–05: The Market for Art* (2005), Part 2.

¹³ I. Robertson, “The Economics of Taste” in I. Robertson (ed.), *Understanding International Art Markets and Management* (Oxford: Routledge, 2005), p.1.

¹⁴ D. Sagot-Duvaurox, “Art Prices” Ch. 5 in R. Towse (ed.), *Handbook of Cultural Economics* (Cheltenham: Edward Elgar, 2003), pp.57–59.

¹⁵ Barriers to entry into the art market appear to benefit both sellers and buyers: L.P. Singer, “Phenomenology and Economics of Art Markets: an Art Historical Perspective” (1988) 12(1) *Journal of Cultural Economics* 27.

¹⁶ See *Kurtha v Marks* [2008] EWHC 336 (QB) at [101].

asked, the provenance of an object might not be subject to any extensive investigation. As a result, forgeries might be sold and resold over a number of years before discovery.

The importance of attribution

Although there are no objective standards that apply across cultural works,¹⁷ the price of objects in the market is made more predictable by external factors. There are institutions and individuals who collectively possess a monopoly of expertise. They include art galleries, auction houses, dealers, collectors, art critics and art historians. Their judgments assist in the process of evaluating objects, which will lead to certain works being selected, while others are rejected. Public museums may eventually endorse these choices, thereby improving their value. The response of the public is also relevant. The popularity of exhibitions may enhance the reputation of an artist and affect the price of a particular work. However, the public's response cannot be characterised as an untutored one: although cultural objects have the potential to induce emotions in those who engage with them, objective critical assessment assists in validating those feelings.

The market in cultural property can therefore be distinguished from markets in ordinary commodities by the fact that levels of demand do not affect price to the same extent as market approval. Attribution is therefore usually of the utmost importance.¹⁸ A painting's worth will depend not only upon the identity of the artist responsible for its creation but also upon the period in the artist's history in which it was created. Consequently, the process of de-attributing works, or re-attributing works to famous artists, will significantly affect their price. A forgery may occasionally have its own attractions.¹⁹ It may, for example, be appreciated for its aesthetic qualities. However, the information which it will contain will be different and almost certainly inferior to the original article. Thus, as a general rule, once a forgery is recognised as such, it will be worth relatively little. A buyer may wish to treat the contract as at an end and obtain the return of the purchase price on the basis that the seller has been unjustly enriched. Unfortunately, the legal position is far from straightforward.

Policy issues

From a policy perspective, the courts may be presented with a dilemma in deciding which of the two innocent parties, the seller or the buyer, must bear the loss. The seller may protest his innocence and argue that the buyer is responsible for investigating whether the object is genuine or not. But the buyer might argue that the seller is in the better position to carry out any checks. After all, the seller has possession both of the object and any accompanying documents relating to the history of ownership (its provenance). If the law was sympathetic to the buyer so that he could be confident of success in obtaining a refund, it would not necessarily be the case that the seller would suffer. The seller might in turn sue his seller and

¹⁷ D. Watkins, "The Value of Art or the Art we Value?" (2006) 11 *Art Antiquity and Law* 251, 259–260.

¹⁸ *Quorum A/S v Schramm* [2002] 1 Lloyd's Rep. 249 QBD at [108]

¹⁹ See, for example, the exhibition entitled "Fakes and Forgeries: the Art of Deception" held at the V&A Museum in London in early 2010; E. Wither, "Artists Fake It Up At London Exhibition", NBC World Blog (2010).

so on. Liability could be transferred up the chain of sales until one reached the rogue who had perpetrated the fraud. Even so, it should be borne in mind that it is harsh on the seller higher up in the chain because the rogue may have disappeared or, if he can be traced, he may not have any funds.

Conversely, where the law favours the seller, the buyer is placed in a difficult position. If he cannot return his purchase, he could resell it as a copy. Yet there is a risk that a copy will eventually be presented as a genuine piece in some future sale. Indeed, this is exactly what happened with one of Greenhalgh's works. He created a painting entitled *The Meeting House* in the style of L.S. Lowry. He attempted to sell it as genuine through a Lancashire auction house but it was identified as a copy and sold as such. But, several years later, the painting appeared at an auction house in Kent, where it was presented as genuine with an estimate of £60,000-£70,000.²⁰ Middlemen may make huge profits: usually far more than the original forger. If the law favours the seller, it risks encouraging dealers to suppress any lurking sense of unease and to hastily sell an object onwards.

Forgeries and modern works subject to copyright

Proving authenticity

Although Greenhalgh preferred to copy objects from centuries ago, many forgers choose to copy modern works of art because the task is easier: the materials are usually cheap and easy to obtain. Huge profits can be made if the forgery is convincing. However, a forgery is more easily detected because there is a living artist who can be consulted and who can say whether it is genuine or not. Consequently, a buyer who suspects that he has bought a forgery should have no difficulty in proving this.

Does the seller have a right to sell?

There is a condition²¹ implied into every sales contract by s.12(1) of the Sale of Goods Act that the seller should have a "right to sell" the object. This phrase means that the seller must not only have the right to transfer the property in the goods but also "a right to confer on the buyer the undisturbed possession of the goods".²² It is well established that there is a breach of s.12(1) where stolen goods are supplied: there is a total failure of consideration because the buyer has not obtained what he contracted for which is title to the goods.²³ The buyer will seek a refund in order to reverse the enrichment unjustly received by the seller. But the seller may sue his seller in turn so that liability is transferred up the chain of sales.²⁴ The only restriction is that a claim must be made within the limitation period, which is currently six years, and time runs from the breach of contract.²⁵

²⁰ D. Linton, "Humble Council House was Home to £10m Swindle", *Manchester Evening News*, November 17, 2007.

²¹ Sale of Goods Act 1979 (SGA 1979) s.12(5A).

²² *Microbeads AG v Vinhurst Markings Ltd* [1975] 1 W.L.R. 218 CA (Civ Div), Lord Denning at 222. See further, *Niblett Ltd v Confectioners' Materials Co Ltd* [1921] 3 K.B. 387 CA at 402.

²³ *Rowland v Divall* [1923] 2 K.B. 500 CA.

²⁴ *Butterworth v Kingsway Motors Ltd* [1954] 1 W.L.R. 1286.

²⁵ Limitation Act 1980 s.5. An exception is created where there has been fraud, concealment or mistake: s.32. See further, *Peco Arts Inc v Hazlitt Gallery Ltd* [1983] 3 All E.R. 193 QBD.

