

June 2008

Articles by Andrew Twigger Joseph Carney Fenner Moeran Luke Harris



Geoffrey Vos QC

3 Stone Buildings held a seminar at the Royal Society of Arts on 6th May 2008 entitled “Art Law and Ethics”. After the seminar, there was a stimulating debate on the motion “So-called ‘ethical’ claims should not prevail over traditional property rights”.

Professor Norman Palmer CBE spoke on “Anti-seizure Legislation”, Richard de Lacy QC addressed the case of *Republic of Iran v Barakat Galleries*, Edward Bannister QC spoke on “Art at Auction” and I considered the Francis Bacon case under the heading “Bacon and Eggheads”. The texts are on our website at www.3stonebuildings.com

This edition of the Newsletter follows up on the arts seminar, by bringing together a series of articles on art-related legal subjects.

Negative Declarations as an Answer to Title Disputes

The transfer of ownership of many works by important artists occurred in highly dubious and sometimes deeply shocking circumstances during the 1930s and 1940s

The combination of doubts about transmission of title and the substantial sums of money at stake makes it inevitable that those who have purchased works of art in good faith sometimes find themselves faced with claims that the article in question actually belongs to someone else, of whose existence they were quite unaware at the time of the purchase.

The effect of any publicity in relation to such a claim might well be seriously to reduce the value of the article. Accordingly, an unscrupulous potential claimant may assert such a claim merely in the hope of obtaining a significant payment to remove any stigma on the title.

If the person who bought the article does not believe the claim is valid, but the person asserting the claim does no more than publicise his allegations, can the former take any legal action to

clear the title? And what if the person asserting the claim lives abroad, say in one of the member states of the European Union?

As to the first question (whether any legal action can be taken to clear the title), the initial difficulty is that it is the person asserting the claim who has the potential cause of action (e.g. conversion), but it is not clear what cause of action the person who bought the article might have.

One possible solution is slander of title, although such a claim is not without problems, including the requirement to prove “malice”, which is likely to involve showing that the person asserting the claim does not honestly believe it.

Another solution is to seek a negative declaration i.e. a declaration that there is no claim, made without any other relief being sought.

The leading case in this area remains *Messier-Dowty Ltd v Sabena SA* [2000] 1 WLR 2040 in which Lord Woolf said that the Court had a discretion to grant such a declaration where it was useful “to ensure that the aims of justice are achieved”. In appropriate circumstances, therefore, it is possible to issue proceedings for a declaration that the claim being asserted was bad.

The second question is whether a claim for a negative declaration can be brought in England against a foreign defendant and, in particular, one who is domiciled in a member state of the European Union, such that the Judgments Regulation applies.¹ The general rule is that a defendant must be sued in the Courts of the member state in which he is domiciled. Although there is an exception for immovable property located in England, the exception does not apply to personal property.

The question, therefore, is whether one of the categories of “special jurisdiction” in Article 5 of the Judgments Regulation can be prayed in aid. The potential candidate is paragraph 4, under which a

claim can be brought “in matters relating to tort ... in the courts for the place where the harmful event occurred or may occur”. The European Court of Justice decided in *Handelskwekerij GJ Bier BV v Mines de Potasse d’Alsace SA* (Case 21/76) [1978] Q.B. 708 that a defendant may be sued under this provision at the option of the claimant, either in the courts for the place where the damage occurred or in the courts for the place of the event which gave rise to and is at the origin of that damage.

But can an action solely for a negative declaration that the foreign defendant has no title to an article be commenced in England under this provision (assuming that the claimant is based in England)?

There is no authority directly in point, but Clarke J’s decision in *Equitas v Wave City* [2005] 2 All ER (Comm) 301, a case concerning the tort of inducing a breach of contract, indicates that it can. The argument is that the person asserting a claim to the article could allege that the person who bought the article is committing a continuing conversion of the article, so that ▶▶

« the event giving rise to the damage (the conversion) is occurring in England. Since the person asserting the claim to the article could, therefore, avail himself of the special jurisdiction in Article 5 to bring an action in England against the person who purchased it, the latter's action for a negative declaration is equally a "matter relating to tort" which falls within the special jurisdiction.

