



Art and cultural property

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

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Another spin on the Roulette Wheel" – Authenticity in the Courts and Revising a Dealer's Duty of Care

Art lawyers, dealers, auction houses and collectors have been blessed with not one but two recent significant High Court decisions to add to the growing body of case law on the complex and highly controversial topic of art attribution and the legal consequences of getting it wrong.

Wemyss Heirlooms Trust vs Simon Dickinson Limited [2022] EWHC 3091 (Ch) and *QIPCO v John Eskenazi Limited* [2022] EWHC 3023 (Comm) make essential reading for anyone with an interest in the art market who wants a better understanding of the duties of care a dealer owes their client when it comes to

making judgments on attribution, selling artwork and avoiding negligence claims. There are many notable points to be taken from the cases (which is unsurprising when the combined judgments nearly total 200 pages!), and whilst, for the most part, the cases do not make new law, they provide a helpful refresher of the current position. This article seeks to detail the key takeaway points.

Wemyss Heirlooms Trust vs Simon Dickinson Limited:

This case was a variation of the "sleeper" cases, where a dealer or auction house sells a painting as being a copy or by a lesser artist only for the artwork

to be later sold as an "original" or by a celebrated artist for vastly more than the original sale price. Consequentially, the dealer or auction house is exposed to a potentially costly claim for negligence in failing to correctly identify and sell the "sleeper" (an undiscovered work of art).

In *Dickinson*, the painting in question was *Le Bénédicité*¹ by the 18th Century French artist Jean-Baptiste-Siméon Chardin (the "**Painting**"). It was one of at least four versions of the same subject. The Painting was a version sold in London in 1751 and acquired by an ancestor of the Earl and Countess of Wemyss. In 2014, the Painting was consigned to Simon Dickinson Limited to be cleaned and assessed for a possible sale. Simon Dickinson Limited then sold the Painting in July 2014 to another dealer, Verner Amell, for £1.15m as being by "*Chardin and Studio*". Only six months later, the Painting was marketed and sold as "*in fact a fully autograph masterpiece by Chardin himself*" – the change of attribution purportedly the result of a "deep clean". Mr Amell sold the Painting along with a painting by Watteau for a combined price of \$10.5m (the Watteau being ascribed the value of \$3m, which all considered to be a bizarre overestimate).

Unsurprisingly, the Wemyss Heirlooms Trust (being the consignor of the Painting) felt aggrieved by the apparent mis-selling of the Painting and sued Dickinson for negligence on several counts, which the Court addressed in turn through a series of questions:

1) Was Dickinson negligent in judging the Painting was not wholly autograph?

The fundamental duty Mr Dickinson owed regarding his appraisal of the Painting was not in doubt – the question is "*what an ordinary skilled professional art dealer having Mr Dickinson's special skills would have done*".

In applying this test, the Court sought to follow the example set in *Thwaytes v Sotheby's* (a sleeper case involving a Caravaggio) and consider all the evidence about the Painting which would support the attribution by the dealer (or auction house in *Thwaytes*) to then decide if such a view was reasonable. The issue for the Court in *Dickinson* was a lack of evidence regarding the Painting's quality.

The Court held that Dickinson's judgment was not negligent when, on the evidence before the Court, only two people were prepared to assert that the painting was wholly autograph, and their

assessments could not be regarded as dispassionate (given they were involved in the second sale by Mr Amell).

2) Was Dickinson negligent in not consulting the author of the catalogue raisonné before selling the painting?

This is one of the most interesting questions arising out of the case and something for dealers and auction houses to note. Should Dickinson have consulted M. Pierre Rosenberg, described by both parties as "*the undisputed living authority on Chardin*"?

Mr Rosenberg had seen the Painting before and had described it in the Chardin *catalogue raisonné* as a "*copie retouchée*".

Fortunately for the Court, they did not have to determine the exact meaning of "*copie retouchée*", which Mr Rosenberg explained when questioned by Dickinson's solicitors was "*used without there being a definition*". However, the Court needed to consider what significance the art market would attach to the qualification and how this would impact the marketing of the Painting.

Such was Mr Rosenberg's authority that if he changed his verdict either way, it would have been wholly determinative in the art world. If he considered the Painting to be wholly studio, it would have been worth a fraction of the price obtained by Dickinson. Conversely, if it had been entirely autograph it would be worth approximately £4-5m (as assessed by the Court). Should Dickinson have rolled the dice or, as the judge said, have "*a spin of the roulette wheel*"? What should a dealer or auction house do in Dickinson's position?