From an ethical perspective, forgeries may be seen as distasteful as stolen objects. Nevertheless, at first glance, it would appear that a dispute over a forged item is distinguishable from a stolen one because the buyer is merely complaining about a defect in quality. However, s.12(1) offers protection to buyers in any situation where a third party has any undisclosed proprietary interest which restricts the buyer's enjoyment of his purchase. In *Niblett v Confectioners' Materials Co Ltd*,²⁶ the sellers supplied cans of condensed milk labelled "Nissly" brand. The buyers were informed that these labels infringed the Nestlé Company's trade mark. The cans were seized by customs and the buyers secured their release by removing the labels. The Court of Appeal held that there was a breach of s.12(1). In *Niblett*, Scrutton L.J. observed that, if the buyers had attempted to sell the cans with the offending labels still affixed, they could have been restrained by an injunction. His Lordship suggested that there is a breach of s.12(1) whenever a seller could be stopped by process of law from selling the goods in question.²⁷

By s.1(1) of the Copyright, Designs and Patents Act 1988, copyright subsists as a property right in an object. According to s.96(2) of the Act, various remedies are available to a copyright owner in an action for infringement of copyright. These remedies include an injunction.²⁸ Furthermore, on the application of the copyright owner, an order for delivery up of an infringing copy can be made,²⁹ or the object can be seized.³⁰ A buyer's enjoyment of an object which he has purchased can therefore be disturbed if there is an infringement. The consequence would be that there would be a breach not only of s.12(1) but also a breach of the warranty implied by s.12(2), which continues after the sale has taken place, that the buyers shall have and enjoy quiet possession of the goods, free from disturbance by the lawful acts of any third party.³¹

What is the position in the context of forged cultural objects? When the object is created, the copyright arises as an automatic right and it generally belongs to the author.³² However, the position is more complex than this. As Mummery L.J. observed in *Brooker v Fisher*:

"Copyright law also distinguishes between an original work, in which copyright may subsist, and an original adaptation or version of that work, in which a separate copyright may also subsist. There can be copyright in an original work created by A, and a separate copyright in an adaptation or version of A's work created by B."³³

²⁶ *Niblett* [1921] 3 K.B. 387 CA.

²⁷ *Niblett* [1921] 3 K.B. 387 at 398. See further, *Rowland* [1921] 3 K.B. 387 at 401–402; *Egekvist Bakeries Inc v Tizel & Blinick* [1950] 1 D.L.R. 585 at 590–591 (affid by Ontario Court of Appeal [1950] 2 D.L.R. 592); *J. Barry Winsor & Associates Ltd v Belgo Canadian Manufacturing Co Ltd* (1976) 76 D.L.R. (3d) 685 at 687.

²⁸ An injunction will ordinarily be granted unless special circumstances exist: *Phonographic Performance Ltd v Maitra* [1998] 2 All E.R. 638 CA (Civ Div).

²⁹ Copyright, Designs and Patents Act 1988 (CDPA 1988) s.99. See *Lagenes Ltd v It's At UK (Ltd)* [1992] F.S.R. 492 CA (Civ Div). As regards forfeiture, see CDPA 1988 s.114.

³⁰ CDPA 1988 s.100. See further s.114.

³¹ *Microbeads* [1975] 1 W.L.R. 218 at 222; *Niblett* [1921] 3 K.B. 387 at 403. The position should be the same, whether the claimant is concerned that his goods are infringing copyright, trade mark or patent law: *Time-Life International Nederlands BV v Interstate Parcel Express Co Pty Ltd* [1978] F.S.R. 251 (High Court of Australia) at 262.

³² CDPA 1988 s.11.

³³ *Brooker v Fisher* [2008] EWCA Civ 287; [2008] Bus. L.R. 1123 at [34(6)].

Thus, if a forger creates an object, he will own the copyright in that object provided that it is viewed as an “original” product of the author’s skill, time and labour.³⁴ If it is merely a copy, without any difference in the mode of expression, it will not be original in this sense.³⁵ However, regardless of whether the forger possesses copyright in his creation or not, he may be an infringer of another’s copyright at the same time. This may occur if, for example, the forger copies or adapts work which is subject to copyright without the consent of the author.³⁶

A forger may infringe not only the copyright that subsists in the original work but also the author’s moral rights. Moral rights exist independently of copyright. Copyright is seen as a form of economic right which is concerned with the exploitation of the author’s work and it can be assigned. In contrast, moral rights can be viewed as the “soul” of the author and, in the context of cultural property, can be linked with mankind’s heritage.³⁷ Moral rights cannot be transferred to another but they can be waived in specific instances. Furthermore, authors’ moral rights are not automatically infringed: they must make an assertion to that effect in writing.³⁸ However, provided an artist is prepared to assert his moral rights, he can insist that a work of art is not falsely attributed to him as the author.³⁹ This right would be infringed if the buyer exhibited a work as genuine when it was not.⁴⁰ Furthermore, if there is an adaptation of a genuine work, then this might trigger liability under s.80 which provides the author with a right to object to derogatory treatment of his work.

The buyer will only be able to consider suing for breach of the condition implied by s.12 where the work is a modern one. This is because copyright lasts only during the author’s lifetime and for a period after his death.⁴¹ As yet, there has been no case where a buyer has brought an action under this section. But it is highly doubtful that a seller could avoid its application easily. This is because sellers cannot exempt themselves from liability for breach of s.12 unless the seller spells out precisely why he only possesses a limited title.⁴² Where a forgery is supplied which infringes copyright law, a seller could only avoid liability under s.12 if he had acknowledged the infringement.

³⁴ CDPA 1988 s.1(1). See *Walter v Lane* [1900] A.C. 539 HL at 551–552. See further, *Sawkins v Hyperion Records Ltd* [2005] 3 All E.R. 636 CA (Civ Div).

³⁵ *Sawkins* [2005] 3 All E.R. 636. See further, *Redwood Music Ltd Chappell & Co Ltd* [1982] R.P.C. 109 QBD at 115; *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch. 601 at 608–609; *Ice TV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14, [2009] 5 L.R.C. 631 High Court of Australia at [33].

³⁶ CDPA 1988 s.17; see, further, ss.16–21.

³⁷ *Seghal v Union of India* [2005] F.S.R. 39 High Court of Delhi at [24], [41].

³⁸ CDPA 1988 ss.77, 78.

³⁹ CDPA 1988 s.84. The moral rights provisions in the CDPA 1988 are intended to absorb the basic principles of the Berne Convention for the Protection of Literary and Artistic Works.

⁴⁰ CDPA 1988 s.84(2)(b). As regards the availability of remedies, including an injunction: s.103.

⁴¹ Or within 70 years of their death: CDPA 1988, s.12, as amended by the Duration of Copyright and Rights in Performances Regulations 1995 reg.5.

⁴² Unfair Contract Terms Act 1977 (UCTA 1977) s.6(1); SGA 1979 s.12(3).

