STEPHENSON HARWOOD

Art law – recent developments

October 2019 issue

Welcome to the latest issue of our "Art law - recent developments" newsletter in which we discuss legal issues currently affecting the global art community.

In this issue we look at:

- Export licensing
- Restitution
- The Ivory Act 2018

Export licensing

In this article, we look at four separate but related aspects of export licensing.

In the first section, we summarise the recent decisions of the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest ("**RCEWA**") for the year 2019/2020, so far. In the second section we look at the legal issues which arose in *Simonis v Arts Council*. In the third section we consider briefly the EU Cultural Goods Bill, albeit the transposition of that law into English law is unclear in light of Brexit. In the fourth section we consider briefly some recently updated guidance from the Government on exporting or importing objects of cultural interest if there is no deal Brexit.

Before we review the recent decisions of the RCEWA, it may be useful to recap on how the UK's export licensing regime works.

Some cultural goods that reach or exceed specific age and monetary value thresholds require an export licence to be exported out of the UK, whether on a permanent or temporary basis.

An application for an export licence is made to the Arts Council and is reviewed by an Expert Adviser. When an export licence application is objected to by an Expert Adviser it is referred to the RCEWA. The RCEWA has an important role to play in advising the Secretary of State for the Department for Digital, Culture, Media and Sport on whether works of art intended for export are national treasures. If cultural items are found to be national treasures, the RCEWA can recommend that the items be placed under temporary export deferral.

The RCEWA will designate an object as a national treasure if considers that the item meets one or more of the, so called, Waverley criteria:

(1) Is it so closely connected with our history and national life that its departure would be a misfortune?

(2) Is it of outstanding aesthetic importance?

(3) Is it of outstanding significance for the study of some particular branch of art, learning or history.

If the RCEWA finds that any of the Waverley criteria have been satisfied it recommends to the Secretary of State that a decision on the export licence application be deferred for a specified period to enable an offer to purchase be made at or above fair market value.

(1) RECENT DECISIONS OF THE RCEWA

Case 1 – A judge's annotated copy of Lady Chatterley's Lover

This case related to the judge's annotated copy of Lady Chatterley's Lover by D.H. Lawrence that was used in the landmark obscenity trial in 1960. Penguin Books decided to publish the uncensored book but ended up in a legal battle which tested the interpretation of the 1959 Obscene Publications Act. The trial was of significance as a symbol of the more liberal values of the 1960s.

The value of the book on the export licence application was shown as £56,250 which represented the hammer price at auction plus the buyer's premium.

The RCEWA found that the annotated book was "a fascinating, multi-layered, and iconic object" and "the centrepiece of a moment that had outstanding literary and legal significance for Britain and helped to usher in permanent social change." As such, it found that the book met the first Waverley criteria.

As a result, the Arts Minister had placed a temporary export ban on this work until August 2019. We understand that this work will now stay in the UK after a successful crowdfunding campaign, spearheaded by the University of Bristol, raised almost £60,000.

Case 2 – Manuscript of the poetry of John Donne

A temporary export bar was placed on a rare 17th century poetry manuscript by the poet, John Donne in an attempt to save it for the nation.

The value of the work was stated as £466,000.

The RCEWA's hearing took place on 10 April 2019. The applicant had submitted that the export of the work would not necessarily be a misfortune as there are 30 other such manuscripts, of which five are in collections in the UK. The Expert Adviser submitted that it was an important discovery and would add to Donne's scholarship, it being noted that, after Shakespeare, Donne is arguably the best known and loved poet to generations of readers.

The RCEWA concluded that the manuscript is "deeply connected with the tissue of English society of the period" and "was of undisputed importance for scholarship". As such, it met the first and third Waverley criteria.

A decision on the export licence was deferred until August 2019. If a serious intention to raise funds at the recommended price of £466,000 is expressed, then the decision may be deferred until November 2019.

Case 3 – Victorian ceramic crab

The Arts Minister placed a temporary export ban on a unique work, a large anthropomorphic crab, by the Martin Brothers from 1880.