On this question, the Court held:

- (i) As a starting point, a dealer who forms a considered and reasonable view as to the attributes of a work which is within his area of expertise and acts on the basis of that view cannot be said to be negligent simply because his opinion is not universally accepted, or because he does not seek its validation from some other expert.
- (ii) If that dealer thinks that consulting a third party would improve the price, then they would be negligent if they did not approach the third party.

¹ [Le Bénédicité - Louvre Collections](#) – The prime version of Le Benedicite by Jean Baptiste Simeon Chardin, held by the Louvre.

- (iii) However, if the dealer thinks that the likely outcome of such a consultation would be detrimental to the sale of the work, then they would have a duty not to consult.
- (iv) If they do not know what the outcome of such a consultation might be, as was the case for Mr Dickinson, then there can be no negligence in taking no steps.

Such a verdict appears to protect against the creation of a "duty to check", which the Court considered "extremely unattractive". However, it does have the potential effect of curtailing the advancement of scholarship and the constant revision of attribution (which is a feature of the art market, especially with old masters) as it may encourage dealers to avoid collaboration with other experts (who may be more qualified). Indeed, surprisingly the Court has pronounced that a dealer should not consult if they think it would be detrimental to a painting's value. Perhaps one would have liked to see the Court protecting dealers from negligence claims if they were ultimately trying to achieve a "true" attribution. Time will tell if this aspect of the decision will gain traction in the art market.



3) Should Dickinson have let the principal decide whether to consult the author of the catalogue raisonné?

This question is very fact specific. The starting point is that the duties owed by an agent to his principal are primarily determined by the terms of the arrangement between them. The dealer should follow the agreement if this sets out how a consignment should be marketed.

In circumstances where the terms are undocumented (as was the case in *Dickinson*) and where owners are unsophisticated in the art market so employing the dealer to handle the sale (as was

the case in *Dickinson*) then it would not be negligent for the dealer to conduct the sale without detailed and regular recourse to them. Accordingly, Mr Dickinson was not obliged to let the Wemyss decide the point – especially where he regarded the chance of Mr Rosenberg changing his attribution for the better to be close to fanciful.

4) Was Dickinson right to market the Painting as by "Chardin and Studio", and was his valuation correct?

The Court held that given: Mr Dickinson's views on the Painting – that some parts were by Chardin but other parts were "pretty mundane"; his level of expertise; and his understanding of the meaning of "copie retouche", he was justified in selling and valuing the painting as being "Chardin and Studio". Accordingly, Mr Dickinson could not be faulted for applying what he believed to be the most accurate description of the work.

Ultimately the Court concluded that the mere fact that the subsequent sale of the Painting was for significantly more did not demonstrate that Mr Dickinson was negligently wrong in forming his conclusion that £1m was the appropriate price to set on the Painting.

5) Was Dickinson negligent in selling the Painting to another dealer?

The argument presented to the Court was that Mr Dickinson should have known that Mr Amell would not be buying the Painting unless he was reasonably sure that he could sell it for a substantially higher price, and might have a buyer in mind. However, there was no evidence to support this.

The Court held: "I cannot find that the sale of The Painting to another dealer constitutes any form of negligence unless there is some evidence to indicate that the seller knew or should have known that they could have sold at a higher price directly to that dealer's client, and actively decided not to do so. There is no evidence to suggest anything of the kind here."

Ascribing a hypothetical value of the Painting:

For completeness, the Court went on to consider what the sale price would have been if the Painting were a clearly acknowledged autograph Chardin and marketed accordingly. The judge recognised that it was "an exercise of the most unscientific and speculative nature imaginable" – accepting that valuing artwork is an art itself and not a science (likely having further sympathy with Mr Dickinson in his attempt at valuing the Painting).

Disregarding the sale by Mr Amell and then considering comparable sales of autograph works by Chardin, the Court concluded that the price of the Painting would have been approximately £5m. However, it was acknowledged that an autograph Chardin would not have been granted an export license immediately, which would have had a negative impact on the price as it would constitute a significant obstacle to the marketing of the Painting to European, Middle Eastern and Far Eastern buyers. Accordingly, the Court concluded the probable price for the Painting would have been £4m (albeit without evidence it seems).

Key takeaway

In summary, *Dickinson* illustrates the potential difficulties of establishing negligence in the art world. It is not sufficient to point to subsequent sales and claim that these are probative of a negligent sale at an undervalue. What is required is clear evidence that the conduct of the Defendant on the sale fell below what was to be expected of an ordinary skilled professional and that this caused the sale at an undervalue. *Dickinson* provides a useful contrast to the next case.

