



Art law – recent developments

July 2021 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:

- Looking up at the stars: a national treasure's collection is saved for the nation
- HMRC issues AML risk assessment for Art Market
- Theft, Secrecy and Traceability: Can Norwich Pharmacal Orders offer new hope to victims of art theft?

Looking up at the stars: a national treasure's collection is saved for the nation

Earlier this year, you may have noticed some activity in the press around the late Stephen Hawking's estate; more particularly, his archive and his office. It was announced in May that the Stephen Hawking archive (containing, amongst other things, a first draft of *A Brief History of Time*, photographs, papers and correspondence, as well as film and tv scripts) will be added to the Cambridge University library. The contents of his personal office from the University of Cambridge's Department of Applied Mathematics and Theoretical Physics, which he occupied from 2002 until shortly before his death and including his customised wheelchairs, personal reference library and communications equipment, will become part of the Science Museum Group Collection and feature in exhibitions and displays from 2022.

This collection, which has been described as a "treasure trove of archive papers and personal objects"¹, has been accepted in lieu of approximately £4.2m in inheritance tax by HM Revenue and Customs ("**HMRC**") and is a reminder of one of the key issues HMRC has to consider when deciding whether to accept certain property for the nation under the acceptance in lieu ("**AIL**") scheme. In reading some of the articles in the press, you would be forgiven for thinking that the AIL scheme is little more than a wheeze to allow already wealthy estates to avoid inheritance tax on death.

¹ Stephen Hawking's Office and Archive saved for the nation - The Stephen Hawking Foundation

However, as this acquisition exemplifies, the payment of inheritance tax by way of transfer to the nation of art, artefacts, buildings or other items of cultural significance replaces the loss of funds to the exchequer with something potentially far more valuable which, without the AIL scheme, could be dispersed across the globe or lost to the public for years to come.



How does the AIL scheme work?

The AIL scheme allows HMRC, with the approval of the Secretary of State for culture, media and sport, to accept land, any object associated with a certain building, or any other object in satisfaction of the inheritance tax due. For any object associated with a building, it must be desirable for the object to remain in or associated with that building going forward (for example, the 35 paintings by Sir Winston Churchill accepted in lieu of tax in respect of Lady Mary Soames' estate in 2015 and allocated to the National Trust for retention at Chartwell).

The item is taken at market value, following negotiation with HMRC and credited against inheritance tax at 70% of that value. This provides an additional benefit to the estate in that a lower rate of inheritance tax (30%) is applied to that item than if the item had been sold and inheritance tax at 40% deducted from the proceeds of sale. It makes it vitally important that the valuation is accurate for all concerned and this is often where a lot of the negotiation takes place.

You will have spotted already that Stephen Hawking's office is not being retained in situ. His archive and office therefore fall within the "any other object" conditions. In deciding whether to accept his archive and office in lieu of the tax due, HMRC, in consultation with Arts Council England, will have

considered whether it is "pre-eminent for its national, scientific, historic or artistic interest"².

What is pre-eminence?

The AIL scheme does not apply just to art. In 2019-20, items accepted for the nation included works by Rembrandt, Pissarro, Corot as well as five antique pianos (notable for the way in which they demonstrate the development of the instrument between 1785 and 1844) and the archives of Sir Charles Lyell (geologist) and Jeremy Hutchinson QC.

The test for pre-eminence (taken from the Waverley criteria which are also used to determine whether an object should be considered a national treasure when considering export) looks at the following four questions:

- 1) Is it closely connected with our history and national life?
- 2) Is it of outstanding artistic or art historical interest?
- 3) Is it of particular importance for the study of a particular branch of art, learning or history?
- 4) Is it closely associated with a particular historical setting?

I am not going to profess any great expertise in mathematics, cosmology or theoretical physics. All are areas of study which I leave to brains far cleverer than mine. However, even I know that Stephen Hawking's contribution to our understanding of the universe, and black holes in particular, was something quite extraordinary. After all, it's not every astrophysicist who features in *The Simpsons*.



² S.230(4) Inheritance Tax Act 1984

In addition, the fact that the University of Cambridge's library servers crashed following the digitisation of his PhD thesis in 2017, solely due to the unprecedented global demand to view and download his 1965 doctoral research, indicates the paramount importance of Hawking's voice on the global stage.

It is in cases such as this that, in my opinion, the AIL scheme (as well as its cousin, the conditional exemption scheme, and its lifetime equivalent, the cultural gift scheme) comes into its own.