Forgeries and works out of copyright

Proving authenticity

Problems may arise if the object has been subject to restoration work in the distant past. There might well be no written record of work carried out centuries ago. For example, in *Thomson v Christie Manson & Woods Ltd*,⁴³ there was an argument over the age of two urns, which had been described as “A pair of Louis XV porphyry and gilt-bronze two handled vases”. The claimant paid £1,957,388 for them but, if they were reproductions from the 19th century, rather than original vases from the 18th century, they would only be worth between £20,000 and £30,000. The liners of the urns had been gilded—or perhaps re-gilded—electrolytically. This process was only available after 1840 and this evidence injected some doubt into the date of manufacture of the urns. The case illustrates that pursuing litigation may be very costly if there are serious evidential difficulties. In *Thomson*, each party used four experts in fine art, stone, casting of bronze and metallurgy. The trial judge considered their evidence at great length,⁴⁴ but was only able to conclude that there was a 70 per cent chance that the urns might be genuine. The key issue in this case was whether the defendant auction house, Christie’s, had exercised due care. On appeal, it was decided that Christie’s had reasonably held the opinion that the vases were genuine and it could therefore not be expected to express any doubts to the buyer.⁴⁵ The claim therefore failed. The case highlights another danger of litigation. In order to succeed, the claimant must make every effort to show that the object purchased is not genuine; yet, if the claim fails, doubts over the authenticity of the item have been aired in a very public way.

Offering opinions

If an honestly held opinion turns out to be wrong, the seller will not be liable.⁴⁶ Auction houses will usually take care to indicate whether they are offering an opinion or whether they are stating as a fact that an object can be attributed to a particular individual. However, statements by dealers and private sellers may not be so clear cut. If there is uncertainty, the court will decide whether there was a common intention that the descriptive words should form part of the contract.⁴⁷ This is a matter of looking at the evidence to determine what the seller “led the buyer reasonably to believe that he was promising”.⁴⁸

The expertise of the parties is significant. If the descriptive words are factual and relate to a matter about which the seller should know but which the buyer would not, they may well be seen as an express term of the contract.⁴⁹ In contrast, where the seller has no expert knowledge and it is a matter on which the buyer

⁴³ *Thomson v Christie Manson & Woods Ltd* [2005] EWCA Civ 255; [2005] P.N.L.R. 38.

⁴⁴ *Thomson v Christie Manson & Woods Ltd* [2004] EWHC 1101 (QB); [2004] P.N.L.R. 42 at [103]–[178].

⁴⁵ *Thomson* [2005] EWCA Civ 255; [2005] P.N.L.R. 38 at [159]–[167].

⁴⁶ *Jendwine v Slade* (1797) 2 Esp. 572.

⁴⁷ *Power v Barham* (1836) 4 Ad. & El. 473.

⁴⁸ *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] A.C. 441 HL at 502.

⁴⁹ *Oscar Chess v Williams* [1957] 1 All E.R. 325 CA at 329. See *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801 CA (Civ Div); *Dick Bentley Productions v Harold Smith (Motors) Ltd* [1965] 2 All E.R. 65 CA. See further, *Peco Arts* [1983] 3 All E.R. 193 (where the attribution was conceded to be an express term).

might be expected also to have an opinion, it is highly unlikely that the words will be seen as a contractual term.⁵⁰ Although a seller may be an art dealer, this does not necessarily make him an expert. The market in cultural property can be divided into categories, such as paintings or sculpture. A category can be subdivided into sectors (such as Old Master paintings or contemporary art within the category of paintings) and further divided into types (such as the Italian school). Dealers may not be experts in relation to the objects which they are selling. However, if the buyer and seller are both dealers with expertise in the area in question, the court will expect clear and express language to indicate that the seller was guaranteeing the authenticity of the object.⁵¹

The age and provenance of an object are also relevant. It is likely that the seller will be viewed as offering an opinion where the origins of an object are obscure. These are known in the trade as “sleepers”. In *Luxmoore-May v Messenger May Baverstock*,⁵² Slade L.J. observed that attribution could not be an exact science in this situation and cautioned against any expectation that market participants could be infallible in detecting the true author of such objects. Similarly, if the object is old, it may be impossible to supply any firm guarantee.⁵³ It was once commonplace for famous painters and sculptors to attract students who would work alongside them to develop their skills; these students might carry out some of the basic work on an object created by the master or might produce a similar work. In *Drake v Thos Agnew & Sons Ltd*,⁵⁴ the buyer purchased a painting in the belief that it was the work of the 17th-century artist Sir Anthony van Dyck. He sued the seller, Agnews, when this attribution was thrown into doubt. However, it emerged during the course of the trial that Agnews had merely expressed the opinion that it was the work of van Dyck, while openly acknowledging that another and more formidable expert contradicted this view. Unfortunately, the buyer’s agent suppressed this information. After hearing evidence, Buckley J. concluded that the painting was only a studio work, observing that “No one could sensibly have believed that Agnews knew or had some magic formula for establishing that van Dyck himself had painted the canvas”.⁵⁵ It was held that the parties could not have intended that Agnews’ opinion should become an express term of the contract.

Any purchaser who suspects that he has bought a forgery has a dilemma. If he wishes to take legal action, it is likely to be a complex and costly affair. The court will need proof that the object is not genuine and will then consider the negotiations carried out, the expertise of the parties and the practice in the trade. The contract itself will be scrutinised. It may, for example, give the purchaser the right to bring the contract to an end if the item is a forgery; if so, this must be established because it will not be enough to show that there has been a mistaken attribution.⁵⁶ The chances of success may be slim because the limitation period may have expired⁵⁷ or the seller may have given an opinion rather than an assurance. These factors

⁵⁰ *Oscar Chess* [1957] 1 All E.R. 325.

⁵¹ *Techarungreungkit v Alexander Götz* [2003] EWHC 58 (QB) at [70].

⁵² *Luxmoore-May v Messenger May Baverstock* [1990] 1 All E.R. 1067 CA (Civ Div).

⁵³ *Techarungreungkit* [2003] EWHC 58 (QB) at [70] (dating of a figure of Buddha from the 11th or 12th century).

⁵⁴ *Drake v Thos Agnew & Sons Ltd* [2002] EWHC 294 (QB).

⁵⁵ *Drake* [2002] EWHC 294 (QB) at [26].

⁵⁶ *Hoos v Weber* (1974) 232 E.G. 1379 CA (Civ Div).

⁵⁷ *Leaf v International Galleries* [1950] 2 K.B. 86 CA.

will defeat not only an action for misrepresentation, but also an action for breach of an express term, or of a term implied by the Sale of Goods Act 1979 relating to description and quality. These implied terms are considered below.

The implied term that goods must correspond with their description

Sale by description

A condition is implied by s.13(1) of the Sale of Goods Act 1979 into every contract which is “by description”, that the goods supplied should correspond with the description. Most sales will be “by description”. Where the goods are not ascertained at the time of the contract, the description is vital to determine whether the seller has fulfilled his obligations by supplying the correct goods. The same is true of goods which have been identified and agreed upon when the contract is made, but where the buyer has not seen them.⁵⁸ In contrast, where the buyer has seen and inspected the goods before purchase, the facts require further examination. Section 13 will not apply where the buyer has examined the goods and the description was clearly a matter of complete indifference to him.⁵⁹ On the other hand, the mere fact that the goods have been selected by the buyer does not prevent the sale being one “by description”.⁶⁰

At one time, courts were prepared to give s.13 a wide application in situations where the purchaser had inspected an object before purchasing it. In particular, in *Beale v Taylor*,⁶¹ it was accepted that there was a sale by description where a buyer relied partly upon his own judgment, and partly upon the seller’s description, in deciding to make his purchase. However, the later decision of the Court of Appeal in *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd*⁶² signalled a significant change in approach. In this case, the defendant specialised in paintings by young British artists. He sold a painting, which he believed to be the work of Gabriele Münter, an artist of the German expressionist school, to the claimant. The defendant knew that the claimant was a dealer who was an expert in the field of German expressionist paintings. The defendant expressly stated that he knew nothing of Münter’s work and indicated that he expected the claimant to rely upon his own examination. The painting was later discovered to be a forgery, but the claimant’s argument that there was a breach of s.13 failed because it was held by the majority of the Court of Appeal that there was not a sale by description.