Qatar Investments & Projects Development Holding Co & Anor v John Eskenazi Ltd & Anor [2022] EWHC (Comm) (29 November 2022)

Whilst Simon Dickinson was able to clear his name, John Eskenazi, a leading London-based specialist in antiquities, was not so lucky.

The basic facts of this case were straightforward. During 2014 and 2015, the claimant, Qatar Investment & Projects Development Holding Co. ("**QIPCO**"), a company whose Chief Executive Officer is Sheikh Hamad, a senior member of the Qatari royal family, purchased from Mr Eskenazi a series of seven purportedly ancient objects for a total price of US\$4,990,000.

The purchases were all made by way of oral agreements, in each case, evidenced by invoices which contained a description of the respective object accompanied by the dealer's declaration "*that to the best of my knowledge and belief the item detailed on this invoice is antique and therefore over one hundred years of age*". QIPCO came to suspect that this was not the case for all seven of the items purchased and, following various investigations, concluded that each of the works was a modern forgery. Legal action was commenced when Mr Eskenazi refused to refund the purchase price.

The Claims

The claims advanced by the purchaser were for breach of contract, misrepresentation and breach of a duty of care (with an additional claim for fraud in relation to a bracelet). Ultimately, the Court held that all three claims would be determined by answering these key questions: Did Mr Eskenazi honestly and reasonably hold the opinion that the objects were of ancient origin? And did he exercise reasonable care in describing the objects' age and origin?

Each of these claims and questions relied on the same question of "reasonableness" which the Court explained as follows: "*each cause of action requires the consideration of reasonableness. In misrepresentation, the question is whether there was a misrepresentation because Mr Eskenazi's belief in the ancient origin of the goods was not reasonably held. In contrast, the question is whether Mr Eskenazi reasonably held the opinion that the objects were of ancient origin. In tort, the question is whether he exercised reasonable care in describing or opining on the age and origin of the objects. **In relation to all three causes of action, the question of reasonableness of the opinions expressed must be considered in the context of a dealer which held itself out as one of the world's leading experts in the relevant fields.** In assessing reasonableness in each of these contexts, the essential factual inquiry is the same."* (emphasis added).

The Contractual Claim – No sale by description / guarantee of authenticity but implied term that the dealer honestly and reasonably held the opinion that the objects were of ancient origin.

In the first instance, QIPCO argued that the Sale of Goods Act 1979 implied into the contract a term that the works corresponded to their description, such that if they were not of ancient origin, there would be a breach of contract. It will be of some relief to dealers that the Court rejected this argument relying on the precedents of *Harlingdon v Christopher Hull* (about a Gabrielle Münter), and *Drake v Agnew* (about a Van Dyck) which make clear that descriptions of works of art rarely have the force of contractual terms, and generally amount to no more than statements of opinion.

In *Eskenazi*, there was nothing supporting an argument that it had been the parties' common intention that the first defendant's attribution be given contractual effect. It would be surprising for a dealer, particularly an experienced dealer, to guarantee authenticity in respect of objects between 1,000 and 2,000 years old. If that result had been

intended, the parties would have been expected to have said so expressly. As such, the Court held that Mr Eskenazi's descriptions of the items in the invoices "were neither statements of fact nor contractual promises" and not a guarantee of antiquity (notwithstanding the "emphatic" and "unqualified" nature of those descriptions).

Whilst no terms were implied by the Sale of Goods Act, there was, however, an implied term (as was common ground between the parties) that the Defendant honestly and reasonably held the opinion that the objects were of ancient origin.

Determining authenticity

A distinguishing feature of the case is the Court's approach to determining authenticity.

Perhaps surprisingly, many of the authenticity disputes decided by the Court do not actually require the Court to determine whether the artwork in question is authentic. Indeed, in *Dickinson*, the Court categorically stated that it was "not in any position to decide the true attribution of the Painting" and that the authenticity of the Painting was not in question. Likewise, in *Sotheby's v Mark Weiss Ltd and ors*, a case concerning the attribution of a Frans Hals painting, the Court expressly stated, "this judgment does not determine whether the Painting is by Frans Hals".

In *Eskenazi* the Court considered the authenticity of the items was a central issue that needed to be determined (even though acknowledging that such a determination was not sufficient to prove liability).

In deciding whether each object is a genuine object as described to the Sheikh, the ordinary civil test of "balance of probabilities" applies. This involved looking at the evidence as a whole and deciding whether the weight of evidence is such that the claimant has discharged the burden. The Court took into account the factual evidence as to the circumstances in which the objects had been acquired, their ownership history or "provenance", and how they had entered the art market, evidence from art historians in relation to the objects, in particular as to their style and iconography, and the materials science evidence.

