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**VALUE, VERITY, AND VALIDATION:
THE INTERPLAY OF LEGAL AND ECONOMIC FACTORS
ON THE SECURITY AND MOBILITY
OF ART AND ANTIQUITIES**

In recent years, legislators and lawyers have developed an increasing interest in the qualitative nature of cultural objects. A common question to arise from this development concerns the legal remedies that should be available to the owners of such objects. There is a mounting conviction that claims relating to objects of art and antiquity are worthy of special treatment and should be governed by principles distinct from those that regulate generic things.

The fruits of this scrutiny are often statutory in form. Many countries now possess, for example, legislation that prescribes the ownership and destination of discovered portable antiquities, or grants legal immunity from seizure to works of art imported for the purposes of temporary public exhibition, or commands the return by national authorities of unlawfully removed cultural objects to the countries from which they have been removed, or penalises the secondary offence of dealing in cultural objects that have already become tainted by illicit removal. Much of the modern mass of legislation is aimed at either equipping legitimately held cultural objects for global travel or raising the international drawbridge against works of imperfect lineage. It is an index of the social importance of cultural objects that legislatures in almost every part of the globe now dedicate such close attention to them, and that the protection and management of the material culture attracts so voluminous a body of specific legislation.

However, legislation is merely one of the forms in which the modern fascination with cultural objects finds expression. Case law also provides increasing recognition, in a variety of contexts, that such objects have a distinct if not unique character. To many judges, identifying the value of such objects may be a more subtle and complex exercise than a simple essay in economic assessment and the redressing of wrongs to such objects may attract special remedies or sanctions that would not ordinarily attach to everyday commodities.

The nature of art has engaged the attention of philosophers as well as jurists. Prominent critics in this regard are Immanuel Kant and Count Tolstoy. Professor Stephen Guest has suggested in (2002) *VII Art Antiquity and Law* 305 at 307 that the value of art:

... is to be found in the value of its own existence, *independent* of its doing *anything* for us. We admire art *because* of this independent value, and so admire it as 'art for art's sake'. Looking at art this way introduces us to art's *austere* quality, through which we respect art, not for anything it 'does' for us, but because understanding it properly requires understanding something of importance, perhaps *great* importance about the world. And so we say that we want to look at a painting by Van Gogh *because* it is wonderful, not that it is wonderful because we want to look at it. This way of looking at art borrows from the great German philosopher Kant, who not only asserted art's independent value, but took the point even further. The appreciation of art, he thought, was akin to moral appreciation and capable of expressing our highest aspirations.

In legal terms, perhaps the most obvious sphere within which the special character of art manifests itself consists in the remedies available to a claimant who complains of having been wrongfully deprived of a cultural object. If the court finds in the claimant's favour as the party entitled to the object, should it order the return of the object or simply require the possessor to pay compensation?

The answer depends on the nature of the object and its meaning to the claimant. In general, the court will grant the remedy of specific restitution, or specific delivery, against the wrongful possessor wherever damages would be an inadequate remedy. Where the contested object has a unique value that surpasses its mere economic worth, or is otherwise irreplaceable, or possesses some peculiar subjective value to the claimant, the court may decline the wrongdoer's invitation to compensate the claimant merely by an award of financial compensation, and will instead require that the specific object be delivered up. In the case of cultural objects, there are several classes of claimant who may be able to show the necessary special relationship with the chattel.¹

A similar policy can be detected in the granting of remedies to the buyers of rare and distinctive cultural or historical objects. Whereas the normal remedy for a seller's failure to deliver, say, an agreed quantity of industrial commodities will be a judgment for damages, the seller of a distinctive cultural object may be required to deliver the exact object. This will be accomplished through a court order for specific performance. The rationale for the grant of such a remedy would be that damages alone could not adequately compensate the innocent party in question. A modern example is the Australian decision in *Smythe v Thomas* [2007] NSWSC 844, where the seller had agreed to sell to a private collector a 1944 Wirraway Australian Warbird aircraft. Rein AJ rejected an argument that the seller should be liable only to pay damages, saying 'in my view the nature of the subject of the bargain, which is not only a fine looking aircraft... but is a vintage and unusual item, leads me to conclude that the case is one in which... the relief of specific performance of the contract sought should be granted.'