The piece was bought at auction at Phillips New York in December 2018 for a hammer price of US$275,000 and was described in the catalogue as "faux jollity mingled with embarrassment and even terror."

When one sees an image of the crab, the first reaction may be one of disgust but the RCEWA took a different view and found that this work met the second and third Waverley criteria. They considered the crab to be "an extraordinary object exemplifying remarkable technical control of stoneware…aesthetically extremely unusual and striking." They also noted that given the unknown provenance of the crab from 1890 to 1980 there was room for further research and study of late Victorian art pottery as well as the work of the Martin Brothers.

A decision on the export licence was initially deferred until September 2019 and is now in the second deferral period until December 2019.

Case 4 – *The Lake Albano and Castel Gandolfo, 1785, John Robert Cozens*

This painting shows an atmospheric sky above Lake Albano, outside of Rome.

It is widely regarded as one of the artist's most evocative and romantic watercolours. It has also broken two records; first, in 1991 when it was sold at Sotheby's for nearly £180,000 and second, in 2010 when it was sold again at Sotheby's for £2.4 million.

Cozens (1752 - 1797) was one of the most respected artists of his generation and this work had an early influence on the Romantic vision of Turner, Girtin,

and Constable who referred to him as "the greatest genius that ever touched landscape."

The RCEWA found that the painting met the second Waverley criteria in that the painting was "Cozens' best work both in terms of quality and in relation to its contribution to the story of British watercolour painting". They also found that it met the third criteria "for the study of the work of Cozens and the development of the national school of watercolour painting in Britain."

A temporary export ban was placed on the painting until September 2019 but may be deferred until January 2020 if a serious intention to raise funds to purchase it is expressed at the recommended price of £2.9 million.

Case 5 – *Nijinsky before the Curtain*, 1913, Philpot

The painting by Glyn Philpot is of a Russian ballet dancer, Vaslav Nijinsky, taking a curtain call after a performance of 'L'Après-midi d'un faune' the Royal Opera House, Covent Garden, where he performed the UK premiere of the ballet in 1913.

Nijinsky was the *premier danseur* of Serge Diaghilev's Ballets Russes company, which had an important impact on British art and culture because, before they visited the UK, there was no national school of ballet, and no permanent ballet companies (as there were in other European cities).

The value of the painting on the export licence was £450,000 which represented an agreed sale price.

The RCEWA found that the painting met the third Waverley criteria as the "unusual" painting was a "rare record" and is "of outstanding significance for the study of the history of dance."

As a result of the RCEWA's opinion, the Arts Minister placed an export ban on this painting until October 2019. This may be deferred until January 2020 if a serious intention to purchase the work is expressed at a recommended price of £450,000 plus VAT.

Case 6 – *The Dark Rigi, the Lake of Lucerne*, 1842, JMW Turner

This £10 million painting depicts a beautiful view of the Dark Rigi mountain at dawn.

Turner first visited Switzerland in 1802 and returned several times, including in 1841, when the study for this painting was made.

The RCEWA commented that while there were numerous Swiss sketches by Turner, accomplished watercolours such as this one were very rare. The RCEWA stated that the work was a "stunning watercolour" and demonstrated Turner's "masterful depiction of light". They also said it "was of outstanding significance for study not only of Turner's mature work, but more broadly for British and European landscape art and its history." As such, it met the second and third Waverley criteria.

The Dark Rigi is also one in a series of three Rigi watercolours (*The Red*, *The Blue* and *The Dark Rigi*), and the only one to have remained in private hands. *The Dark Rigi* has already been the subject of an export licence application in 2006 in which the valuation had been £2.7 million. In May 2006, the RCAEW deferred the export of the painting which was to be sold to the National Gallery of Art in Washington, D.C. and it was instead sold to a private collector only hours before the Tate's notification of its intention to purchase.

The Blue Rigi has already been saved for the nation after a fundraising campaign launched by the Tate and the Art Fund and a major grant from the National Heritage Memorial Fund. The *Red Rigi* is held by Australia's National Gallery of Victoria.

