

Not so picture perfect

As prices for art have soared, so too has the necessity to ensure transactions are as well documented as possible, says Karen Sanig

NOWHERE DOES THE maxim 'caveat emptor' have such resonance as in the art world. Art transcends national boundaries. Rights to ownership of art are won and lost as it moves around the world. Attributions can and do frequently change. Authentic artwork is often exposed as fake or forged, many years after sale. Museums unwittingly house artefacts which are illegally excavated national treasures, exported without compliance with laws of the owning country. Or art left as part of an estate under a will transpires not to have been owned by the deceased even though it had been displayed in the deceased's home throughout their lifetime.

It is yours but do you own it?

Defective title is one of the most prevalent problems for buyers and sellers of art. Most recently, it has become a problem for museums and other institutions too.

The Tribunals, Courts and Enforcement Act 2007 (TCEA) had to be rushed through Parliament in late December 2007. Part 6 of the Act, "Protection of Cultural Objects on Loan" (ss.134-8) protects from seizure objects from outside the UK, owned by non-UK residents, brought into the UK for public display in a temporary exhibition in a museum or gallery.

Without this fast-track legislation, the 'Russia' exhibition scheduled for January 2008 at the Royal Academy of Arts would not have happened. Modern masterpieces drawn from Russia's principal collections had been gathered for a single exhibition. Russia feared that the heirs of dispossessed owners of the art (dating back to nationalisation of the art during the Russian revolution) would attempt to seize the art on loan in the UK.

As a result of the TCEA, institutions are now aware of the need to carry out detailed checks on the ownership history of art being lent or borrowed.

Those transacting in art have to date been less vigilant, relying heavily on the trust placed in art market



professionals. Buyers at auction have frequently misunderstood that auction houses (merely agents for the seller) have little, if any liability for genuinely held opinions offered in their glossy catalogues. Careful, but rare scrutiny of the terms and conditions at the back of auction catalogues clearly states the position. For example see Sotheby's 2008 "Condition(s) of Business for Buyers", which in clause 3 states that: "Sotheby's is not able to and does not carry out exhaustive due diligence on each lot." This leaves little room for doubt that the buyer must carry out its own exhaustive due diligence.

The auction house does not have any contractual liability for information it provides either. See clause 3(d), which states that: "Information provided to bidders in respect of any lot, including any estimate, whether written or oral and including information in any catalogue, other report commentary or valuation is not a representation of fact but rather is a statement of opinion genuinely held".

A purchaser at auction cannot rely on any general duty of care owed by the auction house. No case has successfully established one. An auctioneer's duty in carrying out the preparation of the auction catalogue is only to act as a reasonably competent (international) auction house, see *Taylor Lynne Thomson v Christie Manson & Woods Ltd* [2005] EWCA Civ 555.

Reasonable competence for this purpose appears to include non-exhaustive due diligence!

Private sales can provide just as many potential pitfalls. There is no central registry for art. Verifying ownership is therefore complicated, time consuming and imperfect. Databases exist for checking whether an artwork has been stolen. However, an artwork has to be registered as stolen to show up. There are also different databases in both the UK and in other jurisdictions. Nevertheless, a database check is always a good first call. It is fast becoming a determining factor as to whether someone has acted in good faith. This in itself is vital in establishing ownership of art.

English law relating to the transfer of title: "nemo dat quod non habet" (no one can give a better title than they have) is embodied in the Sale of Goods Act 1979 s.12 ("Implied terms about title") and s.21 ("Sale by person not the owner").

Those in the art world often confuse possession with ownership. The possessor of art, in fact, owes the true owner many duties in relation to the art he holds as bailee. They include a duty not to convert the art. Selling the art while in possession of it would of course breach such a duty.

Another common misconception is that a 'good faith' purchase transfers title. If a good faith acquisition is coupled with the passage of time, rights to title may be extinguished. The limit is six years after the good faith purchase pursuant to the Limitation Act 1980. A good faith purchase alone does not, of course, transfer ownership rights.

The burden of proof is on the person trying to show good faith. The unreported case *De Preval v Adrian Alan Limited* [1997] QBD demonstrates how the courts look unfavourably on art professionals who fail to carry out sufficient checks. The dealer in question tried to auction two French gilt bronze and enamel candelabra by the 19th century French sculptor, Barye. They allegedly formed part of a triptych stolen in 1986. The dealer acquired

them in New York 'in good faith' and relied on the word of the person selling them to him that he had the right to sell them unencumbered. Documents to support the acquisition were scant. They were put into a Sotheby's sale in 1994 but the original owner came forward to stop it. The case turned on whether she was barred from bringing her claim because there had been a good faith purchase over six years previously.

