

The Tribunals Courts and Enforcement Act 2007

Sections 134 to 137

Immunity from Seizure: Some Anomalies

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General

1. The purpose of this talk is to point out some salient features of the Act and the draft Regulations that are proposed in support of it.
2. The objectives of this Part of the Tribunals, Courts and Enforcement Act 2007 are to provide immunity from seizure to objects that have been lent to the UK from overseas to be included in a temporary exhibition at a museum or gallery. Such immunity will protect against any form of seizure ordered in civil or criminal proceedings, and from any seizure by law enforcement authorities¹. Under the previous law, the only immunity provided to objects on loan was that extended by the State Immunity Act 1978. The Explanatory Notes comment that '[t]he absence of a more general immunity for works of art and other cultural objects which are lent to temporary exhibitions in this country has made museums and private owners in other countries increasingly reluctant to lend to such exhibitions without a guarantee that their art treasures will be returned. Provisions in Part 6 will enable such a guarantee to be given'². The controversy over the loans of Russian Art to the Royal Academy's 2008 Exhibition and the consequent announcements by the Government that the implementation of the 2007 Act would be accelerated to cover the Exhibition, illustrate the concerns that this Part of the Act aims to address.

The crucial inhibition

3. The Act aims to block two main forms of action against exhibited objects:
 - (i) court proceedings for civil recovery or other arrest (such as claims in tort for conversion); and
 - (ii) law enforcement action falling outside court proceedings, such as seizure or forfeiture by police and customs authorities.
4. The Act achieves this effect by providing that a protected object shall not be seized or forfeited under any enactment or rule of law: section 135(1). This immunity does not prevent prosecution for offences of importing, exporting or otherwise dealing with the object, but does prevent the exertion any power of arrest to prevent the object from leaving the UK: section 135(2).
5. There is an important exception to the general immunity. The immunity applies unless (i) the seizure or forfeiture occurs by virtue of a court order made in the UK and (ii) the court is required to make the order under, or under any provision giving effect to, a Community obligation or any international treaty: section 135(1). An obvious example of a Community obligation would be the duty imposed on the UK as a requested state by the 1993 EU Directive on the Return of Cultural Objects to return unlawfully removed cultural objects to another EU state as requesting state. An example of a treaty obligation would be the duty to return cultural objects under the First Protocol to the 1954 Hague Convention (when enacted into UK law). A further example might be a public authority's duty to return to a private owner that is compelled by (say) Article 1 of the First Protocol to the European Convention on Human Rights.

The protected objects

6. The protected objects are defined by section 134. An object will be protected only if five conditions are satisfied:
 - (a) the object must usually be kept outside the United Kingdom,

¹ Explanatory Notes, para.537

² Explanatory Notes, para.538

- (b) it must not be owned (whether beneficially or not, and whether alone or with others³) by anyone resident in the United Kingdom,
 - (c) the import of the object must comply with the law on the import of goods,
 - (d) it must be brought to the United Kingdom to be displayed to the public in a temporary exhibition at a museum or gallery, and
 - (e) the museum must have complied with the regulations requiring publication of information about the object⁴.
7. 'Public display' is defined to include any display to which the public have admission, except displays with a view to sale⁵. The immunity will not extend to any objects that are included in an exhibition organised by art and antiques dealers or auctioneers to advertise works for sale or to publicise an auction⁶.

Period of protection

8. Sub-section 134(4) prescribes two periods of time for which the protection lasts. First, the protection continues as long as the object is in the United Kingdom for any of the following purposes:
- (a) public display in a temporary exhibition at a museum or gallery;
 - (b) going to or returning from public display in a temporary exhibition at a museum or gallery;
 - (c) related repair, conservation or restoration;
 - (d) going to or returning from related repair, conservation or restoration;
 - (e) leaving the United Kingdom⁷.
9. Secondly, the protection continues for a maximum of 12 months beginning on the day the object enters the United Kingdom, unless, the object has suffered damage while protected and (a) it is undergoing repair, conservation or restoration in the United Kingdom because of the damage or (b) it is leaving the United Kingdom following repair, conservation or restoration because of damage⁸. The Secretary of State is given a power to require a museum or gallery to provide further information about an object to inquirers⁹.
10. The effect of the protection and the limited circumstances under which it will not be given are set out in section 135 of the 2007 Act. Sub-section 135(1) provides that while an object is protected it may not be seized or forfeited under any enactment or rule of law, unless (as we have seen) it is seized or forfeited under or by virtue of an order made by a court in the United Kingdom where the court is required to make such an order under, or under provision giving effect to, a Community obligation or international treaty. Thus, if a court is asked to enforce an order for the seizure of an object made by the courts of another country to confiscate proceeds of crime, the object will not be immune under the 2007 Act¹⁰. References to 'seizure' or 'forfeiture' in relation to an object include¹¹:
- (a) taking control of the object under Schedule 12 (in England and Wales);
 - (b) execution or distress (in England and Wales);
 - (c) diligence of sequestration (in Scotland);
 - (d) seizure, confiscation or forfeiture, or any other measure relating to the custody or control of the object, in the course of a criminal investigation or criminal proceedings (against the owner, the museum or gallery or any other person).
 - (e) The making or enforcement of an order relating to the custody or control of the object in civil proceedings (against the owner, the museum or gallery or any other person).
11. As a result of subsection 135(2), protection given to an object loaned to an exhibition does not give any protection from prosecution to those dealing with the object, where the dealing in question constitutes an offence.