It is arguable that a single item from the archive or the office would not, on its own, have been sufficient to attract the AIL scheme. However, in applying the AIL scheme to the archive and the office, HMRC, the Arts Council and the Secretary of State acknowledge that they constitute a one-of-a-kind collection of scientific and historical importance, showing the development of one of the greatest scientific minds of all time. Had the collection been divided, perhaps between universities, scientific institutes and private collections, the opportunity to view the archive as a whole would have been lost. Similarly, preserving

Hawking's personalised wheelchairs and communications equipment together will, I hope, result in an exhibition at the Science Museum exploring how his wheelchair technology evolved from finger-operation to an infra-red sensor on his glasses triggered by a movement of his cheek. What could be better inspiration for curious and exploring minds in years to come?

As Hawking himself said "*anyone, anywhere in the world should have free, unhindered access to not just my research, but to the research of every great and enquiring mind across the spectrum of human understanding.*" The AIL scheme has secured exactly that for his own collection.

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HMRC issues AML risk assessment for Art Market

On 28 June 2021, HMRC published a short, art market-specific Anti-Money Laundering ("**AML**") [risk assessment](#), entitled "*Understanding money laundering risks and taking action for art market participants*" ("**the risk assessment**"). The risk assessment identifies a number of particular AML risks such as: unusual transactions, cash sales, and payments from high-risk jurisdictions, which will be widely understood.

However, more noteworthy is the later section, headed "*Risk indicators relating to elements of the Money Laundering Regulations*", which addresses issues which HMRC has "noted" as regards the application of the Money Laundering Regulations ("**MLRs**") in the art industry.

In our [last note](#) on the subject of the MLRs in the art market, we noted that supervisory activity was likely to ramp up after the 10 June 2021 registration deadline had passed. The section of the risk assessment addressing these issues should be particularly instructive, to regulated firms in the art market, as to the areas upon which HMRC might be expected to focus in the course of its supervisory work.



"Risks relating to the Money Laundering Regulations

The risk assessment notes seven risks under this heading and may be taken to suggest that these are areas in which HMRC has noted Art Market Participants ("AMPs") potentially "misinterpreting" the MLRs:

1 Reliance

The risk assessment reminds AMPs of the requirements of Regulation 39 of the MLRs, and, in particular, that when relying on another party for CDD, "You will need to know the identity of the customer or beneficial owner, what level of CDD was conducted, and have an agreement in place with the third party that all CDD documents will be provided immediately on request".

2 Linked transactions

A straightforward example is provided in the risk assessment of a situation in which three sales of £6,000 are made to the same customer, those sales being "Linked transactions", so as to engage the requirements of the MLRs.

HMRC adds that "It would not be appropriate to issue separate invoices for each piece of art work and claim they were separate sales".

3 Data protection

The risk assessment says: "Under Regulation 41 personal data obtained by you for the purpose of the Regulations, e.g. for CDD purposes, may only be processed for the prevention of money laundering and terrorist financing unless use of the data is allowed by other legislation".

4 Dealing with unregistered AMPs

The risk assessment says that when dealing with another AMP, you should check the registration status of that AMP on Gov.UK. The HMRC register of AMPs is available [here](#).

HMRC adds that, if the AMP with which you are dealing is not registered, "you should not continue dealing with that AMP" and, "You should consider reporting this activity to the National Crime Agency (NCA) via a SAR. Reporting should also be made to HMRC on GOV.UK".

5 Online sales verification

In recognition of the increase in online sales in 2020 and 2021, and with regard to the need to verify identity documents in respect of such sales, HMRC recommends that video calls are conducted with the parties to remote or online transactions "to ensure the person you are dealing with is genuine and is the person in the identity documents".

6 Rental of art

Where a person is engaged in "renting art", pursuant to an agreement that comes with an obligation to buy the work, that person may be an AMP for the purposes of the MLRs. The risk assessment cautions that "If the rental amount is inflated to reduce the final sale amount, this could be seen by HMRC as a way to avoid the requirements under the MLRs".

7 Interior designers

Perhaps the most unexpected part of the risk assessment is this final heading which suggests that an interior designer, buying art for a customer, might be an AMP, as an intermediary, and bound to disclose the identity of his or her customer (and any beneficial owner) when buying art for their customer.

Practical consequences of the risk assessment

Regulated dealers in the art market should consider the risk assessment carefully, and consider (as a minimum): (a) whether risk assessments should be updated to reflect and address the risks identified by HMRC; and (b) whether any of the seven risks relating to the MLRs themselves (i.e. the seven points set out above) necessitate updates to policies or procedures.

As HMRC increases supervisory activity in the art market, it will likely focus on the issues set out in the risk assessment and expect dealers to have taken meaningful steps to ensure that these have, where applicable, been addressed.

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Theft, Secrecy and Traceability: Can Norwich Pharmacal Orders offer new hope to victims of art theft?



Auction houses and galleries are no stranger to high value sales veiled in secrecy: it is common for the identities of buyers of artwork to remain confidential. Although it reduces the risk of the buyer's financial status being publicly exposed, this secrecy inevitably causes difficulties in tracing artwork that has previously been stolen.