Nourse L.J. in the majority reasoned that, in order for there to be a sale by description for the purposes of s.13, “The description must have a sufficient influence in the sale to become an essential term of the contract and the correlative of influence is reliance”.⁶³ His Lordship starkly presented only two possibilities: that the buyer either relied upon the seller or did not do so. Yet, as the Court of Appeal had recognised in *Beale v Taylor*, it may be the case that the buyer is relying

⁵⁸ *Varley v Whipp* [1900] 1 Q.B. 513 QBD at 516.

⁵⁹ *Travers (Joseph) & Sons Ltd v Longel Ltd* (1948) 64 T.L.R. 150. See further, *Taylor v Bullen* (1850) 5 Ex. 779.

⁶⁰ SGA 1979 s.13(3). See further, *Grant v Australian Knitting Mills Ltd* [1936] A.C. 85 PC (Australia), Lord Wright at 100 and *Brewer v Mann* [2010] EWHC 2444 (QB).

⁶¹ *Beale v Taylor* [1967] 3 All E.R. 253 CA (Civ Div). See further, *House Garages (Bromley) Ltd (Formerly James Yound Ltd) v Monk* Unreported July 31, 1981.

⁶² *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 Q.B. 564 CA (Civ Div).

⁶³ *Harlingdon and Leinster* [1991] 1 Q.B. 564 at 574.

partly upon what he sees with his own eyes and partly upon how the object is described. Furthermore, Nourse L.J.'s emphasis upon reliance is arguably misplaced. Although evidence of reliance has always been necessary for an action based upon misrepresentation, it had never been seen as essential for the application of s.13.⁶⁴ This point was acknowledged by Slade L.J. in providing the other judgment in the majority, although he observed that "the presence or absence of reliance on the description may be very relevant in so far as it throws light on the intention of the parties at the time of the contract".⁶⁵ The effect of requiring proof of reliance is that it will be difficult for professional art dealers to argue that there has been a breach of s.13 if they have inspected the goods before purchase.

Descriptive words

If there is not a sale by description, s.13 has no application. If it does apply, a second issue would be whether the words of attribution form part of the description. Not all of the information which a seller supplies will be viewed as part of the description for the purposes of s.13; the only relevant words are those which can be viewed as a substantial ingredient which go to the identity of the object.⁶⁶ The judgments in *Harlingdon and Leinster* could be said to conflate the two issues. This leads to a lack of rigour in analysis. For example, as Stuart-Smith L.J. dissenting noted, if the seller had said that he was not sure whether the painting was by M \ddot{u} nter or not, there would be strong grounds for saying that the subject-matter of the contract was the painting as seen.⁶⁷ But the seller did not say this. There was a description. The invoice, which reflected the agreement made, described the painting as one by M \ddot{u} nter. It is submitted that this case should have been concerned with the second issue and whether the attribution constituted a substantial ingredient in the identity of the object. This is not to say that the buyer would have succeeded in his argument that there was a breach of s.13: one could argue that the seller's attribution to M \ddot{u} nter was not viewed as part of the identity of the painting because the buyer did not attach any importance to that attribution.⁶⁸

Relationship with express terms

It is only those express terms in a contract which can be classified as conditions which entitle the purchaser to treat the contract as at an end. In modern times, the courts have sought to confine the scope of such clauses to prevent commercial buyers from terminating a contract for minor breaches.⁶⁹ In *Harlingdon and Leinster*, Nourse L.J. suggested that, in order for s.13 to apply, the descriptive words must be so influential that they can be seen as an essential term of the contract. This test has the effect of merging the law on express terms with implied

⁶⁴ R. Hooley, "Sale by Description and Merchantable Quality" (1991) 50(1) C.L.J. 33, 35; L.A. Lawrenson, "The sale of goods by description — a return to caveat emptor?" (1991) 54(1) M.L.R. 122, 123.

⁶⁵ *Harlingdon and Leinster* [1991] 1 Q.B. 564 at 584.

⁶⁶ *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 3 All E.R. 570 HL at 576. See further, *Ashington Piggeries* [1972] A.C. 441 at 467, 475, 504.

⁶⁷ *Harlingdon and Leinster* [1991] 1 Q.B. 564 at 580.

⁶⁸ M.G. Bridge, "Description, Reliance and the Sale of Goods" [1990] L.M.C.L.Q. 455, 459.

⁶⁹ *Cehave NV v Bremer Handelsgesellschaft mbH* [1976] Q.B. 44 CA (Civ Div).

terms, restricting the opportunities when commercial buyers can reject the goods purchased. This was acknowledged by Buckley J. in *Drake v Thos Agnew & Sons* who remarked approvingly:

“That makes good sense if one bears in mind the serious consequences that flow from a breach of the implied term, when the statute makes it a condition that the goods should correspond with the description.”⁷⁰

But the consequence is that it appears to make s.13 redundant because, if there is a common intention that certain descriptive words are a term of the contract, the claimant would presumably be able to sue for breach of an express term without troubling to rely upon s.13 as well.

Lawrenson has objected that this narrow construction of s.13 cuts away at the protection offered by the Act to buyers in a weak bargaining position, which had freed them from the necessity of turning every detail relating to the goods into written contractual promises.⁷¹ However, Bridge has argued that the implied terms relating to quality and fitness for purpose should remove the need for the implied term relating to description to play such a protective role.⁷² In his view, s.13 no longer serves a useful purpose. Furthermore, a claim based upon breach of an express term allows the court the flexibility to categorise descriptive words as a condition, intermediate term, or warranty, as appropriate in the light of the parties’ common intentions and the court’s understanding of the market.

Subsequent decisions

There have been few decisions since *Harlingdon and Leinster* in which the scope of s.13 has been considered. In *Drake v Thos Agnew & Sons Ltd*,⁷³ Buckley J. adopted the reasoning of Slade L.J. in *Harlingdon and Leinster* and held that there was no sale by description because the buyer was relying upon his agent’s expertise rather than the seller’s attribution.⁷⁴ But, in *Drake*, the seller had merely offered an honest opinion for which he could not be held liable. The litigation arose only because the buyer’s agent had misled the buyer by failing to let him know of the difference of opinion.