Clarke J relied, by analogy, on a number of cases concerning the question of whether there was a binding contract

or not, in relation to which negative declarations had been granted under the equivalent provision of Article 5 relating to contracts.²

Relatively few disputes concerning ownership of valuable works of art have come before the English Courts but the ever increasing prices achieved at auctions must increase the likelihood of claims being made and the availability of the negative declaration may prove a useful tool in their resolution.

¹ Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

² See e.g. the Court of Appeal's decision in *Boss Group Ltd v Boss France SA* [1997] 1 WLR 351, Lord Hope's approval of that decision in *Agnew v Lansforsäkringsbolagens AB* [2001] 1 AC 223 at 258 and Aikens J's judgment in *USF Ltd (t/a USF Memcor) v Aqua Technology Hanson NV/SA* [2001] 1 All ER (Comm) 856.



Andrew Twigger

Stolen Artworks and Limitation Periods

The recent case of *Kurtha v Marks* [2008] EWHC 336 contains the best short summary of the complicated rules that govern the limitation periods relating to stolen property; it furthermore serves as a reminder of the risks dealers, in particular those who have failed to properly document their purchases, face with respect to stolen property.

Kurtha v Marks concerned a Defendant dealer who had purchased two paintings which turned out to be stolen. The dealer had contacted the Art Loss Register ("ALR") about the paintings. (Whether this was immediately before or after the purchase was in dispute.)

The ALR had told the dealer there were no claims on the paintings. In fact the Claimant had notified the ALR of their theft. (The circumstances in which the dealer approached the ALR had aroused its suspicions. For reasons of policy expressly not gone into in the judgment he was not told of the Claimant's notification.)

The relevant purchase occurred in January 2006. The Claimant had kept the paintings in storage. He could not

say when they were stolen, save that it was sometime between 1984 and 2005.

The Defendant claimed that a prior owner of the paintings had purchased them in good faith in November 1999. That owner had on sold the paintings to an intermediary who had then immediately on sold the paintings to the Defendant in January 2006.

Tugendhat J usefully summarised (at paragraph 8) what Arden J (as she then was) described as the "virtually impenetrable drafting" of the relevant provisions found in sections 2 to 4 of the Limitation Act 1980 as follows:

"Six years, as is well known, is the normal period within which an action for the recovery of property, or for damages, must be brought in England. Save in cases of theft, if the claim is not brought within that time, a claimant's title to the property of which he has lost possession is extinguished. But in cases of theft there are special provisions. A claim by a person from whom a chattel is stolen is not subject to the six year time limit from the date of the theft. In a case of theft the six year period never starts to run in

favour of a thief, nor does it run against anyone whose possession of the property is related to the theft. The six year period does not begin to run unless and until someone purchases the chattel in good faith. Any conversion subsequent to the theft is presumed to be related to the theft: so the burden lies on the purchaser to show that the purchase of the goods was in good faith. This is a very brief summary of the effect of the Limitation Act 1980 ss.2-4. These complicated provisions were more fully explained by Arden J in *Nicole de Préval v Adrian Alan Ltd* (unreported 6 February 1997)"

For a number of reasons set out in a very lengthy analysis of the facts, Tugendhat J found that the onus of establishing a good faith purchase had not been discharged. In so concluding he warned (at paragraphs 139 to 140) that:

"The impossibility of proving a purchase in good faith necessary to establish a limitation defence is not the only risk a dealer may face.

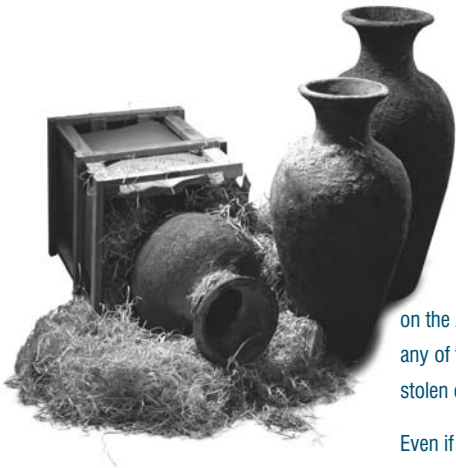
A dealer in valuable works of art who pays in large amounts of cash, keeps no records, and asks no questions as

to provenance of his supplier, exposes himself, and those who buy from him, to other very serious risks. These risks include that the dealer will be unable to answer queries relevant to tax from HMRC. But they also include the risks that he may face a prosecution under the Proceeds of Crime Act 2002 ss327 to 332, and that, whether or not there is a prosecution, he may be made subject to a civil recovery order under Part 5 of that Act."