The Court acknowledged the equal importance of the factual evidence, art history and materials science in determining authenticity. Reassuringly for those in the trade, the Court recognised that art history is not entirely subjective and materials science is not "completely hard-edged" (there can be agreement as to the scientific test results but considerable disagreement as to how the results should be interpreted).

Ultimately the Court concluded that the objects were all not authentic.

Importance of Expert Evidence

No doubt Mr Eskenazi was significantly hamstrung by the expert position. The Court thought highly of QIPCO's art history experts. In contrast, the judge stated of one of Mr Eskenazi's art history experts that it became apparent early on during the cross-examination that he had "no real expertise in art history at all, and certainly none that was in any way comparable [to QIPCO's experts]". As a result, Mr Eskenazi's legal team had to concede that the evidence was "unsatisfactory". Mr Eskenazi's other art history expert was also of little assistance as he was too old to participate in the proceedings and his contribution was limited to a written report.

The result was that QIPCO's art history evidence was not countered or disputed by any reliable art historical expert called by Mr Eskenazi. Of course, the Court acknowledged that this did not mean that it had to accept all QIPCO's experts' evidence, but one can see that Mr Eskenazi would have been seriously disadvantaged.

This should warn art lawyers of the importance of retaining qualified experts in authenticity disputes as soon as possible.



Antiquities vs Fine Art

Unlike most of the art authenticity claims that the Court has decided, *Eskenazi* focused on antiquities rather than the fine arts. That said, it is clear from the judgment that the principles developed in relation to transactions involving paintings are no different for the trade in antiquities. That said, there were at least two distinctions the Court made:

- 1) The Court noted that less weight should be put on a dealer's "eye" about antiquities than whether a painting should be attributed to a particular artist: "This is not a case where the

question is whether a painting is to be attributed to a particular artist, in which context it has been held that "eye" is important. This case is concerned with the authenticity of ancient objects, and the evidence has persuaded me that the most important factor – in the art historical context – is knowledge of and comparison with the known and undisputed historical record. This is not to say that "eye" may not have some relevance: for example, a person with expertise in this area may well look at an object (for example the Frieze and the Head of a Bodhisattva) and be able to recognise a modern pastiche or an object catering for western taste. However, the matters which I have discussed above – art history, provenance, and appearance – are far more significant in the present context than Mr Eskenazi's "eye".

- 2) The judge highlighted that the position on provenance in relation to antiquities must be viewed somewhat differently to a painting dating from recent centuries. He accepted that the absence of provenance for an antiquity is not in itself evidence of inauthenticity, "not least because genuinely authentic objects may have been discovered in undocumented or illegal excavations, bearing in mind that (as in the present case) they may come from parts of the world which have been subject to war or the lack of stable government and society". Be that as it may, the Court still expected that the recent history of an object including its recent ownership and how it came to enter the art market, would be relevant when determining its authenticity.

The relevant standards to assess reasonableness of opinion in art cases

As already stated, although on the balance of probabilities, the Court found the items not to be authentic antiquities, it had to address whether Mr Eskenazi honestly and reasonably held the opinion that the objects were of ancient origin.

In addressing this question, the Court usefully summarised some key principles (distilled from the existing case law) being:

- 1) The question is whether it could be said that no reasonable leading specialist antique dealer would have concluded that the objects were ancient, and expressed an unqualified opinion to that effect.
- 2) If the dealer has or should have had a real rather than a fanciful doubt, it would not be appropriate to give an unqualified opinion.

- 3) When considering the opinion expressed, it was important to avoid the benefit of hindsight.
- 4) Expert evidence in cases (such as in this case) is usually very important (as highlighted above).
- 5) It was not always easy for a party to be able to obtain the services of a well-qualified expert.
- 6) Judges in prior cases dealing with auction houses had identified, in fairly broad terms, the steps that auction houses should take in order to meet their standard of care (albeit each case and object would depend on the facts). By way of useful reminder, in *Thwaytes, Rose J* identified a number of steps that a leading auction house should take in order to fulfil their duty in respect of works consigned to it. In brief, these were:
 - a. ensuring that the assessment of the painting is carried out by highly qualified people - qualified in terms of their knowledge of art history, their familiarity with the styles and oeuvres of different artists, and in terms of their connoisseur's eye;
 - b. devoting sufficient time to a proper examination in order to form a firm view where possible;
 - c. appreciating that it cannot necessarily rely on the poor condition of a painting as a reason for failing to spot its potential; and
 - d. knowing his or her own limitations, and when to consult an outside expert.