The question of when there would be a “sale by description” was considered by the Court of Appeal in *Don Commercials Ltd v Lancaster Trucks Ltd*.⁷⁵ Here, the buyer had inspected a second-hand tractor unit which was described in the invoice as “DAF. Model FTG 2800”. Unfortunately, it was not a “FTG 2800” as such because it had a different type of engine and was deficient in other regards. These shortcomings were not immediately apparent and were discovered only after the buyer purchased and took delivery of the vehicle. Balcombe L.J., providing the leading judgment in the Court of Appeal, considered that there were various factors which indicated that the buyer was not relying upon the description. His Lordship noted that the parties were dealers and that it was normal in the trade to

⁷⁰ *Drake* [2002] EWHC 294 (QB) at [26].

⁷¹ Lawrenson, “The sale of goods by description” (1991) 54(1) M.L.R. 122, 123.

⁷² M.G. Bridge, “Reardon Smith Lines Ltd v Yngvar Hansen-Tangen, The Diana Prosperity (1976)” Ch.11 in C. Mitchell, *Landmark Cases on the Law of Contract* (Oxford: Hart Publishing, 2008), p.321 at p.360.

⁷³ *Drake* [2002] EWHC 294 (QB).

⁷⁴ *Drake* [2002] EWHC 294 (QB) at [26]-[28].

⁷⁵ *Don Commercials Ltd v Lancaster Trucks Ltd* Unreported December 14, 1994.

buy commercial vehicles “as seen”. This practice appeared to be reinforced by the terms of the invoice which stated that the vehicle was “sold as seen no warranty given or implied”. His Lordship also observed that the buyer examined the goods before making his offer: he considered it significant that, after this examination, the buyer reduced his offer because of defects which he had spotted.⁷⁶ The Court of Appeal followed the decision in *Harlingdon and Leinster* and held that there was not a sale by description.

The cases of *Don Commercials Ltd* and *Harlingdon and Leinster* both involved faulty attribution which was serious and not immediately apparent. But, in *Don Commercials Ltd*, the parties had equal expertise, and the market was one where expertise did not vary in the same way as in the market of art and antiquities. The decision confirms that the scope of s.13 will continue to be restricted in circumstances where it is possible to view goods as sold “as seen”. These situations may be far removed from sales of cultural property. The case may herald a divide. The demarcation line is not between the market in cultural property and other markets; instead it is between private buyers and professional buyers and the perceived agreed allocation of risk.

Excluding section 13

Where a seller asserts that he has sold an object “as seen”, a buyer may attempt to argue that this is an attempt to exclude the operation of s.13 by denying that there was a sale by description. However, this is not necessarily so. A phrase such as “sold as seen” may be simply defining the subject-matter of the transaction. Suppose, for example, someone is selling a computer component on behalf of a family member and has no understanding of its function. The law should be able to accommodate sellers who have little idea of what they are selling and where they are encouraging a buyer to make a speculative purchase.⁷⁷ The court must therefore examine the contract as a whole⁷⁸ to decide whether a particular phrase simply modifies the description or is intended to exclude liability.⁷⁹

If the words “as seen” are viewed as an attempt to disclaim liability, then the Unfair Contract Terms Act 1977 will apply. The Act draws a distinction between consumers and other purchasers.⁸⁰ Where a consumer makes a purchase, a seller cannot exempt himself from liability for breach of the implied terms relating to description, quality, or fitness for purpose.⁸¹ A consumer is someone who does not act in the course of a business and who is dealing with a seller who does contract in the course of a business.⁸² Consequently, any private collector of art and

⁷⁶ Compare *Brewer v Mann* [2010] EWHC 2444 (QB), where a private buyer, despite inspecting a vintage Bentley car, was found to have relied upon the professional seller's description.

⁷⁷ *Taylor v Combined Buyers Ltd* [1924] N.Z.L.R. 627 at 633–634.

⁷⁸ *Gill & Duffus SA v Berger & Co Inc (No.2)* [1984] A.C. 382 HL at 394.

⁷⁹ *Hughes v Hall (Gillian)* [1981] R.T.R. 430 DC. Contrast *Cavendish-Woodhouse Ltd v Manley* [1984] Crim. L.R. 239 DC. This is also an issue in relation to criminal offences created by the Consumer Protection from Unfair Trading Regulations 2008, which have replaced most of the provisions of the Trade Descriptions Act 1968.

⁸⁰ Further consumer protection legislation can be found in the Unfair Terms in Consumer Contract Regulations 1999 (SI 1999/2083), which safeguard consumers against unfair terms which have not been individually negotiated.

⁸¹ UCTA 1977 s.6(2).

⁸² UCTA 1977 s.12(1)(a)(b). If the buyer is a private individual, there is no need to show that the goods are of a type ordinarily supplied for private use or consumption because UCTA 1977 s.12(1)(c), has been modified by the Sale and Supply of Goods to Consumers Regulations 2002 reg.14(2).

antiquities purchasing from a dealer (rather than at auction⁸³) can argue that the seller is unable to exclude liability for breach of s.13. In contrast, dealers will not ordinarily be classified as a consumer⁸⁴; as a result, they are in a much weaker position because the seller can rely upon an exemption clause provided that it can be shown to be reasonable.⁸⁵ The difference in treatment can be justified on the basis that business people are better able to look after their own interests. But, in relation to transactions involving cultural objects, the result is not entirely satisfactory: the immense difficulties which confront dealers in bringing actions based upon breach of s.13 will simply encourage them to quickly sell objects onwards where they have a sense of unease about their authenticity.

Breach of section 14(2)

Where goods are supplied by a business seller, there is a term implied by s.14(2) relating to quality. In *Harlingdon and Leinster*, the buyer argued that there was a breach of this term. The majority of the Court of Appeal rejected this argument on the basis that, as the seller's attribution to Münter had not been sufficiently influential to become a condition of the contract for the purposes of s.13, it should not be taken into account for the purposes of s.14(2) either. The majority also ignored the price paid. The seller insisted on being paid £6,000, reflecting the assumption that the painting was by Münter. Once it was revealed to be a forgery, its market value was estimated to be less than £100. The majority's reasoning is surprising in certain respects: there was existing authority not only for the proposition that a higher standard can be expected of a luxury item⁸⁶ but also for the principle that a substantial discrepancy between the contract price and the value of the goods supplied should be taken into account.⁸⁷ The majority refused an invitation to declare that the term implied by s.14(2) was confined to the physical aspects of an object⁸⁸ but it was decided that the buyer had relied upon his own judgment of the painting's aesthetic qualities in deciding to purchase. Nourse L.J. suggested that the forgery could be resold, albeit at a much reduced price, or it could be hung on the wall and enjoyed.⁸⁹

In *Harlingdon and Leinster*, there was no recognition by the majority that once an object is known to be an imitation, all pleasure in relation to its possession is likely to disappear. Forgeries are normally of a poorer quality than a genuine article. There may well be physical flaws which will reveal that the object lacks integrity. Furthermore, connoisseurs of art encourage others to see cultural property as containing independent values relating to human aspirations.⁹⁰ If someone views an object which is known to be a forgery, he is unlikely to feel the type of profound

⁸³ In relation to purchases of second hand goods at public auctions, a private individual purchasing second hand goods will not be viewed as a consumer: UCTA 1977 s.12(2); Sale and Supply of Goods to Consumers Regulations 2002 reg.14(3).

