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Restitution of Looted Antiquities

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The decision of Noland J in *Autocephalous Greek-Orthodox Church of Cyprus and the Republic of Cyprus v Goldberg & Felman Fine Arts Inc and Peg Goldberg*[1] contains a lucid analysis of certain crucial issues arising from the modern epidemic of art thefts. Four mosaics, dating from the sixth century AD, were looted from the Church of the Panagia Kanakaria in Northern Cyprus. Their removal occurred during the Turkish occupation, some time between 1976 and 1979. Early in 1989, the Autocephalous Greek-Orthodox Church of Cyprus and the Republic of Cyprus (the plaintiffs in the action) became aware of the presence of the mosaics in Indiana. They had been acquired by purchase in Geneva on 7 July 1988 by an art dealer named Goldberg. The plaintiffs now sued both Goldberg and Goldberg & Feldman Fine Arts Inc (her company) for delivery up in the tort of replevin. Noland J awarded the orders sought on the following grounds.[2]

First, both the Church and the Republic had standing to maintain the suit. The Church had been in possession of the mosaics at the material time, was the owner thereof, and had not subsequently abandoned its property. The Republic was held to have a 'legally cognizable interest in the mosaics sufficient to confer standing', but (since return to the Church was requested) Noland J considered that further analysis of this interest would be otiose. A motion on the part of the Turkish Republic of Northern Cyprus to intervene as a plaintiff in the proceedings had earlier been rejected on the ground that that Government is not recognised by the USA.

Secondly, the appropriate conflict of laws principles were those of Indiana, the forum. Indianan principles would subject the validity of the Geneva transaction to Indianan law, as the system possessing the most significant contact with the transaction. The place of the alleged wrong (Geneva) was displaced in this regard because Switzerland lacked any significant contact: the delivery of the mosaics took place at Geneva airport, among parties who were not Swiss nationals; finance was provided by an Indianan bank; and the mosaics (which had been brought from Munich) never entered the Swiss stream of commerce.

Thirdly, even if the applicable conflict of laws principles had been those of Switzerland, those principles would equally have pointed in favour of Indianan law as the appropriate substantive system. Although primarily subjecting particular dispositions of movables to the lex situs, Swiss law recognises an exception where the goods are in transit at the material time and their situs is therefore casual. In such a case the law of the destination applies, and that was Indiana.

Fourthly, Indianan law did not permit a thief to convey good title to the stolen property, irrespective of the bona fides of the purchaser. The present transaction fell within none of the local exceptions to the principle nemo dat quod non habet: 'one who obtains stolen items from a thief never obtains title to or a right of possession of the item'. Further, it was irrelevant for this purpose whether the person from whom Goldberg purported to acquire the mosaics was the thief, or some intermediate party. An original theft vitiates subsequent dispositions.

Fifthly, even if Swiss were the applicable substantive law, the material result would be the same. Swiss law made the validity of such a disposition conditional on the buyer's good faith. Here there were ample circumstances to alert Goldberg to the possibility that the mosaics had been stolen; in the words of one witness, 'All the red flags are up, all the red lights are on, all the sirens are blaring'. Among the factors significant in this regard were Goldberg's knowledge that the mosaics came from an area under belligerent occupation; the nature of the goods themselves; their resale value relative to the price which Goldberg paid for them; the scanty but suspicious evidence which Goldberg had as to the identity of the seller (described to her by a middleman as a Turkish archaeologist who found the mosaics while assigned to Northern Cyprus); the questionable antecedents of the middlemen themselves; and the haste with which the Geneva transaction was concluded. Given such circumstances, the precautions which Goldberg took to verify the title were palpably inadequate. She never contacted the Church or the Republic (despite being told that the source of the mosaics was an 'extinct' church in the north of the island); nor did she approach the soi-disant Turkish Republic of Northern Cyprus in order to check the credentials of the archaeologist-vendor, or Interpol, or 'a single disinterested expert on Byzantine art'. Instead, and on her own testimony, she confined herself to unrecorded telephone calls to UNESCO at Geneva (to check on 'applicable treaties' rather than on the possibility of theft of the particular mosaics), to IFAR (from whom she requested no formal search of their lists of stolen art) and to customs officers in the USA, Switzerland, Germany and Turkey (but her testimony in this regard was not collaborated 'by a single document sent to or received from any such Customs Office'). Goldberg could not, therefore, be said to have purchased in good faith.

Sixthly, the plaintiffs were not out of time. Limitation statutes being classified as procedural under Indianan principles of the conflict of laws, the appropriate law of limitations was that of Indiana itself, the forum. The Indianan statute prescribed, in this context, a six-year period from the accrual of the cause of action. The defendants naturally argued that (the removal having occurred between August 1976 and November 1979, and the action having been commenced in March 1989) the claim was barred. The court rejected this defence on two grounds: (a) that the period did not begin to run until the plaintiffs either knew or could with

reasonable diligence have discovered the theft, and (b) that, even if the foregoing conclusions were misconceived, the running of the period was suspended by virtue of Goldberg's fraudulent concealment of material facts.