The Court's conclusions

The Court was not persuaded that there was a reasonable basis for the descriptions and concluded, ultimately, that "no reasonable leading specialist antique dealer would have expressed an unqualified opinion" that the objects in question were ancient.

Important evidence supporting such a conclusion included: that some of the items were apparently in 'immaculate' condition, which would be highly unusual for a genuinely ancient artefact; that the object had even survived, a notion described as "astonishing...[and]... so remote as to be fanciful" in one case (the Head of Krodha, being an unfired clay object 1500 years old with no comparator); that there were fake patinas, tool marks and the chemical and biological weathering of stone; the minimal provenance for a number of the pieces, and Mr Eskenazi's apparent failure to seek it out.

In relation to a Serpent Bracelet, Mr Eskenazi accepted he had no expertise in jewellery yet changed the dating of the bracelet from 3rd Century

BC to 1st Century CE. In circumstances where he lacked expertise, he should have consulted an outside expert and also had a specialist perform a simple test to check the cadmium level in the gold which would demonstrate whether or not it was modern gold (and would have shown that it was far more likely than not that the bracelet was modern gold).

In relation to the Hari Hara statue (in respect of which Mr Eskenazi was accused of fraud for "knowing" it to be a modern forgery or "not caring" whether his statements as to its origins were true) the Court concluded it was not authentic, placing weight on the fact that Mr Eskenazi had no real idea where the piece came from as it was from an unknown dealer in Vietnam, the lack of weathering and damage, the high level of polish (despite Mr Eskenazi acquiring the statue in pieces). However, the Court dismissed the fraud claim as it accepted that Mr Eskenazi paid a substantial amount for the statue (\$85,000) which was evidence that he genuinely thought he was buying an antiquity.

Following the Court's findings, Eskenazi has been ordered to repay the full purchase price.

Key take away

In summary, the case is helpful in demonstrating:

- 1) The way in which the totality of the factual and expert evidence must be looked at to decide whether the work is genuine.
- 2) Even an unqualified attribution for a work of art will almost invariably be a statement of opinion, not fact.
- 3) It is almost impossible to establish the existence of a contractual promise (or 'warranty') that the attribution is accurate (as opposed to carefully given), or any other form of strict contractual liability based on inauthenticity alone; thus, to win, it will almost always be necessary to show negligence.

- 4) The high bar that must be crossed before fraud will be established in these cases.
- 5) That those dealing in antiquities must be on guard for fake antiquities which are known to be rife and the highest standards of due diligence must be maintained. In assessing whether a dealer's opinion on a work is reasonably held, the dealer's 'eye' and his longstanding reputation in the field will count for little in the face of compelling evidence that further investigation was warranted. A dealer who is unable to demonstrate that he carried out adequate provenance investigations, sought scientific analysis where appropriate, researched the relevant historical records and followed up any 'red flags' will be exposed to risks of a negligence claim.

Dickinson v Eskenazi

So why was one dealer found negligent and the other not? In simple terms, in *Eskenazi* the judge repeatedly points to the fact he did not believe it was reasonable for Eskenazi to have made "unqualified statements" as to the ancient origins of the objects when there was a very real, and not fanciful, chance that they were not ancient (based on all the evidence). In contrast, in *Dickinson*, the dealer had the requisite expertise and the Court was satisfied that he was right in not warning the vendors that there was a chance (which was closer to fanciful) that the painting could be sold for significantly more.

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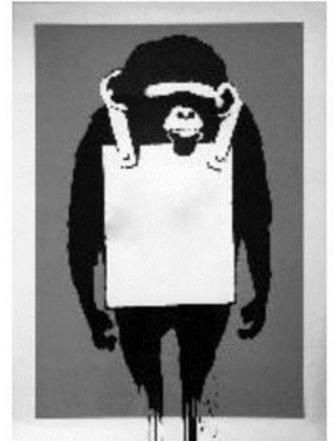
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The last laugh: Banksy succeeds in invalidity appeal

In September 2020, the EUIPO's Cancellation Division declared one of Banksy's most famous artworks, "Flower Thrower", invalid due to bad faith. In May 2021, the Cancellation Division struck again, invalidating Banksy's trade mark in relation to his well-known chimp artwork named "Laugh now but one day we'll be in charge", for bad faith. On both occasions, the invalidity action was filed by a UK based greeting card company, Full Colour Black Limited ("**FCB**"), which uses many of Banksy's artworks on its products.