The Arts Minister placed a temporary export ban on *The Dark Rigi* until December 2019. This may be deferred until June 2020 if a serious intention to raise funds to purchase the work is expressed at the recommended price of £10 million.

Case 7 – *Le Palais Ducal*, 1908, Monet

This masterpiece had been in the same family collection for nearly 100 years before it was sold for £27.5 million to an overseas buyer in February 2019.

The painting depicts the Doge's Palace in Venice and was completed following Monet's only visit to Venice in 1908.

There are only a few post-1900 travelling pictures by Monet and even fewer of the quality of this painting, and the RCEWA acknowledged that the Venetian painting has to some extent been eclipsed in the public's mind by Monet's waterlily series. This had a bearing on the RCEWA's decision. The RCEWA concluded that the painting met the second Waverly criteria for "the subtlety of colour and brushstrokes, balance of composition, and the reflection of light gave the work a spellbinding quality." It also met the third criteria as it was "of outstanding interest for study of Monet's Venetian series."

The decision on the export licence has been deferred until November 2019 but may be extended until May 2020 if a serious intention to raise funds is expressed at the recommended price of £27.534 million plus VAT.

Case 8 - *Ferdinand Lured by Ariel,* 1850, John Everett Millais

This work is a key one in the pre-Raphaelite period and shows the character of Ferdinand from Shakespeare's, 'The Tempest.'

The RCEWA found it to be "a uniquely important painting, radical in its use of colour and attention to detail" and in "excellent condition". It was also of significance to the history of the Pre-Raphaelite movement and the history of Victorian art, in general. They concluded that all three of the Waverley criteria had been met.

A temporary export ban has been placed on the work until November 2019 which may be extended until May 2020 if a serious intention to raise funds of £9.5 million is expressed.

Case 9 – *Two Boys with a Bladder,* 1768 - 1770, John Wright of Derby

This painting had been on the wall of a farmhouse in the Midlands. The owners sent it off to be cleaned and discovered a treasure in their hands. The painting was then purchased by a London gallery who put it up for sale and it was bought by the Getty Museum in California for £3,500,000.

The British artist, Joseph Wright of Derby, was one of the most important artists of the 18th century. The RCEWA found that the painting was an early example of "elements of European art making their way into the British art, emphasising the sophistication and importance of Joseph Wright's work." The painting features a bladder which the RCEWA said "emphasised the transience of human life, drawing from a longer European visual tradition." Further, it was noted that the use of metal leaf in the painting was an unusual and short lived technique.

The RCEWA found that the painting met the third Waverley criteria as it was important for the study of Wright's work and his working practice.

A decision on the export licence application for the painting has been deferred until January 2020. This may be extended until May 2020 if a serious intention to raise funds of £3.5 million plus VAT is expressed.

Reform

In all the cases referred to above, the RCEWA found that the works were national treasures and recommended to the Secretary of State that they be saved for the nation by an appropriate purchaser putting forward a matching offer.

As identified in our Art Law Newsletter of February 2018, there were calls to reform the export licensing regime in the UK when the owner of Pontormo's *Portrait of a Young Man in a Red Cap* declined a matching offer from the National Gallery. This was due to the impact of currency fluctuations following Brexit, despite the National Gallery having successfully raised the £30.7 million required to purchase the work.

A public consultation on export licensing reform began at the end of last year and closed in February 2019.

That sought views on strengthening the process for retaining national treasure by the introduction of a regime which would legally oblige export licence applicants to honour their commitments to accept a matching offer from a UK purchaser to purchase the work.

The consultation specifically sought views on a draft option agreement which would be entered into by the owner at the end of the second deferral period to give an interested purchaser an option to purchase the work. This would legally oblige the owner to sell the work to the purchaser if the purchaser has sufficient funds at the end of the second deferral period to make the matching offer. One concern for owners would be the risk of currency fluctuations between the time at which a fair market value is determined and the date on which the sale under the option agreement is final. To alleviate this risk, one proposal is for the owners to choose the currency of the purchase price. The financial loss that would have been suffered by the owner of the Pontormo was the primary reason why he could not proceed with his sale to the National Gallery.

