Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Hubner v Bandamora Gallery [2017] NSWCATCD 19**
Hearing dates:	6 December 2016 & 23 January 2017 (written submissions)
Decision date:	20 March 2017
Jurisdiction:	Consumer and Commercial Division
Before:	C Campbell, General Member
Decision:	1. The application is dismissed.
Catchwords:	Limitation periods; agency; disclosed or un-named principal; expert evidence; misleading or deceptive representations
Legislation Cited:	Fair Trading Act 1987 Limitation Act 1969
Cases Cited:	McBride v Christie's Australia Pty ltd [2014]NSWSC 1729 Marsh & McLennan Pty Ltd v Stanyers Transport Pty Ltd [1994] 2 VR 232
Texts Cited:	Professor Reynolds "Practical Problems of the Undisclosed Principal Doctrine" (1983) Current Legal Problems 119
Category:	Principal judgment
Parties:	Michael Hubner and Alison Hubner (Applicants) Bandamora Investments Pty Ltd t/as Bandamora Gallery (Respondent)
Representation:	Applicants in person Mr Bell, solicitor, for the respondent
File Number(s):	GEN 16/44026
Publication restriction:	Nil

REASONS FOR DECISION

1 This is an application for an order for the refund of the purchase price paid for a painting purchased in 2007, which the applicant alleges is a forgery.

2

The matter was listed for hearing before me on 06.12.16. Mr Hubner appeared on behalf of both applicants. A principal of the respondent company Mr Tozer did not appear. Mr Bell lawyer sent a detailed letter to the Tribunal attaching a medical certificate and a schedule of Mr Tozer's pharmaceutical regime. Mr Bell sought leave to present the case for the respondent on the grounds Mr Tozer was elderly and unwell and was certified by his medical practitioner as being unable to drive from Tumut to Sydney due to suffering from visual disturbance and dizziness. Mr Hubner did not object and I granted leave for Mr Bell to appear on behalf of the respondent.

3 Mr Tozer telephoned the Tribunal and I granted leave for him to give sworn evidence over the phone. At the conclusion of the evidence orders were made for both parties to file written submissions.

THE CLAIM

4 On the 31.01.07 the applicants purchased a painting called "Work Starts" by D'Arcy Doyle from the respondent for $23,000. In or about July 2016 the applicants discovered they painting is a forgery and is worth next to nothing.

APPLICANT'S SUBMISSIONS

5 In January 2007 the applicant saw a D'Arcy Doyle painting called "Work Starts" advertised on the internet and he attended the respondent's gallery in Gundagai. He knew the gallery as 'they had been around for a long time."

6 He drove to Gundagai and inspected the painting. He spoke with Brian Tozer at the gallery and said to him words to the effect:

> "Are you comfortable with the provenance of the painting?"

To which Mr Tozer replied:

> "Yes."

7 He stayed overnight, spoke with his wife about the painting. An offer was made and an agreement was reached as to the purchase price the following day.

8 The painting was delivered to him in the basement car park of a city building at which time he paid the $23,000 in cash. For reasons which were not explained by either party a receipt was issued on the 31.01.07 in the sum of $30,000 said to be inclusive of GST.

9 On the 14 March 2007 the respondent provided a valuation for the purpose of "insurance or replacement" in the sum of $30,000.

10 In January 2007 the applicant purchased another D'Arcy Doyle painting called "Country Cricket" from an auction house.

11 In July 2016 applicant was asked by his insurer insurers to provide up to date valuations for their contents for the purpose a home and contents insurance policy. He arranged for a valuer, Trevor Richards of Morpeth to value both D'Arcy Doyle paintings. Mr Richards said neither paintings had been painted by D'Arcy Doyle and were forgeries. Mr Richards issued one Valuation Certificate for both of them, with the value

being assessed for the frames only. The Valuation Certificate is stated to be *"for replacement insurance purposes only."*

12 Immediately under the valuation Mr Richards states:

> Having sold Darcy Doyle works through our gallery over the past 25 years it is my opinion that the above paintings shown to me on Thursday 7th July 2016 are not his work and were not painted by the hand of D'Arcy Doyle. In this regard I believe these are problematic paintings, and can be classified as forgeries.

13 Mr Richards made a notation on the bottom of the Valuation Certificates to the effect that in his opinion it was likely the paintings had originated out of a gallery at Kenthurst owned by Mr Ronald Coles. Mr Coles was at that time incarcerated for offences relating to forged paintings and imitations by famous Australian artists, including D'Arcy Doyle.