Joseph Carney

Recovering Stolen Property



You cannot be involved in art or antiquities today without being aware of money laundering. This is because art and antiquities have the four characteristics that launderers seek out:

- > High value;
- > Relatively low volume;
- > Transportability; and
- > Difficulty in locating the item in question.

It is these characteristics that allow them to work so favourably at each stage of money laundering.

For example, a crook takes £100,000 in stolen funds and purchases a 19th century oil painting. He passes that art work to his collaborator, who takes it to (say) Germany, providing him with a copy of the impeccable provenance provided by the original vendors. The collaborator sells it on to a dealer for, say, £95,000, with the funds paid into a German bank account in the collaborator's name.

None of this will have registered so much as a blip on the radar of public authorities. The painting was worth less than £103,000, so it will not have required an export licence. And because it was not stolen, it will not be

on the Art Loss Register or caught by any of the conventions on the trade in stolen or illicit cultural objects.

Even if you find the original crook, unless you can get them to tell you where the painting went, or you happen to hear of the sale of a relatively unimportant single painting in Germany, there is no realistic chance that you will ever see that money again.

So what can the victims of crime - and in particular, fraud - do to trace their property? Obviously there are a range of remedies available in the criminal courts, including compensation orders with the sanction of imprisonment in default; see Powers of Criminal Courts (Sentencing) Act 2000 s.130. But too often, particularly in complicated fraud cases, the public authorities do not act at all, or if they do they act too slowly to satisfy private individuals who have already suffered the losses in question.

In such circumstances their best chance of redress is to seek assistance from the civil courts, with a (worldwide?) freezing order supported by ancillary orders for disclosure of assets. In particular, where the victim of the fraud has a proprietary claim - for example on the basis of constructive trust by reason of knowing receipt or dishonest assistance in breach of fiduciary duty - then the Court can order that the putative fraudster disclose details of where the proceeds

of the fraud have gone. This is on the basis that where there is a proprietary claim the Court may "at the interlocutory stage of the action, make orders designed to ascertain the whereabouts of that property"; *A v C* (Note) [1981] 1 QB 956 at 959D per Goff J (as he then was).

Until recently this sort of order was of limited practical help because it almost inevitably came with the usual exception on the basis of privilege from self-incrimination. There were exceptions, particularly under the Theft Act 1968 s.31, but that was limited in application and has been subject to considerable judicial criticism. However, the impact of the Fraud Act 2007 s.13 is bound to change all that. This section provides that "A person is not to be excused from (a) answering any question put to him in proceedings relating to property, or (b) complying with any order made in proceedings relating to property on the ground that doing so may incriminate him of an offence under this Act or a related offence." The trade off is that the information provided is not admissible in evidence against them in criminal proceedings.

The section is drafted so as to be as wide as possible. Property means "money or other property whether real or personal (including things in action and other intangible property)" and the definition of "Proceedings relating to property" is extremely wide, including "the recovery or administration of any property, the execution of a trust, or an account of any property or dealings with property". Finally, a "related offence" means "conspiracy to defraud [or] any other offence involving any form of fraudulent conduct or purpose."

In other words, if you have suffered a fraud then the fraudster cannot refuse to answer questions in civil proceedings on the basis of privilege from self-incrimination.

Just how wide the ambit of the section is was highlighted in the recent Court of Appeal Case of *Kensington International Ltd v Republic of Congo* [2007] EWCA Civ 1128. In that case the CA confirmed that the section:

- > Covers not only the direct proceedings for recovery, but also associated proceedings such as *Norwich Pharmacal* order proceedings (at least where substantive proceedings have also been commenced).
- > Covers not just claims for money or property which the claimant has been wrongfully deprived of, but also a claim to obtain payment of a debt - and specifically, money paid as a bribe.
- > Covers criminal actions that took place prior to 15 January 2007, when the section came into force.