There is clearly a need to balance the owners' freedom of choice with the need to ensure national treasures remain within the UK, which is not an easy task and it will be interesting to see what the outcome of the public consultation is.

(2) *SIMONIS V ARTS COUNCIL*

The life of the painting by Giotto, *Madonna con Bambino* (the "**Painting**") has been an interesting one as is seen below.

It was the subject of the decision of the English Administrative Court in 24 July 2018 (*R (Simonis) v Arts Council England* [2018] EWHC 1822) in which the Claimant, Kathleen Simonis, applied for judicial review of a decision of the Arts Council who refused

to grant an export licence to Switzerland for the Painting.

The principal issue in the claim was whether the Painting had been "lawfully" dispatched to the UK in 2007 and therefore whether the Arts Council was the competent authority to grant an export licence to remove it from the EU, to Switzerland.

Background

The Claimant bought the Painting in Florence in 1990 for the equivalent of around £3,500. At that time, it was considered to be a 19th century work. In 1993 it underwent restoration and was subsequently attributed to Giotto di Bondone (1266-1337) (or his school), thereby greatly increasing its value and cultural importance.

Over the past two decades, the Painting has been the subject of legal battles in Italy relating to the export and re-export to and from that country. The Painting was first exported to the UK, and then reimported into Italy in 1992. It travelled to Switzerland and then the US, and ended up back in Italy in 1999.

In 1999, the Italian authorities issued a five year temporary import licence, allowing the Painting's removal from Italy to another EU state until 2004 (the "**1999 Licence**"). In 2000 and in 2004, the Italian authorities issued decrees annulling the 1999 Licence because the Painting's restoration had "altered its nature fundamentally". There was ensuing litigation in Italy in relation to the lawfulness of the final export of the Painting in 2007 to the UK.

Administrative Court case

In May 2015, the Claimant applied to the Arts Council for the permanent export of the Painting outside of the EU, to Switzerland. The Arts Council refused to grant an export licence arguing it was not the competent authority under EU law to issue such a licence because the Painting had not been "lawfully" dispatched from Italy to the UK as required by Article 2(2)(b) of EC Regulation 116/2009 (the "**Regulation**"). Its position was that the 1999 Licence was no longer valid and under Italian law the Claimant was required to apply for a new licence. The Arts Council instead offered to grant an export licence to return the Painting to Italy.

The Claimant argued that the Arts Council's position that she had to obtain a new licence was a purely technical requirement and it was disproportionate because the Italian authorities could have taken the route under the Return of Cultural Objects Regulations 1994 ""**Return Regulation**"), which governs the return of cultural objects unlawfully removed from Member States.

The position of the Italian authorities, who were interested parties, was that the Claimant had unlawfully exported the Painting to the UK in 2007.

The decision

The judge dismissed the Claimant's claim and determined that the Arts Council was not the competent authority to decide the Claimant's application for an export licence to export the Painting to Switzerland.

The judge determined that the concept of "lawfulness" under Article 2(2)(b) of the Regulation was measured by reference to the national law of dispatch (i.e. Italian law in this case) in light of the overarching EU framework (found under Article 35 and 36 of the Treaty on the Functioning of the European Union ("**TFEU**")). Article 2 had to be construed consistently with the overarching EU framework under Articles 35 and 26 of the TFEU.

The judge also relied on an Italian law expert, Professor Federico Lenzerini, to consider whether the dispatch of the Painting to the UK had been lawful as a matter of Italian law. The judge determined that, under Italian law, by 2007 the Claimant had been required to apply for and obtain a new licence to export the Painting to the UK. This had not been done and so the dispatch of the Painting in February 2007 had not been "lawful" under Article 2(2)(b) the Regulation.