14 The applicant asserts Mr Richards is an expert on D'Arcy Doyle artworks. Mr Richards was not called to give evidence. The applicant spoke with other art dealers, including Mr David Hulme from Banziger Hulme Fine Art Valuers and he said Trevor Richards is an expert in D'Arcy Doyle paintings.

15 In the statement provided with his evidence Mr Hubner refers to comments made by Mr Richards about the zig-zag pattern on the masonry board onto which the artist has painted the picture and type of board not being available at the time the picture was painted. This commentary is not referred to on the Valuation certificate issued by Mr Richards.

16 The applicant put into evidence his response to Mr Bell's request for an adjournment dated 26.10.16. At point 3. of the applicant's response Mr Michael Hubner says:

> I recall Brian Tozer saying it was being sold on consignment, but don't recall him saying on behalf of a Queensland client.

At point 6. in the same document the applicant says :

> Bandamora Art Gallery was acting as agent for the vendor. I had never met or spoken to the vendor."

17 The applicant seeks a full refund of the $23,000 paid for the painting.

18 In cross-examination Mr Hubner admitted he was aware of the scandal surrounding Mr Cole and the forged artworks, which was reported in the press and a Four Corners television show in 2009. He said he felt "comfortable" as he had purchased the painting from a reputable gallery.

MR TOZER'S EVIDENCE

19 The respondent called Mr Tozer. Mr Tozer recalled the applicant saying he liked the painting. He told him the painting came from a reputable collector in Brisbane, he did not disclose his name. However when an offer was made, he told the applicant he would have to contact the principal to see if he would accept the sum of $23,000.

20 Mr Tozer denied in cross–examination ever being asked if it was a "genuine painting". He said "of course I did not say that, as I was selling it for someone else."

21 He denied being ever being asked about the provenance of the painting. He knew

D'Arcy Doyle was deceased. He said that if he had been asked about the provenance of the painting, his usual practice over many years in relation to deceased artists was to say: "… I believe the painting is by the name of the artist who appears on the painting, but cannot warrant that." He said he would not warrant a painting by a deceased artist.

RESPONDENT'S SUBMISSIONS

22 The respondent denies liability on four grounds.

23 The primary submission is the application is statute barred. The respondent relies on S.79L of the Fair Trading Act 1987, and submits *the cause of action* (my emphasis) giving rise to the claim first accrued more than three years before the date on which the claim is lodged.

24 Mr Hubner conceded that he was aware of the controversy surrounding the operations of Mr Cole and the forged art works. He had viewed the Four Corners program and read about it in newspapers. The respondent contends the applicant was "well aware" of the risk his painting may be a forgery and made no enquiry to ascertain its authenticity at the time of the newspaper and television exposes.

25 Instead the claim is brought almost ten years after purchase and seven years after the applicant says he was aware of the fraudulent activities of Mr Cole.

26 The respondent says the applicant has not established the painting is a forgery, and the respondent does not admit the painting is a forgery. The only evidence the applicant has put before the Tribunal is a valuation from a person who is not properly qualified as an expert witness. Nor was Mr Richards called to give evidence. The document relied on is a valuation certificate only.

27 There is a failure to comply with NCAT Procedural Direction 3 in relation to the expert evidence. The respondent submits the science of forgery can be very skilled one, involving highly technical and scientific examination. There is no evidence that Mr Richards has any expertise or scientific qualifications or that he undertook any forensic examination which involved him applying a particular expertise or specialist skill.

28 In the absence of any expert evidence the claim should fail and the application be dismissed.

29 At all material times the applicant was aware the painting was being sold on consignment. The respondent disclosed this to the purchaser prior to the purchase and during the course of the negotiations.

30 The applicant conceded the he knew the respondent was acting as an agent. *"…I recall Brian Tozer saying it was being sold on consignment but don't recall him saying on behalf of a Queensland client."*

31 He knew the respondent was not the owner, but was not provided with the identity of the owner. The respondent says this is not relevant. The respondent relies on the decision of Bergin CJ in Equity in *McBride v Christie's Australia Pty Ltd* [2014] NSWSC 1729. Where her honour discusses the so called doctrine of "undisclosed principal" by

reference to the Victorian decision of *Marsh & McLennan Pty Ltd v Stanyers Transport Pty Ltd* [1994] 2 VR 232 at 241 (See McBride at [127]. In *Marsh & McLennan* Marks J said :

> " There is some confusion in this area of the law. It arises from the failure to bear in mind the clear distinction between the non-disclosure of the name of a principal and the non-disclosure of the fact there was is one, that is, non-disclosure of the fact of agency."

