# No matter what… it's art!

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The duty to inform on a specific feature of an artwork exists only if a seller should assume that this feature might influence the decision of a buyer to conclude a contract or even the conditions under which a contract is concluded.

Judgment of the Federal Supreme Court of 5 July 2021

Case Reference : 4A_42/2021

## Facts

A buyer bought a sponge sculpture ("Eponge bleue") made by the late artist Yves Klein at an auction for a total of CHF 123,120. The sponge itself was created in 1961 and mounted on a metal structure after the artist's death. It would appear that Yves Klein created many sponge sculptures during his lifetime and that he mounted some of them on a base himself.

The auction catalogue specified the dimensions of the sponge (6 x 6 x 6 cm), the fact that it was mounted on a metal structure and the total height of the structure (17.5 cm). It also contained a warranty exclusion provision, according to which the description provided in the catalogue had been done to the best knowledge and belief and that any liability for legal or material defects was excluded. These clauses were not only applicable to the relationship between the auction house and the buyer, but also to the relationship between the buyer and the seller of the artwork.

Having learnt that the sponge had not been mounted on the metal structure by Yves Klein himself, the buyer declared he was no longer willing to uphold the contract and argued that he never wanted to acquire a *"patchwork"*. He sued the auction house and the seller before the District Court of Zurich, claiming the payment of CHF 123,120 in exchange for the artwork. In support of his claim, the buyer invoked error, fraud as well as liability for defects.

After the District Court ruled in favour of the buyer and ordered the auction house and the seller to pay CHF 20,520 and CHF 102,600 respectively, the Court of Appeal admitted the appeal filed by the seller (the auction house had not challenged the judgment of the District Court). Contrary to the District Court, the Court of Appeal considered that the buyer had failed to demonstrate a significant difference in value between the sponges mounted on supports by Yves Klein himself and those mounted posthumously. It concluded that the seller had no duty to inform the buyer that only the sponge had been created by Yves Klein.

## Issue

The legal question that arose was whether the seller had an obligation to inform the buyer on his own initiative that the sponge had not been attached to the support by Yves Klein himself, or whether the onus was on the buyer to seek more information himself.

## Decision

Under Swiss law, an error (Art. 24 para. 4 SCO) is excluded if it concerns a feature for which a seller has validly excluded its liability. However, an exclusion of liability is invalid if a seller has fraudulently concealed a defect (Art. 199 SCO). A fraudulent concealment (Art. 199 SCO), as well as a deliberate deception (Art. 28 SCO), should be admitted if the seller failed to inform the buyer of a particular feature since a duty to inform exists. According to case law, such duty exists when a seller should assume that a fact he knows could impair or significantly affect the designated purpose, or be of importance to a buyer, because it might influence the decision to conclude a contract or the conditions under which a contract is concluded.

In the case at hand, the buyer had allegedly assumed, based on the catalogue description, that the sculpture in its entirety

had been made by Yves Klein in 1961, which supposedly influenced his estimate of the price.

However, the Federal Supreme Court ruled that the only relevant question was to examine whether the difference between the actual and targeted features was substantial, resulting in an obligation for the seller to provide information. All features that are important in the decision-making process to buy, and not only those that have a negative impact on the sale price, are concerned by the duty to inform. The Federal Supreme Court specified in this context that mere allegations of the paramount importance of the authenticity of the artwork and the fact that the seller was a professional, were not sufficient. Moreover, the duty to provide information depends on the level of knowledge of the parties and the context of the sale. In particular, limited requirements apply to the descriptions made in auction catalogues, considering the high number of artworks up for sale.

In the case in question, the Federal Supreme Court held that the buyer had failed to demonstrate that the seller must have recognized that the authorship of the base was of particular relevance to him, this circumstance baring no significant weight on the price of the artwork. It also held that there was no reason to believe the seller had acted in bad faith. On the contrary, it would have been expected that the buyer ask questions about the authorship of the base if that point was so important to him.

## Key takeaway

There is no fraudulent concealment when a seller of an artwork has no reason to believe that the difference between the actual and targeted features is substantial. The authorship of part of an artwork is in itself not substantial, as long as the seller has not recognized that this is of particular relevance to the buyer and is acting in good faith.

## Comments

In sales, a seller may induce a buyer to purchase a good by explicitly misleading him. This unethical practice has long been sanctioned in the Roman-Germanic law system, in order to restore justice to the deceived buyer. More recently, the courts have begun to recognize that fraud can result not only from a deliberate act by the seller, but also from the seller's mere passive behaviour, when he lets the buyer be mistaken or does not try to correct his mistake. This second way of acknowledging fraud (i.e. fraud by non-disclosure) is more difficult for the buyer to prove and is rarely admitted by the courts, especially in Switzerland. While French law has recently codified fraud by non-disclosure in its civil code (Art. 1137 para. 2: "There is also fraud if one of the parties intentionally conceals information which he knows to be of decisive importance for the other party."), it is still the subject of case law in Switzerland, and therefore, remains largely dependent on the assessment of the judges.

The case commented here emphasises the importance for a buyer of an artwork to be proactive by obtaining information on the artwork and, more generally, the artist's work. If the buyer would have done so in this particular case, he would have probably learned that the sponge may not have been assembled on the metal structure by the artist himself. This would have led him to ask the seller more questions about the auctioned sponge. By relying only on the lapidary description of the auction catalogue, the buyer lost the opportunity to invoke the warranty.

## Other sources presenting the case

Oliver Dalla Palma / Hans Caspar von der Crone, Aufklärungspflicht, Freizeichnungsklausel und absichtliche Täuschung beim Kaufvertrag, *in* SWZ, 2021 p. 629.

Raja-Marie Achermann / Elia Kaufmann, BGer 4A_42/2021: Ein Urteil zu den Aufklärungspflichten beim Kunstkauf, *in* PJA, 1/2022, p. 56 ss.

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