Appeal

The Claimant has obtained permission to appeal and we understand the appeal hearing is floating over 4 or 5 February 2020.

However, there remains the question of what will happen after Brexit when the UK will be outside of the EU's framework. For now, nevertheless, the Painting remains in the UK.

(3) EU CULTURAL GOODS BILL

We cannot leave this edition of the Art Law Newsletter without mentioning the EU Cultural Goods Bill, but only in passing as it is not clear what effect this will have, if any, on the UK following Brexit.

The EU Cultural Goods Regulation (the "**Regulation**"), first proposed by the European Commission in July 2017, was adopted by the European Parliament on 12 March 2019 and was formally adopted by the EU Council on 9 April 2019.

However, most of the Regulation's provisions will only be in force from 2025 when an electronic licensing regime is in place.

The Regulation's aim is to stop the movement within the EU of cultural goods illegally exported from their country of origin. It was drawn up to seek to prevent the illicit trade in antiquities which, some say, is an apparent source of income for terrorists and organised crime groups.

The Regulation will apply to "cultural goods" created or discovered outside the EU. Therefore, it will not apply to goods of any nature created or discovered within the EU, and so notably excludes Switzerland, Norway, and potentially the UK following Brexit.

The Regulation will impose increased administrative burdens on art businesses as it requires cultural goods of more than 200 years old that originated outside of the EU to have certain certification and documentation when imported into the EU (including in relation to past export). In many cases, it is likely to be impossible to provide proof of past legal export given the time since the original export took place, including difficulties identifying when that export was made, what laws applied at that time and a lack of paperwork providing proof of original export.

Even if the Regulation is not transposed into the UK as a result of Brexit, UK art businesses are likely to be affected given the volume of exports to the EU. We await developments in the next few months to see what the effect of Brexit will be for the UK on this issue.

(4) BREXIT

The Government's recently updated guidance on exporting or importing objects of cultural interest if there is no deal Brexit is found at:

https://www.gov.uk/government/publications/exporting-objects-of-cultural-interest-if-theres-no-brexit-deal/exporting-objects-of-cultural-interest-if-theres-no-brexit-deal

At present, there are licensing regimes that need to be complied with in relation to exporting items of cultural interest, as has been seen earlier in this newsletter. There is currently no licensing regime for importing cultural items into the UK or EU.

If there is a no deal Brexit, the Arts Council will not be able to issue EU export licences after 31 October 2019. If there is no deal Brexit, a UK licence will be required to export cultural items from the UK to any destination and you will no longer need to apply for an EU licence.

After Brexit, there will still be no licensing requirements for the import of cultural items into the UK. However, if you are importing items from the EU to the UK, or from another country outside of the EU, you need to comply with the EU and the relevant country's export licensing rules.

Again, we await further developments and guidance on this issue in the coming weeks.

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Restitution

There have been a number of interesting recent developments in the area of restitution, from the UK, to Brussels and the West Coast of the United States. In this article we take you through a selection of these developments and their impact on the international art market.

Rue St. Honore, apres midi, effet de pluie painted by Pissarro in 1987 has been the subject of a Californian Central District Court case brought by David Cassirer, as the ancestor to Lilly Cassirer Neubauer, against the Thyssen- Bornemisza Collection Foundation ("the Thyssen) which forms part of the well-known Thyssen National Musuem in Madrid. This case was brought in California with the assistance of the Jewish Federation of San Diego County but was the subject of Spanish and Swiss law, rather than California law.

Lilly inherited the painting in 1926 from a relative and in 1939, as a Jew facing persecution in Germany, she was forced to transfer the painting to a Nazi art appraiser in order for her and her husband to obtain exit visas to flee the country. Lilly was paid a small sum for the painting that fell well below its actual value and which was paid into a blocked account that she could not access. The painting was then sold on a number of times in the following years. After the war, Lilly filed a claim for the painting and a decision was published in 1954 that confirmed that Lilly was the owner of the painting. Believing that the painting had been lost or destroyed, in 1958 she entered into a settlement agreement with Germany (although she did not waive her right to seek restitution of the painting).