Marks J. also referred to the learned article by Professor Reynolds "Practical problems of the Undisclosed Principal Doctrine" (1983) *Current legal* Problems *119.* The question is one of interpretation of the contract;

> …Where the principal is not undisclosed but rather un-named or unidentified…the prima facie rule is that the contract is between [the purchaser] and principal.

For the agent to be liable some "special feature" is required such as the use of a written contract by which the agent undertakes liability. According to Marks J. the question is whether the principal is truly undisclosed rather than merely un-named.

32 The respondent submits the claim should be dismissed as there is no legal basis upon which the respondent can be held liable. The applicant was aware at all times he was acting as an agent for an un-named principal and there is no obligation or legal requirement for the agent to disclose the identity of its principal, provided the agency is disclosed

33 The respondent denies it gave any warranty as to the provenance of the painting. The valuation given to the applicant for insurance and replacement contains a disclaimer at the bottom which states:

> This valuation has been given with all available information to hand on the above date.

34 That valuation is dated 14 March 2007, two months after the contract was complete. The respondent submits the applicant did not rely on any alleged representations as to provenance when making his decision to purchase the painting in January. Rather, he purchased it because he liked the look of it. This is supported by the fact he purchased a second D'Arcy Doyle painting in January 2007 at an art auction.

DECISION

35 The first question requires a decision about which of Mr Hubner's account or Mr Tozer's is more probable. In other words: did Mr Tozer warrant that he was satisfied with the provenance of the painting? If he did, that might constitute the type of "special feature" referred to by Professor Reynolds.

36 I prefer the evidence of Mr Tozer. These events occurred back in 2007 and Mr Tozer's evidence of his usual practice is more reliable guide than Mr Hubner's attempt to recall a single conversation with a dealer which occurred nearly ten years before he gave evidence.

37 Moreover, I am of the view that his attempted recall is likely to be coloured by what he now knows about the scandal surrounding the forger Mr Cole and the opinion of Mr Richards, that this painting and the other Mr Hubner bought independently were the work of that forger.

38

I do not accept that Mr Hubner bought the painting simply because he liked the look of it. Given the sums he was expending on art and the distance he was prepared to travel to inspect a work he was interested in, I infer that he knew something about art himself. He clearly had some familiarity and an interest in, D'Arcy Doyle's work. He probably made his own decision about the painting's authenticity. Naturally the fact he felt he was negotiating with a reputable dealer played its part in his thinking. But that consideration alone does not amount to the requisite "special feature". He obviously felt sufficiently confident to negotiate a price with Mr Tozer.

39 On these findings I am not persuaded that Mr Tozer gave any personal warranty or made any misleading or deceptive representation about the provenance of the painting that induced the purchase.

40 I accept the respondent's argument that the doctrine of the undisclosed principal is not engaged here and Mr Tozer is not personally liable on the contract on this basis. Even on Mr Hubner's evidence he knew that Mr Tozer was acting solely as a commission agent. Nothing in the "so called" tax invoice alters that understanding. Rather this is the situation analysed by Professor Reynolds where the principal is merely un-named or unidentified and the contract is between Mr Hubner and Mr Tozer's principal. There is no special feature appearing in the evidence rendering the agent, Mr Tozer, also liable on the contract.

41 I also accept that the claim has not been brought within the time stipulated S.79L of the *Fair Trading Act 1987.* Properly characterised the claim is one for pure economic loss and there may be difficulties determining when the statutory cause of action accrues. This may well depend upon identifying the date when Mr Hubner could no longer sell the painting himself in good faith as a D'Arcy Doyle. Given that he became aware of the forgery controversy in 2009 I find that thereafter he could not honestly sell the painting as a genuine article without first making proper inquiries.

42 It seems clear that had he then approached Mr Richards he would have been given the same advice. I find that any cause of action under the statute accrued no later than the end of 2009 and that claim is statute barred.

43 To the extent to which Mr Hubner relied on a simple contract, the six year limitation period under s.14 of *Limitations Act 1969* expired on 30 January 2013.

44 It is probably unnecessary to say much about the admissibility or weight due to the Mr Richard's opinion. However, in the taciturn form in which it was presented it is difficult to see how his opinion that the paintings he inspected were probably forgeries was wholly or substantially based upon his specialised knowledge, which I am prepared to assume he possessed. The "opinion" was really no more than an inscrutable *ipse dixit.* It certainly does not comply with the Tribunal's Procedural Direction 3.

45 In the form in which it was tendered it would be difficult to confidently base any relevant finding of fact on it.

46 For these reasons the application is dismissed.

C Campbell

General Member

Civil and Administrative Tribunal of New South Wales

20 March 2017

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

Decision last updated: 11 May 2017