⁸⁴ A dealer who is a private individual will not be a consumer if he is buying for purposes related to his "trade, business or profession": Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.2. *Quare* where he is buying for his private collection.

⁸⁵ UCTA 1977 s.6(3); in relation to what is reasonable, see Sch.2.

⁸⁶ *Rogers v Parish (Scarborough) Ltd* [1987] Q.B. 933 CA. This notion is now encapsulated in the definition of satisfactory quality: see SGA 1979 s.14(2B).

⁸⁷ *B.S. Brown & Son Ltd v Craiks Ltd* [1970] 1 W.L.R. 752 HL.

⁸⁸ *B.S. Brown & Son* [1970] 1 W.L.R. 752, Nourse L.J. at 576–577; Slade L.J. at 586–586.

⁸⁹ *Harlingdon and Leinster* [1991] 1 Q.B. 564 at 576.

⁹⁰ Guest, "The Value of Art" (2002) 7 *Art Antiquity and Law* 305, 306–308.

emotional experience which a genuine work might produce. As Merryman observes, the knowledge that the object is a forgery affects our way of seeing it and evaluating it.⁹¹ It will be a constant reminder that the object was made for the purposes of deception, vanity and secret gain.

The dispute in *Harlingdon and Leinster* concerned an earlier version of s.14(2), which was replaced because it was seen as outmoded.⁹² The goods supplied must now satisfy a new definition of satisfactory quality.⁹³ Under the old law, no complaint could be made if the goods supplied were suitable for one purpose in a range of ordinary purposes.⁹⁴ This legal principle no longer applies. Under the new definition of satisfactory quality, s.14(2B)(a) provides that one of the aspects of quality is that the goods must be fit for *all* ordinary purposes.⁹⁵ The concept of an “ordinary” purpose gives rise to difficulties in the context of cultural objects. In particular, it would be difficult to place any undue emphasis upon the purposes associated with the physical aspects of an object when it may have no value apart from its link with the idea of the artist. For example, Duchamp became famous for presenting “Readymade” items as works of art. One such item was a snow shovel which was suspended from the ceiling and was inscribed along its lower rim with the following title: “In Advance of the Broken Arm, (from) Marcel Duchamp 1915”. Various replicas were made under Duchamp’s supervision. What if a purchaser with no expertise was assured by a reputable dealer that he was purchasing a Duchamp shovel when in reality it was a forgery? Would the court declare that there was no breach because the essential term of the contract consisted of a promise to supply a snow shovel? Yet, what if the snow shovel broke while shovelling snow? Surely the purchaser could hardly complain in relation to its quality (or fitness for purpose) as he had made it clear to the seller that he was purchasing the shovel not for the purpose of shovelling snow but as a piece of art, presumably to suspend from his own ceiling. It would appear that a purchaser could be stranded in a legal “no man’s land” unless the court is prepared to grapple with the intrinsic values possessed by cultural property.

A key question is therefore whether the new statutory definition is flexible enough to allow parties to adduce evidence relating to the historical, spiritual and other values which give cultural property its special status. Section 14(2A) provides that:

“Goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.”

This provision is reinforced by s.14(2B) which states that:

“The quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods: (a) fitness for all the purposes for which goods of the kind in question are commonly supplied, (b) appearance and finish, (c) freedom from minor defects, (d) safety, and (e) durability.”

⁹¹ Merryman and Urice (eds), *Law, Ethics, and the Visual Arts*, 2006, p.1059.

⁹² *Sale and Supply of Goods* (Law Com. No.160; Scot Law Com. No.104, 1987), Cm.137, para.2.9.

⁹³ *Sale and Supply of Goods Act 1994* ss.1, 8.

⁹⁴ *M/S Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 W.L.R. 1 CA (Civ Div).

⁹⁵ *Jewson v Boyhan* [2004] 1 Lloyds Rep 505 CA at [69].

The statutory provision would appear to be primarily concerned with sub-standard goods in the physical sense.⁹⁶ Consequently, as the description is taken into account, a buyer could not complain if a cultural object was of an age where it would be unreasonable to expect it to be in perfect condition. On the other hand, the guidelines provided in s.14(2B) are concerned with the intrinsic qualities of an object.⁹⁷ Why then should the cultural information possessed by archaeological, ethnographical and historical objects and works of art be ignored? The United Kingdom's ratification of the UNESCO Convention in 2002 is significant. In *Islamic Republic of Iran v Barakat Galleries Ltd*, the Court of Appeal emphasised the importance of each nation's cultural heritage and it was noted that the Convention made it "essential for every State to become alive" to their moral obligations to protect and respect cultural property.⁹⁸ Article 5 of the Convention presses signatory states to take educational measures to assist the public in developing respect for the values of cultural property, for example. If the UK Government is encouraging ordinary members of the public to recognise cultural values, it is not unreasonable to expect these values to be acknowledged by the courts in assessing the quality of an object. Indeed, the courts have been prepared to accept evidence of these values in other spheres of law, with the aid of expert advice.⁹⁹ If these values are taken into account, a misattributed work (such as the studio work in *Drake v Thos Agnew & Sons*) might well still be viewed as of satisfactory quality because it will contain these values. On the other hand, although a forgery might satisfy one purpose in possessing aesthetic value, this would not be enough.

If the special status of cultural property is recognised, this does not lead inevitably to the conclusion that any forged work supplied involves a breach of s.14(2). First, it should be noted that courts have considerable discretion and are guided to consider the statutory factors listed as aspects of quality "in appropriate cases". Secondly, s.14(2C)(a) provides that the section has no application in relation to a matter which is "specifically drawn to the buyer's attention before the contract is made". Obviously, the buyer could not object if an object is sold with a false addition of which he has been informed. Thirdly, s.14(2C)(b) provides that where the buyer has examined the goods before the contract is made, he cannot complain about defects which that examination ought to have revealed. This may have implications for professional buyers. Both professional dealers and consumers are in a similar position in arguing that an object is not of satisfactory quality because the same objective test of quality is applied.¹⁰⁰ However, it may be that a

⁹⁶ *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 1900 (Comm); [2006] Lloyd's Rep. 629 at [140].

⁹⁷ *Jewson* [2004] 1 Lloyd's Rep. 505 CA (Civ Div) at [77]. The court may additionally consider external factors: *Webster Thompson Ltd v J G Pears (Newark) Ltd* [2009] 2 Lloyd's Rep. 339 QBD at [38].

⁹⁸ *Islamic Republic of Iran v Barakat Galleries Ltd* [2009] Q.B. 22 CA (Civ Div), Lord Phillips of Worth Matravers at [2].

⁹⁹ *Haunch of Venison Partners Ltd*, Decision of the VAT and Duties Tribunal (London) of December 8, 2008.