Unbeknownst to Lilly, the painting had appeared in the United States in 1951 and remained there with various collectors until 1976 when it was publicly exhibited by the Stephen Hahn Gallery in New York and was sold to the Baron Hans Heinrich Thyssen-Bornemisza ("the Baron") for USD 300,000, which the court found to be a fair market value for the painting at the time. The painting was kept as part of the Baron's collections in Lugano, Switzerland until 1992 when it (along with a number of other works) was the subject of a loan agreement with Spain which resulted in the painting's public display in Spain in 1992. In 1993 Spain agreed to purchase the collection on loan.

The questions for the court to consider were limited to two: (1) did the Baron possess the painting in good faith? and (2) did the Museum have actual knowledge that the painting was stolen property?

In order to address the first question, the court had to look to Swiss law to determine whether the Baron acquired title to the painting when in Switzerland. This involved a consideration of whether the Baron exercised the diligence required by the circumstances, when he acquired the painting. The court found that there was sufficient suspicious circumstances or "red flags" such that the Baron had a duty to investigate the seller's title. Specifically, the court determined that the following circumstances, considered together, should have caused a sophisticated art collector like the Baron to conduct additional inquiries: (1) the presence of intentionally removed labels and a torn label showing that the painting had been in Berlin; (2) minimal provenance information provided by the Stephen Hahn Gallery including no information from the WW2 era; (3) the well-known history of Nazi looting of fine art; (4) the fact that Pissarro paintings were often looted by the Nazis.

After considering the expert evidence on the issues, the court concluded that there were sufficiently suspicious circumstances to trigger a duty to investigate under Swiss Law and they found no evidence that the Baron took any steps to allay suspicions that he may have had. The result was that the Baron did not possess the painting in good faith and therefore did not acquire good title to the painting under Swiss law, which in turn meant that he did not pass title to the Thyssen in 1993.

The court then had to consider whether the Thyssen acquired lawful ownership of the painting. Under Spain's laws of acquisitive prescription an item must be subject to 3 years of uninterrupted possession in good faith, or 6 years "without any other condition", save for when the person claiming ownership is an accessory to the theft of the item. The second question for the court to consider was whether the Thyssen was an 'accessory' under Spanish law, and in particular whether the Thyssen had actual knowledge that the painting was stolen.

The court found that the Thyssen lacked actual knowledge that the painting was stolen, on a number of basis, including that (1) save for the 1954 decision, there was no published information about Lilly's prior ownership of the painting or that the Nazi's had looted it; (2) Spain obtained legal opinions from reputable law firms to ensure that the Baron held good title and that the conveyance was lawful; (3) it was not aware of any adverse title claims that arose after the painting was publicly exhibited; and (4) the price paid for the entire collection was reasonable. The court found that

these factors, amongst others, taken together might have been sufficient to raise suspicions but they fell short of demonstrating that the Thyssen had actual knowledge that the painting had been stolen. The court also found that the Baron did not have actual knowledge that the painting was stolen. The court concluded that as a result of the Thyssen's lack of actual knowledge that the painting was stolen, it could not be an accessory to the theft.

Somewhat reluctantly the court concluded that the Thyssen is the lawful owner of the painting and the claim by Cassirer failed. The finding in this case will have been unsatisfactory for many. The case highlights the ongoing difficulties in restitution claims and the tension between, on the one hand, what the court describes as the 'moral commitments' of sovereign nations as set out in the Washington Principles and the Terezin Declaration, and on the other hand the parties' legal rights and responsibilities that the court is required to enforce.

A story with a similar background came to light in August this year, this time involving Christie's New York and the FBI art crime team. During the Nazi occupation in 1933, Lucie Mayer-Fuld's bank accounts were seized and she too became subject to an 'exit tax' to leave Germany. She subsequently left Germany in 1939 with few belongings. In 1940, an auction house in Berlin listed for sale various items from her estate and determined that the proceeds from the auction would be put towards satisfying her exit tax. Two bronze vases were sold at the auction to an antiques dealer in Berlin.