Background

Pest Control Office Limited ("**Pest Control**") is Banksy's representative company which has been set up to deal with commercial matters on his behalf. It should be noted that throughout this article, references to Banksy include Pest Control.

Because of Banksy's anonymity, Pest Control applied to register the following figurative sign as an EU trade mark (registration no. 017981629) (the "**Mark**"). The Mark was registered on 8 June 2019 and covered a range of goods and services in classes 9, 16, 25, 28 and 41:

In November 2019, FCB applied for the Mark to be declared invalid for all relevant goods and services on grounds of bad faith under Article 59(1)(b) EU Trade Mark Regulation 2017/1001 ("EUTMR") and also pursuant to Article 59(1)(a) EUTMR in connection with Article 7(1)(b) and (c) EUTMR. FCB relied on a number of arguments that it had successfully relied upon in the earlier "Flower Thrower" case, which included:

- Banksy had no genuine interest to use the artwork protected by the Mark in a commercial sense, or in relation to the goods and services for which Mark is registered. FCB raised Banksy's public admission that he set up his shop "Gross Domestic Product" with the intention of fulfilling the use requirement under trade mark law;
- Banksy only sought trade mark protection to avoid protecting his rights under copyright law (which, in order to rely on, would require Banksy to lose his anonymity), thus allowing him to acquire legal rights to prevent others from using the artwork without having to reveal his identity;
- the Mark did not denote the basic functions of a trade mark (which includes signifying the origin of goods) because it had been freely used and

sold on third party items, including merchandise, and had been made publicly available by Banksy; and

- Banksy had previously expressed his disdain for intellectual property law, citing his previous comment that "copyright is for losers".

In the first instance, the Cancellation Division agreed with FCB and decided that Banksy had applied for the Mark in bad faith, the Mark was therefore declared invalid under Article 59(1)(b) EUTMR. It was concluded that Banksy had no intention of using the Mark as a trade mark, but rather to acquire rights in order to circumvent the issues he was faced with copyright.

The Appeal

The Fifth Board of Appeal (the "**Board**") found that the Cancellation Division had erred when it concluded that the Mark was registered in bad faith and overturned the decision in October 2022. The Board found the decision of the Cancellation Division to be subjective.

Considering FCB's argument of Banksy's lack of genuine intention, the Board was of the view that Banksy's choice to protect his artwork by trade mark registration instead of relying on copyright did not automatically give rise to bad faith. It acknowledged that it is possible to protect a mark through both copyright and trade mark law.

Further, in assessing Banksy's intention, the Board confirmed that his earlier statements, in particular "copyright is for losers", would not affect this consideration; Banksy is entitled to free speech. Additionally, the Board noted that intention is to be considered at the date of filing, whereas this comment was made years before.

On the argument relating to use under the hastily set up store, "Gross Domestic Product", the Board held that this store was more relevant to the "Flower

Thrower" case, as that mark had already entered the non-use challenge period. In this case however, the Mark had not hit the five year deadline, FCB brought the invalidity application less than six months into the five year grace period, and so Banksy was not obliged to prove use.

Comment

The Board's decision is an interesting and positive step forward for creatives. Whilst it is unclear whether FCB will appeal to the General Court, the decision may be viewed by artists as a means of retaining rights in their creative work indefinitely through trade mark registration (i.e. beyond the 70 year time limit after the death of the artist, afforded by copyright protection), provided that the marks are commercially used.

The judgment also raises the question of the type of evidence needed to succeed in a bad faith challenge. Despite Banksy's various statements made against copyright and his apparent lack of genuine intention, inferred by his store created for the sole purpose of fulfilling trade mark categories, it appears that the threshold for convincing, objective evidence is high.

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Charity law changes impacting museum de-accessioning on hold for now



Introduction

The Charities Act 2022 (the "**New Act**"), which amends the current Charities Act 2011 (the "**2011 Act**"), was due to come into force last autumn. However, while certain sections came into force in October 2022, other sections of the New Act around the disposal of property (Sections 15 and 16) have been put on hold. This is so the Government can consider the (seemingly unintentional) impact these provisions might have on the ability of national institutions to repatriate or otherwise dispose of objects in their collections.