Recent experience has suggested to the author that at present judges and lawyers are, perhaps surprisingly, somewhat unaware of the existence and impact of the section. That said, however, there can be little doubt that this section is set to become a main stay of any civil fraud practitioner's armoury.



Fenner Moeran

The Artificier's Lien

An owner of artwork (A) loans it to an institution (B), who then delivers it to a restorer (C) for restoration work. B fails to pay C for the work pursuant to the contract between B and C.

Can C assert a lien over the picture against the owner, A, forcing A to pay for the work before regaining of the object? This is an important question for those who provide specialist skilled services for artworks.

The answer lies in the scope of the authority that A gave B to deal with the artwork.

C may assert a lien against A where A has authorised its creation by B. The authorisation may be either actual or ostensible.

Actual authority may be express or implied. As to express authority, the simplest case will be where the original bailment (in our example the loan from A to B) expressly authorises the sub-bailment (the delivery up for repair).

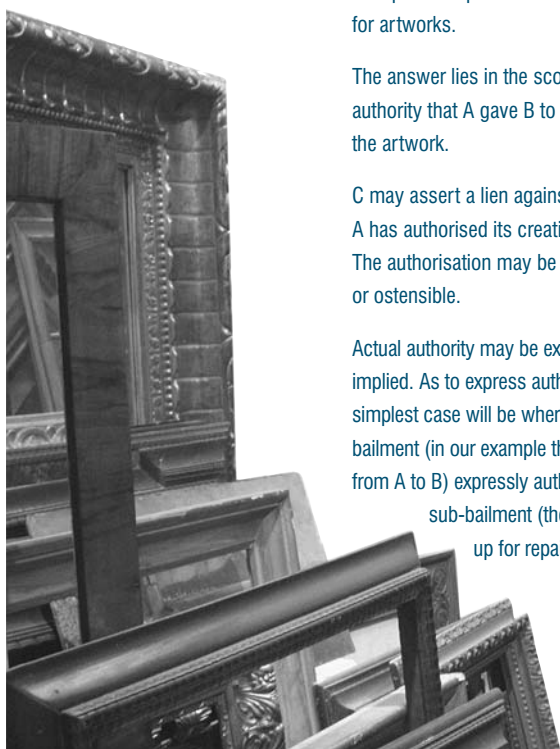
Actual authority may also be implied from the fact that the bailment expressly contemplates sub-bailment to a third party in circumstances where that sub-bailee would ordinarily acquire a lien over the goods. Further, an implied authority to create the lien may also be derived from (1) a duty on the bailee to look after and repair the goods (implying a right to deliver up the goods for repair, *Green v All Motors Ltd* [1917] 1 K.B. 625) or (2) by looking to the conduct which is necessarily incidental to the fulfilment of the purpose of the bailment (*Tappenden v Artus* [1964] 2 Q.B. 185).

So, for example, if the loan from A to B imposed an obligation on B to take any necessary urgent works of repair or maintenance to the artwork, a power in B to deliver up the object to a skilled tradesmen at his premises might readily be inferred; and such a right might well be inferred even if the loan agreement was silent as to B repairing obligations.

The doctrine of ostensible authority depends upon showing that the bailor is estopped from denying the authority of the bailee, it will be necessary to find some express or implied representation to the sub-bailee that the bailee is empowered to enter into the transaction

giving rise to the lien. Once established, the bailor will be bound provided, of course, that the sub-bailee had no knowledge of the true scope of the bailee's authority (*Bowmaker Ltd v Wycombe Motors Ltd* [1946] 2 All E.R. 113).

Returning to example of an art loan, it should be borne in mind that, at common law, the repairer's lien will not arise for mere maintenance of goods but only for their improvement; and the prevention of deterioration is not to be equated with improvement. However, assuming C can assert a lien at common law, or on the basis of his express terms, whether that lien can be asserted against A will depend upon whether B had actual or ostensible authority to enter into the repair transaction on those terms in accordance with the above principles.



Luke Harris