³ Sub-section 134(3)

⁴ Sub-section 134(2)

⁵ Sub-section 137(3)

⁶ Explanatory Notes para. 556

⁷ Sub-sections 134(4) and (7). Repairs, conservation or restoration which will be considered to be related are defined by sub-section 134(8)

⁸ Sub-sections 134(4) and (5)

⁹ Sub-section 134(9)

¹⁰ Explanatory Notes, para. 547.

¹¹ Sub-section 135(3)

12. Only those institutions that fall within the definitions of ‘museum or gallery’ in subsection 136 and that have been approved by the relevant authority¹², will qualify for immunity under Part 6. The factors that the approving authority should take into account when deciding whether or not to approve a particular institution for these purposes include, the institution’s procedures for establishing the provenance and ownership of objects, and whether it complies with guidance published by the Secretary of State on such procedures¹³.

The effect on private law claims

13. The remainder of this paper concentrates on court action by way of civil proceedings. This means, principally, a claim that is pursued by suing the museum or the lender in respect of some wrong inflicted on object, such as unlawful detention during the loan period.
14. An owner who seeks to recover his personal property from an alleged unlawful possessor will normally sue in conversion. Liability is strict and can be incurred innocently, ie without deliberate intention to act wrongfully, or even without negligence. Where the object is in the possession of someone other than the original wrongful taker, the owner will normally seek to establish conversion by demand and refusal.
15. By taking away an owner’s right of action for recovery of the object during the exhibition period, the Act appears to remove from the owner the immediate right of possession that would normally attach to ownership. He has no right to possession because there is no right to recover the object during the exhibition period.
16. That right of possession forms, however, the basis of several of the more important wrongs to chattels: not only conversion, but also negligence and trespass.
17. In removing the right of immediate possession, therefore, the Act arguably debilitates *any* claim in tort for wrongs inflicted during the period: not merely claims in conversion for recovery and/or damages against the borrowing museum, but also claims in conversion against a ‘fourth party’ interloper who steals it while on exhibition, or in negligence or trespass to goods for inadvertent or deliberate damage inflicted by a ‘fourth party’ during that period. Negligence and trespass to goods, like conversion, depend on the claimant’s showing an immediate right of possession at the time of the wrong. But they are outside the policy of the anti-seizure legislation and the power to sue for them should, I submit, be unaffected by Act.
18. The traditional wisdom that the Act operates merely anti-seizure and not anti-suit must be evaluated in this light. In theory, for example, it may be possible for a claimant to recover damages in conversion after the object has left the borrower’s possession, at least where the borrower already knew of the adverse claim before returning to the lender. But the borrower may argue that even at the time of the conversion, ie presumably at the point when the object was returned to the lender, the lender still lacked the immediate right of possession because of the immunity.
19. This gives rise to some hard questions. Can the owner sue for conversion on the strength of his/her revived right of possession once the immunity has lapsed, in respect of wrongs committed while the immunity was still in force and while that right of possession was still suspended? Should the proper claim be one for permanent damage to the claimant’s reversionary interest? If so, can the claimant really demonstrate such reversionary damage in a case of alleged conversion when it is theoretically possible for the claimant to sue elsewhere (in the courts of another country) once the exhibition period is over and the object has moved outside the field of immunity? That may not be a problem if the claimant sues for enduring damage inflicted by negligence or trespass, but it leaves unresolved the question of non-enduring damage, and it could at best complicate a claim in damages for conversion.

The circular question of ownership

20. The immunity does not apply if the object is normally kept inside the UK, *or if it is owned by a person resident in the UK*. But suppose that the claimant is him/herself resident in the UK. When the UK-resident claimant can establish ownership the immunity does not apply: he/she can exclude the object out from the statutory protection and subject it to civil proceedings.
21. But for such ownership to be established it would be necessary to have a trial of precisely the types of issue that the Act seeks to insulate from the court’s jurisdiction. This seems self-defeating. It might even invite

¹² The ‘approving authority’ means: the Secretary of State in relation to museums and galleries in England; the Welsh Ministers in relation to institutions in Wales; the Scottish Ministers in relation to institutions in Scotland; and the Department for Culture, Art and Leisure in relation to an institution in Northern Ireland (sub-section 136(5))

¹³ Subsection 136(2)

overseas claimants to assign their interests to UK residents before the object enters the UK in order to displace the immunity.

22. One might argue that claims based on UK-resident ownership are themselves made non-justiciable under the spirit and purpose of the Act, but the position is at best unclear.