¹⁰⁰ No distinction is drawn between consumers and other purchasers for the purposes of SGA 1979, s.14(2) but a trader would be unable to reject if the breach was so slight that it would be unreasonable to do so: s.15A. For protective measures which specifically benefit consumers, see for example SGA 1979 s.14(2D) relating to public statements on the specific characteristics of the goods, added by the Sale and Supply of Goods to Consumers Regulations 2002. See further, W.C.H. Irvine, "Satisfactory Quality: What Does It Mean?" (2004) J.B.L. 684, 687.

professional dealer would be expected to recognise the implications of an obvious defect in a cultural object, such as where a forged work of antiquity shows ancient horses wearing modern equipment.¹⁰¹

Let the buyer beware?

Traditional market norms

One commentator has suggested that the division in judicial opinion in *Harlingdon and Leinster* turned upon the perception by the judges of how the art market operated.¹⁰² The majority clearly thought that dealers took the risk of buying a forgery. Nourse L.J. noted that, in sales by auction, the strength of the attribution was usually made clear in the catalogue. His Lordship contrasted the position where there was a sale between dealers: in his view, the fact that there was no established practice indicated that the seller's attribution was not a matter of importance.¹⁰³

Nourse L.J. also observed that the existence of forgeries was such a well-known problem in the market in cultural property that all but the most "inexperienced or naïve" purchasers would be aware of it.¹⁰⁴ In his view, buyers should be wary (the doctrine of *caveat emptor*). These observations could be interpreted as displaying a casual attitude towards the existence of forgeries. Admittedly, it has been estimated that as much as 40 per cent of the art on the market today, with the exception of contemporary works, is forged.¹⁰⁵ But surely the fact that there are so many forgeries should give rise to serious concern? Merryman has suggested that the existence of numerous forgeries is a cancer on the market.¹⁰⁶ Unfortunately, not everyone views forgeries in a serious light. This is partly because the forger may be seen as a rebel in society rather than a criminal. Some take the view that a forgery is as good as the original and that it is merely snobbery which prevents people from acknowledging this.¹⁰⁷ Yet it must not be forgotten that it is not only dealers who may end up in possession of a worthless forgery. As regards Greenhalgh's forgeries, a number of his victims were museums which would have been using thousands of pounds of public money to purchase objects for educational purposes.

Modern market norms and money laundering measures

Portable property, unlike land, is not expected to last forever. Purchasers will usually not make a detailed investigation of the history of commodities.¹⁰⁸ There is an assumption that most goods will be rapidly resold or put to work in producing other goods, leaving no time for lengthy investigation of title. Cultural objects are

¹⁰¹ This proved to be Shaun Greenhalgh's undoing: "Octogenarian art-forgers brought to justice", *The Times*, November 16, 2007.

¹⁰² R. Clutterbuck, "Implied Terms in the Art World" (1990) J.B.L. 180, 181.

¹⁰³ *Harlingdon and Leinster* [1991] 1 Q.B. 564 at 577–578.

¹⁰⁴ *Harlingdon and Leinster* [1991] 1 Q.B. 564 at 577.

¹⁰⁵ Merryman, "Counterfeit Art" in *Thinking About the Elgin Marbles*, 2009, p.488.

¹⁰⁶ Merryman and Urice (eds), *Law, Ethics, and the Visual Arts* (2006), p.1054.

¹⁰⁷ Merryman describes this as the "Van Meegeren problem" in "Counterfeit Art" in *Thinking About the Elgin Marbles*, 2009, p.472.

¹⁰⁸ J. Ulph, "Good Faith and Due Diligence" in N. Palmer and E. McKendrick (eds), *Interests in Goods*, 2nd edn (London: LLP, 1998), p.403.

different because they are usually expected to be preserved for future generations. It might have been expected that a different norm would have evolved in this market because of this fact, so that sellers would have a responsibility to thoroughly check the provenance of an object. However, this has not been the case.

The approach of the majority in *Harlingdon and Leinster* may not have been at odds with market norms at the time the case was decided in 1989, but arguably it no longer fits with recent developments in criminal law, which are changing industry practice. In the past, it has been difficult to prosecute dealers who facilitated the sale of forgeries by turning a blind eye to whether an object was genuine or not. This is because it is very difficult to establish that a dealer has acted dishonestly for the purposes of a criminal prosecution for fraud.¹⁰⁹ Anyone who has merely failed to make inquiries about the provenance of an object would be safe. However, since 2003, money laundering measures, which already existed in the financial sector, were extended and applied to those dealing in all types of high value goods.¹¹⁰ The latest rules are to be found in the Money Laundering Regulations 2007 and are concerned with risk based due diligence.¹¹¹ This means that dealers and auction houses are expected to obtain information regarding their clients which is sufficient in the circumstances. They are obliged to introduce procedures to verify their clients' identities and to determine who owns or controls the goods. This must be done whenever they have a new client, or where there is an occasional transaction, or if there are suspicious circumstances. These measures cut away at a norm of rapid and secret sales of objects by requiring a written trail in relation to transactions. Furthermore, the Proceeds of Crime Act 2002 creates various criminal offences to deal with those who engage in money laundering by retaining or possessing criminal property.¹¹² These offences are extraordinarily wide in scope and anyone in possession of the proceeds of sale knowing or suspecting¹¹³ that the money represents the proceeds of crime, may be convicted of a money laundering offence. Dealers and auction houses could also commit an offence if they fail to report certain information relating to property or financial transactions which they obtained in the course of their business,¹¹⁴ and which they knew or had reasonable grounds to suspect might involve a benefit obtained as a result of criminal conduct.¹¹⁵ These measures will make it more difficult to sell both looted objects and forgeries. All dealers and auction houses should become less casual in relation to provenance.

¹⁰⁹ For the test to be applied, see *R. v Ghosh* [1982] Q.B. 1053.

¹¹⁰ "High value dealers" are defined by reg.3(12) of the Money Laundering Regulations 2007 to include firms and sole traders (including auctioneers) who receive in cash of at least €15,000 in total.

¹¹¹ SI 2007/2157. See further, the Third Money Laundering Directive 2005/60.

¹¹² Proceeds of Crime Act 2002 (POCA 2002) ss.327–329. See J. Ulph, "Bailment, Crime and Proceeds of Crime" Ch.35 in N. Palmer (ed.), *Bailment*, 3rd edn (Sweet and Maxwell, 2009), paras 35-030 to 35-037.

¹¹³ POCA 2002 s.340(3); *R. v Da Silva* [2007] 1 W.L.R. 303 CA (Crim Div).

¹¹⁴ POCA 2002 ss.330–332, as amended by the Serious Organised Crime and Police Act 2005. See further, POCA 2002 Sch.9. These provisions were extended inter alia to those who deal in high value items of €15,000 or more by SI 2003/3074; see now the Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2007. Certain high value dealers with a low turnover are excluded: POCA 2002 Sch.9 Pt 1(2), as amended.

¹¹⁵ For the definition of proceeds of crime, see the POCA 2002 s.340(3).

