



## FIDUCIARY DUTY

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Deloitte's biggest concern about fiduciary duty in the art market lies specifically in the responsibilities of art advisors: "An art market downturn is likely to raise questions on the legally vague fiduciary responsibilities of new intermediaries, such as art advisors."<sup>1</sup> But what is "fiduciary duty" and which advisors are they specifically referring to? Since the times of Roman Law, a creditor in "fiducia" was obligated to keep the property under his possession in safekeeping to the benefit of the debtor and reconvey the same except in case of default.<sup>2</sup> Modern fiduciary duty is understood as "a legal duty to act solely in another party's interests."<sup>3</sup> Fiduciary relationships abound in today's art market for different kinds of advisors in the field of art: auction houses and galleries are fiduciaries to their consignors, museum directors and trustees are fiduciaries to their institutions, and primary dealers are fiduciaries to their artists.

Are fiduciary responsibilities more "legally vague" in the art industry than in others? A recent legal precedent in England, for example, would not seem to favor the consulting firm's argument. In the case of *Accidia Foundation v. Simon C. Dickinson Limited*, fiduciary duty was upheld in favor of the seller notwithstanding that there were two art intermediaries involved, a dealer representing the seller and a gallery that found the buyer. The dispute initiated when, in 2006, the Accidia Foundation ("Accidia") decided to sell Da Vinci's painting *Madonna and Child with St. Anne and a Lamb* (1508). Accidia instructed art dealer Daniella Luxembourg to negotiate an agreement with the Simon C. Dickinson Ltd. Gallery ("Dickinson"), requesting a "net return price" (i.e. the price to be paid to the seller net of the dealer's commission) of \$6 million USCy. Dickinson, eventually and secretly agreed to have the final buyer pay \$7 million USCy for the painting, without the knowledge of



Da Vinci's painting *Madonna and Child with St. Anne and a Lamb*

<sup>1</sup> Picinati, Adriano Et al. *Art & Finance Report 2014*, Ed. Deloitte and Art Tactic, 2014, p. 19.

<sup>2</sup> [thelawdictionary.org/fiducia/](http://thelawdictionary.org/fiducia/)

<sup>3</sup> Please refer to: "Meeting Your Fiduciary Responsibility." *Investopedia*. 8 Aug. 2007. Web. 1 Sept. 2015.

<http://www.investopedia.com/articles/08/fiduciary-responsibility.asp>



Accidia. Accidia's understanding was that the price for the transaction had been \$6 million US\$ and, based on such figure, paid the respective commissions to both Dickinson and Luxembourg. Almost a year afterwards, Accidia found out the real sales price and sued Dickinson for breach of fiduciary duty. The court ultimately concluded that Dickinson had acted as Accidia's agent and therefore owed strict fiduciary duties to Accidia as principal.<sup>4</sup> "The Chancery Division of the High Court ruled that the defendant art dealer company was not able to keep the commission it obtained on the sale of a drawing attributed Leonardo da Vinci, as the agreement it had made with the buyer had not been authorized by the seller, and it was inequitable that it should be entitled to take such a large commission without the express authority of the seller."<sup>5</sup>

Being a "fiduciary" means having the legal responsibility (and authorization) to hold assets in trust for another person.<sup>6</sup> The trustee/assignee should avoid any conflicts of interest between himself and his principal and should not profit, against the principal's interests, from his relationship with third



Van Gogh's *Vase with Fifteen Flowers*.

parties. However, beyond the strictly juridical realm and those assets placed specifically under trust agreements, the concept of fiduciary duty is also an ethical one. From the ethical perspective, the art advisor fiduciary should act as a gatekeeper. He should position himself between the client and the largely unregulated art market. A highly skilled seller may, for example, easily inveigle a collector to impulsively buy an overpriced artwork. Nevertheless, an art advisor with a fiduciary duty towards the buyer should appease the collector's anxiety with well-informed and rational recommendations in order to avoid future regrets. To illustrate the above, we refer the reader to the story of Van Gogh's famous painting *Vase with Fifteen Flowers*, which was sold in 1987 by the

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<sup>4</sup> Freund, Hugh, Jo Backer Laird, and John Sare. "Dealing in Hidden Risk: Agency and Fiduciary Liability in the Dealer-Seller Relationship." *Legal Canvas*. Patterson Balknap Webb and Tyler, 2012. Web. 2 Sept. 2015.