In a decision that will be welcomed by victims of art crimes, the High Court judgment in *Hickox v Dickinson [2020] EWHC 2520 (Ch)* demonstrates that the English courts are prepared to assist victims of art fraud or theft in tracing their property.

The Background

Ms Hickox owned an oil painting, *Calanque de canoubier (Pointe de Bamer)*, by impressionist artist Paul Signac (the "**Work**"). She wished to sell the painting and arranged for Timothy Sammons (now a known art fraudster) to broker a sale on her behalf.

Having taken custody of the Work in order to find a purchaser, Sammons found a buyer for the Work through the art dealers Simon Dickinson Ltd and its director Simon Dickinson (the "**Defendants**"). The Work was sold for US\$4.85m to an unknown purchaser and the proceeds of the sale were paid to Sammons. Sammons, however, never passed these funds to Ms Hickox and the whereabouts of the Work remained a mystery.

In an attempt to locate the unknown purchaser, Ms Hickox brought an application seeking a Norwich Pharmacal Order ("**NPO**") to obtain information from the Defendants as to the whereabouts of the Work.

The Law

In order to make a successful application for a NPO, a claimant must establish four criteria:

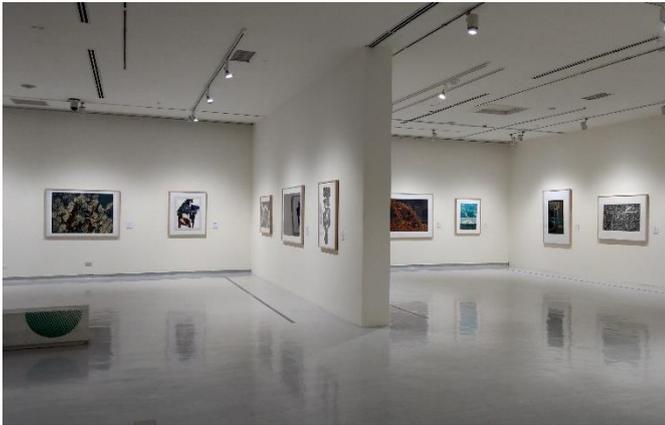
1. That there is a good arguable case that there has been a wrongdoing by an ultimate wrongdoer;
2. That the Defendant has been involved, in some way, in the wrongdoing;
3. That the Defendant is likely to have relevant documents or information regarding the wrongdoer or wrongdoing;
4. That the NPO is necessary and proportionate in all the circumstances.

These criteria allow claimants to obtain information in order to plead a case against a wrongdoer, to trace assets or to bring proprietary claims. An NPO will not be granted where the court considers the application to be an exercise in speculation.

The Case

This case focussed on two key issues argued by the Defendants as follows:

- **Issue 1:** the nature and existence of a wrongdoing had not yet been established and so, therefore, there was not a good and arguable case that a wrongdoing had been committed; and
- **Issue 2:** the art-world custom of confidentiality prevented disclosure of the names of private buyers of art works.



The Outcome

The Court granted the application.

In relation to Issue 1, the fact that Ms Hickox had not yet identified specific wrongdoing did not prevent her NPO application from having merit. The court held that Ms Hickox did have a good arguable case that there was wrongdoing based on three factors. First, Ms Hickox had not authorised Mr Sammons to sell the Work but he had sold it anyway. Second, any person who had taken possession of the Work from Mr Sammons could not have taken better title than Ms Hickox and was, therefore, liable in conversion. Lastly, it was almost certain that Mr Sammons had acted dishonestly and that an unknown third party had purchased and taken possession of the Work.

For this reason, the Court held that the NPO was required in order to establish whether a wrong had in fact been committed. In practice, this means that, where a claimant seeks material to establish the merits of a claim of wrongdoing (particularly where a single defendant holds that material), the courts may be prepared to find that there is a good arguable case of wrongdoing.

As regards Issue 2, the Court held that although confidentiality and delay were relevant considerations (as per *Rugby Football Union v Consolidated Information Ltd* [2012] UKSC 55), they

did not outweigh the rights of Ms Hickox to locate and retrieve the Work. This demonstrates that the art world custom of confidentiality is just that: a custom. It is not a legal obligation and, where there is a public interest in protecting a victim of fraud, this custom is unlikely to prevent that victim from obtaining disclosure of relevant information.

Conclusion

This case provides hope for victims of art fraud or theft who hope to trace their assets. In particular, where certain details (including a wrongdoer's identity) are required to establish that a wrongdoing has been committed, it shows that NPOs can be a powerful legal tool for victims. This is the case even where the existence or nature of a tort has not yet been established.

However, claimants should be reminded that, unless there is actually a good arguable case, NPOs will be rejected on the presumption that they are fishing expeditions

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