Provenance

Money laundering measures have made provenance more significant. They also coalesce with the expectation in art.10 of the UNESCO Convention that signatory states should monitor the movement of cultural property which has been illegally removed from another signatory state and should impose obligations upon dealers to maintain a register which records “the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold”. Unfortunately, it would be naive to assume that these measures have had the effect of severely curbing the trade either in stolen cultural objects or forgeries. This is because criminals have responded to the changes in industry practice by creating false documents relating to provenance. Indeed, even before money laundering measures were introduced, criminals had begun to appreciate the importance of provenance. One example involves John Myatt, who produced outstanding copies and pastiches of the work of famous artists. One of Myatt’s customers was John Drewe, who sold Myatt’s paintings as genuine works and eventually involved Myatt in his deceit for a short period. They were both convicted of conspiracy to defraud in 1999. The police seized approximately 60 of Myatt’s works, but it is estimated that he had produced approximately 200 objects before he was caught. Drewe instructed Myatt to copy only dead artists, such as Marc Chagall, Alberto Giacometti and Paul Klee. Drewe focused upon creating credible documents, such as forged receipts and letters from museum officials, to give these works a false history. Drewe obtained access to the reading room of the Tate Gallery and to the archives of London’s Victoria and Albert museum and then added photographs of Myatt’s paintings to the files to create false records.¹¹⁶ Consequently, whenever there was an attempt to check the authenticity of any of Myatt’s paintings, there would be false records which would indicate that they were genuine. The scam was only discovered when Drewe’s wife reported his activities.

An independent statute or code of practice?

There is a risk that purchasers of cultural property do not give sufficient thought to the possibility that their purchase may be a forgery. One answer would be to amend s.14(2B) of the Sale of Goods Act 1979 so that the special status of cultural property was recognised as an aspect of quality. Yet the Act is already buffeted by the winds of change, with piecemeal insertion of amendments to protect consumers, prompted by European initiatives. The result has been significant fractures within the Act itself.¹¹⁷ If legislation was seen as necessary, it might be better done by an independent statute which regulated this market. There are precedents for this. For example, in the United States, the Uniform Commercial Code largely reflects the English position. However, the State of New York responded to concerns about the practices of the art market by enacting the Arts and Cultural Affairs Law.¹¹⁸ This statute provides inter alia that, if an object is supplied with a certificate of authenticity, this will be treated as an express

¹¹⁶ M. McCarthy, “A Fake’s Progress”, *Independent*, July 15, 2000.

¹¹⁷ L. Miller, “The Common Frame of Reference and the Feasibility of a Common Contract Law in Europe” (2007) J.B.L. 378, 398.

¹¹⁸ New York Consolidated Laws Chapter 11-C. The statute is set out in an Appendix in P. Gerstenblith, *Art, Cultural Heritage and the Law*, 2nd edn (Durham NC: Carolina Academic Press, 2008); for discussion, see p.389.

contractual promise; it cannot be excluded unless it is reasonable in the circumstances. Further guidelines are provided in relation to the effect of what might be stated in the certificate or other written document. For example, if the work is stated to be “attributed to” a named author, this will not be a guarantee that it is by the author.¹¹⁹

An alternative to extra legislation is the creation of a code of practice, which would also include agents, such as the auction houses. It would encourage all parties to focus upon the problem of forgeries. There is already a code in existence covering the illicit trade in art and antiquities: the COPAT Due Diligence Code for Dealers. One advantage of such a code (or special legislation) is that it could tackle the difficult question of what should be done with an object once it is discovered to be a forgery. One possibility is to encourage or require a copy to be indelibly marked as such. There is currently a real risk that if the possessor of such an object puts it back on the market as a copy, it will eventually be presented as genuine. An advantage of creating such a code is that it encourages sellers and dealers and auctioneers to achieve a consensus in relation to the insertion of typical contract terms. The existence of a code of conduct may particularly assist in protecting consumers, not only in providing clarity in relation to their rights but in encouraging traders to comply with the code to avoid the risk of prosecution under the Consumer Protection from Unfair Trading Regulations 2008. By reg.5(3)(b), if there is a code of conduct to which a seller has agreed to be bound, the seller must comply with the provisions of the code to the extent that they impose obligations rather than being merely aspirational in character. As regards the responsibilities of the seller and buyer, it is submitted that the only sensible way forward is to put considerable responsibility upon the seller to check an object’s provenance and to describe it appropriately in accordance with those checks. If the seller chooses to give an object a confident factual attribution to a particular author and that attribution is wrong, the courts can refer to the code and the buyer should obtain a refund for breach of s.14(2) of the Sale of Goods Act 1979 on the basis that it does not have the value which it was held out to possess.

Conclusions

It is in the public interest to fight the easy trade in forgeries.¹²⁰ The importance of being able to accurately attribute objects to a particular author or era cannot be overstated. As science and technology and our knowledge of the past advance, it is possible to acquire fresh insights into cultural property first created centuries ago. The existence of bogus works masquerading as genuine pieces causes confusion.

The Sale of Goods Act 1979, and its predecessor, created a flexible system of principles which could cope with any disputes which might arise, regardless of whether the transaction involved commodities, such as grain, or unique objects, such as works of art. The policy objections which can be made against accepting the free circulation of forged cultural objects can be made in relation to any type of counterfeit object. It is in the public interest to curb all types of fraud. However,

¹¹⁹ Arts and Cultural Affairs Law art.13.

¹²⁰ J.H. Merryman, “The Public Interest in Cultural Property” (1989) 17 Cal. L. Rev. 339.

in relation to art and antiquities, the policy arguments are stronger. The ratification of the UNESCO Convention has provided an impetus for re-evaluating the law. Surely, if anything should distinguish this market from any other, it is the thought that its participants should behave *more* responsibly, because cultural property is invaluable as part of our common heritage.

This article has concentrated on English law, but forgery presents problems for the global market in art and antiquities. For example, Greenhalgh created a sculpture of a faun in the style of Paul Gauguin in Bolton. It was originally sold at auction in 1994 by London dealers for £20,700 but was eventually acquired by the Chicago Art Institute for \$125,000 in 1997. The way forward in the longer term is an international agreement dealing with issues such as the destruction or branding of fakes and standard contract terms. International consensus would be desirable because it is feared that organised criminal syndicates are playing a significant role in the market, not only in relation to forgeries but also in relation to objects which have been stolen or illegally excavated abroad.¹²¹

In *Harlingdon and Leinster*, these policy objections were not discussed. The majority of the Court of Appeal considered that all but the most naive of buyers were aware of the risk of purchasing a forgery and should take precautions accordingly. But the danger of placing too much responsibility to investigate an object on the buyer is that it may encourage a seller with serious misgivings about an object to suppress those concerns. This is precisely why a code of practice is desirable. It ought to encourage sellers to be more vigilant in checking the provenance of an object. It should provide more clarity in the law so that, when appropriate, buyers can confidently return forgeries to their sellers.

¹²¹ United Nations Economic and Social Council (ECOSOC) Resolution 2008/23.