[http://www.pbwt.com/files/Uploads/Documents/The Legal Canvas Summer 2012\\_7\\_28.pdf](http://www.pbwt.com/files/Uploads/Documents/The%20Legal%20Canvas%20Summer%202012_7_28.pdf).

<sup>5</sup> "Accidia Foundation v Simon C Dickinson Ltd." *Lexis Library Web*. 1 Nov. 2010. Web. 2 Sept. 2015.

<http://lexisweb.co.uk/cases/2010/november/accidia-foundation-v-simon-c-dickinson-ltd>.

<sup>6</sup> "Fiduciary" Definition, *Investopedia*. 20 Nov. 2003. Web. 1 Sept. 2015.

<<http://www.investopedia.com/terms/f/fiduciary.asp>>.



daughter-in-law of the mining magnate Sir Chester Beatty<sup>7</sup> to Mr. Yasuo Goto for \$74.5 Million USCy. Such an amount almost doubled the painting's market value of \$39 Million USCy. The transaction was apparently closed in the context of celebrations for the Yasuda Fire and Marine Insurance Company.<sup>8</sup> If Mr. Goto had been represented by an advisor under proper fiduciary duties and with the appropriate level of independent research, there might have been taken a more rational approach.

The rapid rise in the value of art and the continuing concentration of wealth (potentially leading to unjustified spending sprees and price bubbles), together with the current volatility and lack of appeal of the traditional financial markets, require more of art fiduciaries. Now they must be more objective in exercising responsibility regarding their client's interests. In addition to the artificial inflation of art prices, there are the risks of inadequate insurance, physical security, maintenance and transport. And there are also other major operational uncertainties involved when dealing with art. Collectors are often unaware of the depth of research required, the subtleties of the transactional processes and other meticulous details, which can be turned into considerable disadvantages against buyers without proper fiduciary representation.

Often, art market players do not know with whom they are ultimately dealing, given the preference for anonymity and secrecy of both buyers and sellers. It is true that the art world has long been characterized as one that lacks disclosure, has a preference for secrecy, and involves frequent undocumented transactions. It is precisely these "customs" that provide the breeding ground for conflicts of interest, contractual breaches and extra-contractual liability. The art fiduciary should take responsibility for all aspects of each operation and decision made on behalf of his clients. Art fiduciaries for example, in acting to the benefit of their clients, should identify factors such as investment horizons, risk levels, expected returns and the particular interests of their principals.

The argument that fiduciary duties are legally vague in the art world may not be entirely precise. Fiduciary duty exists in the art industry and has been legally upheld before in spite of the absence of regulations specific to the sector. However, since the art market is in fact subject to little oversight, collectors may be better off investing through art funds. These entities are subject to contractual and/or statutory fiduciary duty regulations. Art funds also offer periodic disclosures, providing protection to their investors from situations like those described above. Art funds assist buyers as well in identifying the best investment opportunities available in the art market and making

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<sup>7</sup> "Sir Alfred Chester Beatty." *The Chester Beatty Story*. Chester Beatty Library, 2015. Web. 1 Sept. 2015.

<<http://www.cbl.ie/About-Us/The-Chester-Beatty-Story.aspx>>.

<sup>8</sup> Reif, Rita. "SUNFLOWERS' BUYER: JAPANESE INSURER." *The New York Times*. The New York Times, 8 Apr. 1987.

Web. 1 Sept. 2015. <http://www.nytimes.com/1987/04/09/arts/sunflowers-buyer-japanese-insurer.html> .



well-informed decisions in each transaction. Artemundi Global Fund (“AGF”), through the implementation of detailed examination and investment protocols, affords its investors prudent and sagacious investments instead of impulsive and conflicted ventures. AGF offers the strictest of fiduciary duties.

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