RECOVERY OF UNLAWFULLY-REMOVED WORKS OF ART AND ANTIQUITY - THE LEGAL DIMENSION

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Introduction

The purpose of this short paper is to emphasise the role of civil or private law, as opposed to criminal law, in the recovery of unlawfully-removed cultural objects. Five points must be made at the outset.

Theft is not the whole story

Our standard picture of art crime is of a burglary or robbery from a collector's house or a museum. Many misappropriations do indeed conform to that stereotype. But unlawful removal is a diverse phenomenon which it is not confined to 'theft' in the narrow popular sense of a direct taking from the possession of private individuals and institutions without their consent. It can encompass the illicit excavation of antiquities, or their illicit retention after licit excavation; unlawful export, even by an owner of the object; disposal in breach of trust; looting in time of armed conflict; the forced bargains imposed on victims of the Nazi terror; and taking under duress or from infirm or otherwise disadvantaged persons. There is no current single piece of legislation encompassing all these forms. Each of them calls for a slightly different legal response, not least in that some do not lend themselves to criminal law enforcement.

Recovery does not occur as of right

Even if a wrongful removal is established, the physical return of the object to its claimant owner is only one option available at law and is generally at the court's discretion. In some cases courts will prefer to award damages (ie, financial compensation) and allow the defendant to keep the work. In general this will occur only where damages would be an adequate remedy, and in most cases of privately-owned art or antiquities nothing short of the restitution of the object will compensate the owner; the object will be unique and damages inadequate. But damages may be thought adequate, for example, where the chattels at issue are a dealer's stock, bought for commercial gain rather than private enjoyment. It should also be noted that some contested claims result in mediated compromises where the parties 'share' the normal rights of ownership or jointly donate the object to a museum. An example of the latter is the recent settlement in the United States of the Gutmann family claim against Daniel Searle for the Degas picture 'Smokestacks in a Landscape' allegedly looted from its Jewish owner during the terror of 1933-1945.

Qualifying to bring a claim

The normal cause of action for a wrongfully-removed chattel is the common law action or claim for conversion. To sue in conversion a person need show only that she had either possession, or the immediate right to possession, of the chattel at the time the wrongful act was committed. It is not necessary to prove full ownership, although most claimants in conversion are in fact the owners. A museum holding a picture on loan from the owner, for example, could sue for conversion if the work were stolen and bought by a third party who refused to return it. Conversion is a tort of strict liability and can be committed innocently, without malicious intent to deprive the person entitled to the chattel of her rights. Subject some statutory exceptions, an innocent buyer of a stolen chattel commits conversion against the person entitled and can be compelled to return it or pay damages.

Mediation and ADR generally

It is assumed so far that the wrongful removal of the work will result in a court claim and a legally-imposed solution reached according to strict law. But an increasing number of art claims are being submitted for resolution to the alternative process of mediation, where the final result need not be according to strict legal principle but can derive from the parties' common interests and future relationship and be evolved by the parties themselves, though facilitated by the mediator. This can be a quicker, cheaper and more discreet way of settling art disputes than suing in court. [In the United Kingdom a body called ArtResolve has recently been established for this purpose]. There are signs that out-of-court mechanisms like mediation and its counterparts are gaining governmental endorsement: see, for example, in the field of Holocaust-related claims, the recent French legislation of September 1999 and the plans to set up a Spoliation Advisory Panel in the United Kingdom.

Recording and retrieval agencies

Increasing importance is attached to those bodies which maintain data bases of stolen art, such as the International Art and Antiques Loss Register in London. Apart from their obvious value in tracking stolen art, these organisations can have a wider legal significance. For example, a failure to check the provenance of a an unlawfully-removed work against the Register can controvert a later allegation by the buyer of that work that she bought in good faith. This is already acknowledged by some of the international case law (eg, the *Goldberg* case on the Cypriot mosaics) and legislation (eg, the UNIDROIT Convention, below). It is increasingly hard to maintain the defence 'why wasn't I told?'.

Does the ordinary law work?

The positive side

Claims to cultural objects (by individuals, cultural institutions, municipalities and states) can and do succeed through reliance on the general law. Recent examples in England are Madame de Preval's claim for the return of her Barye candlesticks (1997) and the City of Gotha's claim to the painting '*Holy Family*' by Joachim Wtewael (1998).