Even where a court is compelled for some reason to award damages for the neglect or maltreatment of a cultural object, the peculiar relation between the claimant and chattel may justify the granting of a special sum, above the mere market value, to reflect its subjective importance to that claimant. Deliberate and perhaps even negligent wrongs to chattels that possess sentimental or 'heirloom' value may attract an additional amount, above and beyond the market valuation, to compensate for the distress, vexation and injured feelings suffered by the owner.² It would be interesting to see whether the public interest could be reflected in such an award, and whether a logic similar to that in the 'subjective distress' cases might persuade a court to grant a state or national museum a special compensatory sum, over and above the market value, to reflect the national iconic status of an object of vast public significance (such as the Crown of Saint Stephen) following its theft or destruction by an identifiable wrongdoer.

Other cases addressing other areas of obligation, both civil and criminal, reflect a similar sensitivity to the distinctive value of cultural objects. Three examples are offered in this paper, though many others could be cited.

In the landmark decision of the Court of Appeal in *Government of the Islamic Republic of Iran v Barakat Galleries Ltd* [2009] QB 22, [2007] EWCA Civ 1374, the fundamental question was the effect that the English court should give to the provisions of Iranian law that purported to confer on Iran the ownership of and the right of possession over antiquities that were allegedly buried on and illicitly excavated from Iranian territory. Inherent in this question were critical matters of international policy concerning the respect that a nation's heritage – the 'keys to its ancient history' – should command from its fellow nations. At para 2 of the collective judgment, Lord Phillips of Worth Matravers CJ expressed the Court's opinion thus:

**All museum practitioners
should be equipped
to anticipate and avert
legal problems.**

The unlawful excavation and trafficking of antiquities has become very big business. In 1970 the signatories to the UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property (ratified by the United Kingdom in 2002) recognised not only that it was incumbent on every State to protect the cultural property within its borders against the dangers of theft, clandestine excavation and illicit export, but also that it was essential for every State to become alive to the moral obligations to respect the cultural heritage of all nations and that the protection of cultural heritage could only be effective if organised both nationally and internationally among States working in close co-operation (recitals 3, 4 and 7). In the Supreme Court of Ireland, Finlay CJ said that it was universally accepted that one of the most important national assets belonging to the people is their heritage and the objects which constituted keys to their ancient history; and that a necessary ingredient of sovereignty in a modern State was and should be an ownership by the State of objects which constitute antiquities of importance which were discovered and which had no known owner: *Webb v. Ireland* [1988] I.R. 353 at 383.

In *Aerospace Publishing Ltd v Thames Water Utilities Ltd* [2007] EWCA Civ 3 controversy arose as to whether the proper redress available to the owner of an archive for the substantial destruction of the archive by flooding should take the form of a financial payment to represent the diminution in value of

the archive or should rather consist of a sum of money to reflect the cost of reinstating the archive. Both in principle and in quantum these two measures of assessment were significantly disparate. The judgment of Longmore LJ at paras 50–52 again reflects a significant regard for the identity of this collection of historically significant material as something distinct and distant from a mere assemblage of commercial goods:

(T)he present case is not a case of a readily marketable asset, nor yet of a unique chattel like a rare manuscript, a Picasso painting or a Stradivarius violin. In the first sort of case little difficulty will arise; reinstatement will not usually be appropriate as it would not be reasonable to reinstate if an article can be bought in by the claimant at a lower cost. In the case of a unique chattel it may be reasonable to reinstate but it will not be too difficult, by reference to past auction prices, to assess realistically a market value even though the chattel is itself unique. It will then be easy to compare figures for reinstatement and market value.... Here, by contrast, while cost of reinstatement is calculable (and is in the event largely agreed), market value is problematic to assess. Plutarch... regarded the human memory as an archive. In a similar way the archive in the present case represents the companies' memory and, as such, is an asset whose value could in conventional parlance be described as 'priceless' and whose actual value can only be calculated with considerable difficulty. The relevant experts agreed that it would be impossible to acquire a similar archive within a reasonable time and that, even if one were to sell the archive, it would have to be done through a number of auctions over a number of years in order to achieve the best reasonable price. In these circumstances it was submitted by [counsel for] for the claimants that the court should lean towards reinstatement unless the cost is prohibitive especially when as in this case the only way in which a resale value... could be realised would be by destroying the very characteristic (namely its unity and comprehensiveness) which gives the collection its true value in the first place.... In general terms, I would be minded to accept this submission on the facts of this case since it is difficult to regard what may be called the strictly economic value of the archive (what the authorities call the resale value) as being the sole value of the archive. It was a labour both of love and dedication to build up and then catalogue the archive in the first place. The fact that it has an economic value, in the sense of a commercial utility, should not blind one to the further fact that its value to the owner may be (and, in this case, is) greater than such sum as can be obtained by selling it at spaced-out auctions. Moreover, the fact that not every item in the archive can be precisely replaced does not mean that the cost of reinstatement is not, in general, the measure of damages to be preferred. If the archive of a famous and long-established art dealer such as the Fine Art Society Ltd or an auctioneer such as Christie's or Sotheby's were destroyed, it would be mealy-mouthed in the extreme to confine recovery to the re-sale value of individual items.