The vases surfaced at an auction in London in 1997 and then later in 2000 at another auction before becoming part of a private collection in the United States. The vases were then recently consigned for sale at Christie's New York. As part of their due diligence process, including checking the lost art databases, Christie's discovered that the pair of vases were the unrestituted property of Lucie. Christie's worked with the FBI art crime team to return the vases which culminated in a repatriation ceremony at the US Embassy in Berlin on 1 August 2019. This story demonstrates the significant practical use of the lost art databases and thorough due diligence.

Aside from these cases, there have been several developments in restitution legislation.

The European Parliament passed a resolution calling for the European Commission to improve the legal framework for the cross-border restitution of art and cultural goods looted in armed conflicts and wars. The resolution means that the commission is required to review the proposals for a pan-European meta-data-base of looted art, funding for provenance research, the establishment of alternative dispute resolution mechanisms and exemptions from statutes of limitations for Nazi-looted art claims. The implementation of European legislation could highlight the opposition of some Eastern European countries to the implementation of the Washington Principles.

Closer to home, parliament has passed legislation to repeal the cut-off date for Holocaust era restitution claims to national museums and galleries. The Holocaust (Return of Cultural Objects) (Amendment) Bill removes the sunset clause in the 2009 legislation and will allow national institutions to remove objects from their collections that are found to have been stolen during the Nazi era. The bill has been widely welcomed as a demonstration of the UK's efforts to identify and return Nazi looted art. The 2009 act has already been used to deal with a handful of claims including three Meissen figurines that were returned by the Victoria and Albert Museum in 2014 to the heirs of Emma Budge and a John Constable painting that was returned by the Tate in 2015 to an anonymous claimant.

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Judicial review of the Ivory Act 2018

In our last newsletter (Ivory Act 2018 – a political triumph at the art market's expense?) had received royal assent and discussed its potential impact on the art market.

Since then, there have been two significant developments:

(i) Judicial Review of the Act

A newly formed company of dealers and collectors, the Friends of Antique Cultural Treasures Limited ("FACT"), sought and was granted permission for a judicial review of the Act.

A full hearing took place on Wednesday 16 October 2019 before Mr Justice Robert Jay.

FACT's arguments were two-fold: (i) it asserted that the Act is contrary to the EU Wildlife Trade Regulations, which permit trade in worked antique ivory and, according to FACT, do not allow the UK government to introduce more stringent measures, and (ii) it challenged the proportionality of the Act arguing that, if implemented, the Act would amount to "*severe interference with fundamental rights and freedom*". FACT relied on a report it had commissioned which estimated economic loss for private collectors and businesses of £390million.

The Department for Environment, Food and Rural Affairs (Defra) argued that the relevant EU rules set a minimum level of environmental protection; they did not prohibit the UK from imposing more stringent requirements. Defra also asserted that the Act was necessary in light of data showing that legal controls needed to be global in nature and would curb the use of lawful trade to mask a trade in items containing poached ivory. Furthermore, the Act's effect on owners would be "*purely financial*" and owners and dealers had a long window in which to sell their items before the Act comes into force.

A draft judgment will be provided to the parties in confidence by 31 October 2019 (the current Brexit deadline). A date has not been set for the public judgment to be handed down. Given FACT's challenge is premised on EU law, it is unclear whether, in the event of a Brexit on 31 October 2019, any judgment following the hearing will stand.

(ii) Non-Elephant Ivory Trade Consultation

On 30 May 2019, the UK Department for Environment, Food and Rural Affairs launched a call for evidence on whether action should be taken in relation to ivory from species other than elephants, including hippopotamus, walrus and narwhal. The consultation closed on 22 August 2019.

It remains to be seen what steps (if any) the government will take in response to the consultation. The Telegraph, citing senior sources at Defra, has reported there will be a consultation to change the law to include all ivory-bearing animals. A summary of the government's responses is expected to be published by mid-November 2019.

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