The restitution of cultural artefacts is a topic that continues to generate heated debate on a global scale. This year marks the 25th anniversary of the Washington Principles intended to resolve issues on Nazi-confiscated art, which whilst not binding, has arguably done much to galvanise provenance due diligence and the restitution of looted art, as well as increasing awareness of this issue more generally. A landmark bill passed by the French parliament last year (known as the "*Bachelot*" law after the then French cultural minister) allowed for the restitution of 15 works, including those by March Chagall and Gustav Klimt, from national museums to their original owners, with further laws still to be put before the French parliament to accelerate restitution more generally. National museums in both Germany and Spain have also announced reviews of their collections as to provenance and consideration of possible returns of certain pieces. Hopes by some that these changes in the international sphere could trigger a change under

English law were somewhat raised last July, after George Osborne, chairman of the British Museum, made headlines with his announcement that a new deal with Greece was under discussions as regards the Parthenon Marbles. Recent years have also seen several restitutions of cultural property from the UK to Nigeria – for example, a bronze cockerel from Jesus College, Cambridge University in 2021 and a set of Benin Bronzes from the Horniman Museum in 2022.

Sections 15 and 16 of the New Act, if enacted, will have a twin effect on future restitutions of artefacts. The first is to give national institutions, such as the British Museum, power to seek authorisation from their regulators, to return items. The second is that these institutions will be able to make *ex gratia* dispositions of low value property.

This article considers these legislative changes and sets out some considerations which ought to be borne in mind by trustees should they wish to rely on these provisions, if enacted.

Current legal framework

Pursuant to section 106 of the 2011 Act, the Charity Commission may authorise charity trustees to make "*ex gratia* payments" (which might include restitution of property) where:

- charity trustees have no power to take action (because their constitutional documents prevent them from doing so); but
- in all the circumstances regard themselves as being under a moral obligation to take it.

Notably, the regime under section 106 does not extend to charity trustees of museums governed by statute and which are accordingly 'exempt charities'. This includes many of the major national institutions including the British Museum (governed by the British Museum Act 1963), the Imperial War Museum (by Imperial War Museum Act 1920), the National Gallery, the Tate Gallery, the National Portrait Gallery and the Wallace Collection (all by the Museums and Galleries Act 1992) and the Victoria and Albert Museum, the Science Museum, the Armouries and the Royal Botanic Gardens, Kew (all by the National Heritage Act 1983). These museums fall under the purview of various government departments (as opposed to the Charity Commission) including the Department of Culture, Media and Sport ("DCMS"), the Ministry of Defence and the Department for Environment, Food and Rural Affairs.

The statutes governing these national institutions often contain prohibitions or restrictions on the ability of trustees to de-accession from their collections. For example, the British Museum Act 1963 contains a general prohibition on disposal of collection objects (section 3(4)) save for where, for example:

- the object is a duplicate of another object;
- the object dates from prior to 1850 and substantially consists of printed matter (and where the Museum has a photographed copy); or
- the object is "unfit to be retained" and can be disposed of without detriment to the interests of students (section 5(1)).



The final carve-out regarding objects "unfit to be retained" was discussed on 8 June 2000 in the House of Commons' Culture, Media and Sport Select Committee.² The Committee observed that the purpose of this provision was to prevent trustees from finding themselves compelled to retain objects which are discovered to be fraudulent, forgeries or wrongly identified. On occasion, trustees have interpreted the provision as going beyond forgeries and objects wrongly identified: in 1975, a relic of cannibalism was judged to be "unfit to be retained" (seemingly due solely to its nature) and exchanged with Fiji for a collection of prehistoric shards.³ However the carve-out is undoubtedly very narrow in scope.

It follows that, as the law currently stands, different rules apply depending on whether a charity is under the purview of the Charity Commission (with the ability to authorise ex gratia payments) or qualifies as an exempt charity governed by statute (usually with more stringent restrictions on the trustees' power to part with objects in their collections).

The New Act

The New Act as originally drafted seeks to close the gap between exempt and non-exempt charities by loosening the restrictions on national institutions' powers to dispose of items in their collections. In particular, the New Act:

- allows trustees to make ex gratia transfers of low valued property (section 15). The threshold for this depends on the charity's gross income and the maximum is set at £20,000;
- envisages that trustees of charities (both exempt and non-exempt) may obtain authorisation from the Charity Commission, the Attorney General or the Court to dispose of higher valued property (section 16).

The above provisions only apply if the charity trustees otherwise have no power under their governing constitutional framework to dispose of the property and, in all the circumstances, they could reasonably be regarded as being under a moral obligation to part with the property in question.