The judge found that given the dealer's expert knowledge as an experienced antiques dealer he ought to have realised that the candelabra were rare and special. As such, he ought to have doubted the seller's title. It was decided that the dealer had not acted in good faith at the time of acquisition because he relied only on the word of the seller to verify ownership. The rarity of the item ought to have alerted him to making greater checks about their ownership history.

Today, checking the candelabra on a stolen art database would probably be sufficient to determine the matter in the dealer's favour. However, if the dealer checked the database and they were not registered as stolen, would the court find he had acted in good faith if he then sold them?

Due diligence has evolved since 1997. Today we see more careful checks being carried out but they are far from perfect. See for example a report in the October 2008 edition of *the Art Newspaper* which recounts that Christie's has sold 14 miniatures stolen from a public gallery. Christie's had apparently checked the two databases but the miniatures were only recorded on one and no photograph of them appeared on the other.

In practice, sales by auction often confuse the question of ownership long enough for multiple sales of stolen artworks to take place. This coupled with the mobility of art often transfers title and complicates matters. Whereas English law favours the dispossessed owner, many continental jurisdictions favour the innocent purchaser.

In France for example, (Article 2279 Code Civil): "possession vaut titre" (possession equals ownership). Good title is obtained three years following a good faith acquisition and good faith is assumed. It is for the dispossessed owner to show bad faith.

Consider also how the movement of art affects its ownership, for example where art stolen in the UK is sold abroad and then returned to the UK for sale. In the case of *Winkworth v Christie Manson and Woods* [1980] 1 All ER, art stolen in the UK was transferred to Italy.

There it was sold to an innocent third party. Title was transferred to the unsuspecting purchaser according to Italian law. The art was offered for sale

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at auction in the UK. The original owner was unsuccessful in stopping the sale because of the transfer of title under Italian law.

Uncommon solutions

Recent draconian legislation, designed to stop the trafficking in cultural heritage property, highlights the dangers of dealing in art without verifying ownership.

The recent Dealing in Cultural Objects (Offences) Act 2003 provides for criminal sanctions as follows:

- (1) a person is guilty of an offence if he dishonestly deals in a cultural object that is tainted, knowing or believing that the object is tainted.
- (2) it is immaterial whether he knows or believes that the object is a cultural object.
- (3) a person found guilty of the offence is liable –
 - (a) on conviction on indictment, to imprisonment for a term not exceeding seven years or a fine (or both);
 - (b) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum (or both).

International law on the looting of works of art in Iraq also provides for criminal sanctions – Iraq United Nations Sanctions Order 2003. These cover "illegally removed Iraqi cultural property" including Iraqi cultural property and any other item of archaeological, historical, cultural, rare scientific or religious importance illegally removed from any location in Iraq since 6 August 1990.

This carries a maximum two-year prison sentence or fine or both.

Where is the paperwork?

Independent checks on art ought to be a prerequisite to sale. They are not. Properly documented sale and purchase agreements are still the exception. A purchaser acquiring extremely expensive art is well advised to insist on such a document.

It should contain clear warranties by the seller. These should include warranties relating to ownership, condition, authenticity, compliance with import/

export regulations and compliance with tax regulations. In this way, a purchaser may at least have a clear claim if the contract is breached. Without such written warranties the seller may rely on his honestly held opinion about the art to avoid contractual liability.

In addition to the warranties, a vigilant purchaser also needs to ensure that the contracting party is capable of paying damages if litigation becomes necessary. Sellers and buyers often insist on anonymity.

Contracting with an unnamed but disclosed principal may give few rights against an agent who has acted within the scope of his authority. The purchaser ought therefore to attempt to obtain warranties from the agent itself as well as the seller on whose behalf the agent is acting. In addition to the written contract, separate reports on condition, authenticity and value ought to be obtained independently by the purchaser.

No one in business would acquire or dispose of a company without adequate documentation. How is it then that millions have been lavished on art without such documentation?

Badly damaged paintings, stolen artefacts or fakes have changed hands with no liability pertaining to the seller. Buyers and sellers have been caught up in expensive litigation as a result. The use of comprehensive sale and purchase agreements may minimise this. However, the art market remains a law unto itself and resistant to change. The majority of transactions are still carried out with the minimum of paperwork.

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