Lenders

23. The Act does not in terms confine the statutory immunity to objects brought into the UK by way of loan. It applies whenever the object “is brought to the UK for public display in a temporary exhibition at a museum or gallery”. The immunity would therefore apply, for example, to objects brought to the UK for exhibition by one member of an international ownership syndicate that operates on a rotating enjoyment programme, or by trustees for exhibition by the beneficiary of a trust.
24. Technically the word ‘loan’ is contentious in the museum context, because many such bailments are for mutual advantage, whereas a true loan is gratuitous on the part of the bailor (lender). It is therefore good that the Act largely avoids it.
25. But the avoidance is not carried through into the draft Regulations. For example, Regulation 5 of the draft Regulations refers to “the name of the lender” as one of a prescribed catalogue of information that must be given to a potential claimant who is regarded as having a “plausible” case; without such information the immunity is not engaged. This use of the word ‘lender’ implies that loans are the only types of transaction protected by the Act. In fact, however, Regulation 1 defines a lender for this purpose as “a person whose agreement is required to make the object available for exhibition”. This is an expansion of the normal meaning of the word, but one that generates its own difficulties. It could be argued that the true owner (ie, potentially, the claimant) is precisely a person “whose agreement is required to make the object available for exhibition”, in that any exhibition without his/her agreement is potentially at least a conversion. If such a person’s name is not supplied as required by the Regulations the museum or gallery arguably forfeits the immunity. But to determine whether a claimant is in fact a person whose consent is required again means investigating his/her right of possession, that is, inquiring into those very issues the investigation of which the Act is designed to avoid. Regulation 5 also incidentally refers to “the borrowing institution”, which concept is not defined.

Museums and the sympathetic response to claims

26. Suppose that a borrowing museum, having published the necessary material as required by the Regulations, receives a claim with which genuinely sympathises. What options are open to it?

Before loan begins

27. If the museum has not yet borrowed the object, and presumably now decides not to do so, the DCMS consultation paper contemplates that it will not be required to convey to the lender the information specified in draft Regulation 5 unless this is separately required by the Freedom of Information Act 2000: see para 17 of the consultation paper. But there seems to be no reason in principle why the museum should not disclose this information if it wishes to, unless of course the lender has had the foresight to stipulate that it shall be confidential. The position in practice may however be quite different: a museum may place primary importance on its relations with the lender and its desire to avoid controversy with a contractual and professional neighbour.
28. It seems unlikely that a museum that knows of a potential flaw in the lender’s title would deliberately go ahead and borrow the object, foregoing the statutory immunity, purely in order to enhance the claimant’s prospects of recovering the object. Few museums would court the risk of being sued, or of being accused of blatant duplicity towards lenders, however idealistic the motivation. But it is not wholly inconceivable that in an extreme case the museum might consider such a course more in keeping with its moral obligations than merely to discard the matter from the outset.

After loan begins

29. If the museum has already taken possession of the object and gained the statutory immunity before a potential claim comes to light, there seems to be nothing in the Act itself that would prevent it from biting the bullet and returning the object to the claimant if it truly wishes to do so, though this would almost inevitably invite counter-action from the lender.
30. An impromptu return against the wishes of the lender would require both thought and courage on the part of the museum. A cautious but sympathetic institution is more likely to seek ways of (i) investigating the issue

and trying to determine title on all the facts, or (ii) dropping out of the controversy altogether by way of the legal process of interpleader.

Verifying title

31. The drawback of the first approach (detailed investigation of title) is that unless the loan agreement makes advance provision for this contingency, the lender who considers that the borrower is dragging its heels and considering return to a party other than the lender may demand the return of his object forthwith and threaten legal action rather than accept the prospect of its being handed to the claimant. A bold museum might reply by arguing that under the Act even the lender has no right to go to court to seize the object from the borrower. While this might be true on a literal reading of the Act (there are arguments to the contrary) it would protect the museum only during the exhibition period. And the lender might in any event argue that his rights are protected by Article 1 of the First Schedule of the ECHR, safeguarding the peaceful enjoyment of his possessions, to which the court is bound to give effect pursuant to a treaty obligation (see section 135(1) above). Regrettably, the exercise of determining whether the object counts as one of “his” (ie, the lender’s) possessions within that provision could again involve the litigation of the very issues that the Act is designed to avoid.

Interpleader

32. The drawback of the second approach (interpleader) is that the museum can interplead only if it is sued or expects to be sued by more than one claimant. It is arguable that no museum would expect to be sued once the statutory immunity is in place because the very purpose of the immunity is to ensure that it will not be sued. Whether the claimant could overcome this hurdle by suing, for example, for damages for wrongful detention rather than for an order for possession is a contentious question. A further caveat to be borne in mind is that a party who colludes with one potential claimant cannot interplead.

The moral

33. The immunity is a blanket with holes. There are ways of resolving the gaps and anomalies, but such resolution would require:
 - (a) at best, some very careful advance provision in the loan agreement, the bureaucracy, time and expense of which could well discourage lenders; and
 - (b) at worst, resort to litigation, which would be self-defeating, and could well dishearten *everyone* concerned except perhaps certain lawyers.