This paves the way for national institutions to make disposals on moral grounds and effectively reverses previous case law on the subject. In *Attorney*

²

<https://publications.parliament.uk/pa/cm199900/cmselect/cmcmds/371/0060805.htm>

³

<https://publications.parliament.uk/pa/cm200102/cmhansrd/vo020524/text/20524w14.htm>

*General v Trustees of the British Museum*⁴, the Court had found that exempt charities could not rely on moral considerations to circumvent statutory provisions restricting their ability to dispose of objects in their collection.⁵ Section 16 of the New Act makes clear that these statutory restrictions are no longer absolute.

A notable distinction between the New Act and section 106 of the 2011 Act (which already applies to non-exempt charities) is the way in which the moral obligation should be assessed. Whether or not there was a moral obligation was previously a subjective question. The new wording makes the test an objective one. Trustees will therefore need to provide objective evidence of the moral obligation to make a restitution rather than evidence they regard themselves as being under a moral obligation. This may require onerous due diligence exercises to be conducted, for example, a large amount of research into the provenance of the items and the circumstances of their acquisition.

Current status

However, following the publication of an article by the Institute of Art and Law,⁶ the Government appears to have rowed back on implementing these changes. In a House of Lords debate on 13 October 2022, Lord Parkinson said the New Act was a "Law Commission Bill that was not designed to make significant policy changes in contentious areas". Lord Kamall then confirmed that the relevant sections would be put on hold, stating:

"I am aware that it has been reported that the two provisions, Sections 15 and 16 of the Act, have the effect of enabling national museums for the first time to retribute items from their collections, based on moral grounds. I am [...] advised that when your Lordships and the House of Commons debated the Charities Bill, no such intent was considered, nor agreed on. Given this, the Government are deferring the commencement of the sections of the Act ... until we fully understand the implications for national museums and other charities".

Lord Kamall further confirmed that *"the Government's position remains unchanged. The Government will continue to abide by the long-standing principle and legal position supported by successive UK Governments that claims should be considered on a case-by-case basis."*

As it currently stands, sections 15 and 16 are now effectively in a state of limbo. The Government's implementation plan confirms only that they are *"under further consideration prior to commencement"*, with no further confirmation as to when they can be expected to come into force.⁷ As regards any deal with Greece for the return of the Parthenon Marbles, it has been suggested that this was envisaged to be by way of a loan-type arrangement with the British Museum, which proposal has been vehemently rejected by the Greek government who maintains that their removal from Greece was theft. Last December, Prime Minister Rishi Sunak ruled out amending the laws that prohibit deaccessioning and given that the impact sections 15 and 16 might have on the ability of national institutions to repatriate or otherwise dispose of objects in their collections was apparently unintentional, it could be argued that appetite at parliamentary level for change in this respect, is subsiding (if it ever existed at all).

Comment

Notwithstanding the above, the new legislative changes, if implemented as drafted, will it seems provide extended powers to charity trustees, including those of national institutions, to dispose of property in their collections. Accordingly, such charities may find themselves under heightened pressure to return controversial items to their countries of origin. Given that moral grounds are to be assessed objectively, those benefitting from a restitution may also feel incentivised to put together their case as to the moral obligations for returning an item. This may again increase the pressure for a charity to make an application for authorisation when presented with a strong case.

Trustees will benefit from clear guidance on how to approach this issue. For institutions which are not governed by statute, the Charity Commission will be the arbiter of any restitution claim. Charity Commission decisions on restitutions should be made public to give trustees insight into the thought process of the Commission and guidance as to which factors are particularly relevant when assessing the moral strength of a case.

Trustees of national institutions which are governed by government departments like DCMS must approach the question of restitution with the additional caveat that their regulators may have

⁴ [1970] Ch 700

⁵ In particular, the court held that the *Re Snowden* principle did not apply to charities governed by statute. The *Re Snowden* principle preceded section 106 of the 2011 Act and allowed the Attorney

General to permit *ex gratia* transfers, otherwise than in pursuance of a charity's charitable purposes.

⁶ Museums, restitution and the new Charities Act | Institute of Art and Law (ial.uk.com)

⁷ [Charities Act 2022: implementation plan - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/111111/Charities_Act_2022_-_implementation_plan_-_GOV.UK.pdf)

different views from the Charity Commission. There may never be a single unifying set of standards across the various government bodies and, to add complication, the bases for decision-making could be changed at short notice by different ministers and governments and their respective policy decisions.

The starting point, as with all decision making, must be that trustees have to act in the best interests of their charity. They must approach the new legislation (if indeed implemented) with caution and consider the wider interests of their charity in their decision-making process to avoid breaching their duties. In some instances, the moral argument will be overwhelming but other cases will be less clear and trustees will be faced with difficult decisions.

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