The negative side

Claimants face numerous legal hazards, including the expiry of the relevant limitation period and the operation of the *lex situs* rule, by which an overseas disposal of personal property contrary to the rights of the original owner is regarded by the courts of this country as effective to confer title on a good faith acquirer (and to extinguish the rights of the original owner) if that is the effect given to it by the law of the country where the chattel was situated at the time (see *Winkworth v Christie Manson & Woods*, 1980). The law is not in a satisfactory condition and its use can be particularly distressing for elderly victims of mass injustice, such as Holocaust victims, or even survivors of the Bolshevik confiscations (like Madame Shchukina, who unsuccessfully sued the Pompidou Centre at Paris for the return of some Matisse paintings seven years ago).

The need for international action

The benefits of treaty

A world-wide treaty provision dealing with unlawfully removed cultural objects can bring two main advantages: (1) it would harmonise the laws of different countries, reducing the incentive to make cross-border movement of stolen objects from countries which favour the common law rule *nemo dat quod non habet* to those countries which prefer (under conditions) to grant title to good faith buyers, and (2) it would facilitate the international enforcement of claims. Leaving aside the 1954 Hague Convention on armed conflict, there are two main conventions in this field, the UNESCO Convention of 1970 and the UNIDROIT Convention of 1995. It is crucial to emphasise that neither is retrospective and that ancient removals are not redressed by these Conventions.

Australia and the United Kingdom compared

The principle, if not the full detail, of the UNESCO Convention has been adopted into Australian law by the Protection of Movable Cultural Heritage Act 1986. Time does not permit detailed analysis but attention is drawn especially to section 14. This is a provision of substantial breadth and scope which has important implications for all collectors (private and institutional) buying or borrowing works into Australia.

The United Kingdom has implemented only one international instrument dictating the return of unlawfully removed cultural objects. This is the 1993 EC Council Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, enacted into United Kingdom law by Regulations which came into force on the 2nd March 1994. Broadly, the 1994 Regulations apply to any object which has, after 1st January 1993, been unlawfully removed from one EC country to another, in breach of the latter country's law on the protection of national treasures. They are designed to operate in tandem with a Council Regulation on the export of cultural goods. Subject to numerous formalities, they confer on the country from which the object was unlawfully removed a right of action to recover it from a possessor or holder in the country where the object is currently situated (Regulation 6(1)). The 1994 Regulations give no direct right to individual (non-State) claimants to recover cultural objects and have other limitations. They apply only between EC countries and, as the former Secretary of State Peter Brooke MP appeared to anticipate, have had "pragmatically" very little effect. No instance of a successful claim under the 1993 Directive is known.

The 1970 UNESCO Convention failed to gain acceptance by the United Kingdom. One reason (given by the then Secretary of State in correspondence with John Browning, the claimant in the Icklingham Bronzes dispute) was the existence of trade and museum codes of practice, suggesting a preference for self-regulation. Some find this preference implausible. [More recently, since the Sydney seminar, the United Kingdom government announced that it would not be proceeding to adopt the UNDROIT Convention].

For potential claimants, the 1995 UNIDROIT Convention has the advantages over the 1994 Regulations of (1) a greater geographical scope, and (2) a direct personal right of action for the victim of a theft of a cultural object (Article 3.1) – an advantage not shared by UNESCO. This direct personal right of action is coupled with a liberal definition of theft to include illicit excavation or illicit retention after licit excavation: Article 3.2. The UNIDROIT Convention also makes a distinction between stolen and illegally-exported objects. It subjects each class

of unlawful removal to different rules (for example, by requiring that the return of unlawfully exported as opposed to stolen objects be sought by States and not by individuals, and that the importance of such objects to the requesting State's culture be established before return can occur). This dichotomy appears to have much to commend it.

The sting of UNIDROIT

Countries do not immunise themselves from the UNIDROIT Convention by ignoring it. The effect of the Convention could be felt whenever in future an object bought by (say) an English museum or private collector is subsequently loaned or sold abroad to a country which has enacted UNIDROIT and is there claimed by a third country, or individual in a third country, which has also enacted it. To take another example, objects bought by English buyers might become the subject of title, quiet possession, freedom from encumbrance of fitness for purpose claims in English courts under the Sale of Goods Act 1979 when the buyers find that they cannot sell or lend the objects overseas without risk of seizure under Unidroit. And, of course, failure to implement Unidroit would disable the United Kingdom from taking advantage of its cross-border recovery scheme as regards objects unlawfully removed from the United Kingdom.