Noland J relied upon *O'Keefe v Snyder* 416 A 2d 862 in applying the 'discovery rule' to actions for replevin of personal property. He held that the plaintiffs, using due diligence, could not have known or have been put upon reasonable notice of the identity of the possessor of the mosaics until late 1988. Since the plaintiffs had mounted a systematic and wide-ranging endeavour to locate the mosaics from the moment they became aware of the misappropriation (having contacted the UN, UNESCO, leading museums and museum organisations, scholars, curators and the press) they had amply satisfied the requirement of the diligence. In particular, the court held that they should not reasonably have been alerted as to the current whereabouts of the mosaics by a report in a Turkish magazine dated June 1982, or by the recovery by Cyprus of frescoes and portions of the original Kanakaria mosaic in 1983 and 1984 with the assistance of the Menil foundation in Texas. The cause of action accordingly accrued no earlier than late 1988.

O'Keefe also supported the court's conclusion that replevin actions are subject to the doctrine of fraudulent concealment. Here, such concealment was established, and operated to suspend the limitation period,

> 'because the possessor and location of the mosaics were actively and fraudulently concealed from the plaintiffs. The fact that the mosaics were stolen and resurfaced in the art world after a period of approximately nine years indicates by its very nature that the mosaics were fraudulently concealed from the true owner . . .'

At the very least, the doctrine suspended the limitation period throughout 1983, and that was sufficient to dispose of the limitation defence. Further, the plaintiffs had satisfied the requirement of due diligence in this context, no less than in that of the discovery rule. Invocation of fraudulent concealment demands that the plaintiff exercise due diligence to investigate the claim and discover the fraud. The plaintiffs had done so as soon as they discovered the theft. A similar result to that on fraudulent concealment was justified, according to Noland J, on the additional grounds of equitable estoppel.

No short account can do justice to the complexity of the case, or to the rational sweep of Noland J's judgment. Some conclusions are nevertheless justifed. First, situations akin to that in *Goldberg* will arise with increasing frequency as looters become more resourceful and art rich nations more pertinacious. One need cite only the pending litigation over the so-called 'Lydian Hoard', or the recent sale in New York of Roman bronzes taken from a field in Suffolk (England) to demonstrate the scale of the phenomenon. The UNESCO Convention (1970) and bilateral treaties (such as those between the USA and Mexico, or the USA and Peru) clearly fail to address every conflict.

At its meeting in Strasbourg in October 1989, Committee 20 (Cultural Property) of the General Practice Section of the International Bar Association, considered both the new UNIDROIT draft Convention on the International Protection of Cultural Property and the Council of Europe's new draft European Convention on Offences relating to Cultural Property. These and related questions were also considered by a Committee of Experts meeting at the Instituto Superiore di Scienzi Criminali in Syracusa, Sicily at the end of October, and recommendations will be submitted.

Secondly, there are some interesting potential differences between Noland J's approach and that which an English court would be likely to take in similar circumstances. The Limitation Act 1984 (UK) now seeks to render limitation laws an issue of substance rather than procedure for the purposes of the English conflict of laws. Further the English domestic legislation (Limitation Act 1980) makes elaborate provision for the specific question of limitation periods in cases of conversion of chattels. It might also be noted that Noland J appears to have treated the appropriate choice of law rule as that relating to tort. English law would undoubtedly have classified the question as one relating to the disposition of property, and thus as primarily to be governed by the situs of the mosaics at the time the disputed transaction was made. But English law (like Switzerland) also recognises an exception to the *lex situs* rule when the situs is casual or the goods are in transit. In that event, the governing law appears to be the proper law of the transaction; which (on English principles) may well have been Indiana. The result may therefore have been no different on this point had the question before Noland J fallen to be decided by an English court. It is submitted, however, that a proprietary approach is preferable in litigation of this nature. Although the form of action is tortious (and a tort was undoubtedly committed), the essence of the claim is the violation of a possessory title. It is appropriate that the strength of that title (and the competing merits of a subsequent purported disposition in good faith) be determined by characterising the essential issue as one of title to movable property for purposes of the conflict of laws: see generally *Winkworth v Christie, Manson & Woods Ltd* [1980] Ch 496.

Thirdly, it is to be noted that some states possess a 'demand and refusal' doctrine, retarding the commencement of the limitation period until the claimant has demanded the return of the chattel. Such a demand can, of course, be made only when the claimant has identified the possessor and whereabouts of the goods. But in practical terms the result may well be similar to that obtaining in jurisdictions which subject the limitation period to doctrines of reasonable discovery and fraudulent concealment; because most jurisdictions operating the 'demand and refusal' doctrine make it conditional upon the claimant's having exercised reasonable diligence to run the abstracted property to earth: see generally Pinkerton vol 22:1 *Case Western Reserve Journal of International Law* (Fall 1989).

Can any significant criticisms be levelled at Noland J's analysis? He seems to pass somewhat lightly over the issue of fraudulent concealment, and the authors are not entirely convinced by his reasons for holding the Republic (as opposed to the church) an appropriate claimant. This conclusion appears to be grounded upon somewhat general notions of national patrimony, comparable to those perceived by the Irish Supreme Court in the *Derrynaflan* case.[3] But in general terms the lucidity and thoroughness of the judgment, and the contribution which it makes to the principles affecting transactional traffic in stolen artistic property, are warmly applauded. □

Footnotes

1 (1989) US District Ct, Southern District of Indiana, Indianapolis Division, Cause no IP 89-304-C. An appeal is currently pending.

2 It should be noted that the order in which the court's reasons are expounded below is not necessarily the order in which they appear in the judgment.

3 (1987) Unrep, December 16th; see Vergo (ed) *The New Museology* (1989) at 186-189.

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