The third example concerns a criminal case. In *R v Hakimzadeh* [2009] EWCA Crim 959 (noted by Warner in (2010) XV *Art Antiquity and Law* 94), the Court of Appeal was called upon to determine the appropriate sentence

to be inflicted on a significant collector of ancient maps and manuscripts, who had violated the trust reposed in him through his membership of the British Library and the Bodleian Library by removing pages from bound manuscripts and books. Once again, the Court of Appeal accords substantial recognition to the notion that the acquisitive destruction of cultural and historic material differs qualitatively from other forms of malicious damage and theft. At paras 3 and 12, Blake J said:

The offences relate to theft and damage to books that the appellant removed from learned libraries in this country. Counts 1 to 9 and 15 relate to books taken from the British Library and counts 11 to 14 relate to the Bodleian Library. The common theme of these books was that they dealt with cultural contacts between Europe and what was then Persia from the 15th, 16th centuries and thereafter.... In our judgment, it is apparent that this kind of offending, where cultural property is concerned, is very different from offending where the seriousness can only be gained by the value in the open market of items which can readily be replaced and purchased, whether they may be goods in a supermarket or ordinary books which are still in print and available and it is simply the replacement value of items lost. Cultural property cannot be valued in the same way as cash or readily replicable items, and the gravamen is the damage to rare items of historical, intellectual and cultural importance, and that is why, in our judgment, a significant element of deterrence is always necessary to deter others from such crimes which diminish the intellectual and cultural heritage of the nation.

MONEY LAUNDERING AND THE PROCEEDS OF CRIME

The estimable qualities possessed by cultural objects do not mean that the uses to which they are put are necessarily positive and creditable outcomes. Modern courts have also been quick to recognise the peculiar suitability of art and antiquities for use in the financing and the orchestration of criminal activity and as a medium through which to disguise and sanitise the fruits of delinquency. Recognition of the criminal possibilities of a misuse of cultural objects has begun to penetrate decisions in civil law. Two statements by Tugendhat J illustrate this concern. In *Rachmaninoff v Sotheby's and Eva Teranyi* [2005] EWHC 258 QB at para 2, he said:

There is a dark side to the confidentiality surrounding the identity of an auctioneer's principal. The public and the law have increasingly come to recognise the potential for abuse by criminals of works of art, and of those who deal in them (consciously or unconsciously), for money laundering, and for disposing of the proceeds of crime. The less the legal risks involved in committing a work for auction, the more attractive the market in works of art and manuscripts becomes for criminals. The policy of the law, both in this jurisdiction and elsewhere, is to look more sceptically than would have been thought proper in the past upon those who have very valuable property for which they give no provenance.

Similar remarks were made by the same judge in the later case of *Aziz Kurtha v Michael Marks* [2008] EWHC 336 QB at para 140:

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 the 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 ss. 327–332, and that, whether or not there is a prosecution, he may be liable to a civil recovery order under Part 5 of the Act.

ECONOMIC EVALUATION

For all their distinctive character, cultural objects inhabit the same prosaic world as other assets. They can be bought and sold, owned and stolen, loaned and exhibited, valued and disparaged, like any other commodity. They can also become the subject of complex and sophisticated transactions between individuals and the state. Obvious examples of such transactions are the special taxation arrangements, such as conditional exemption, gift with reservation or acceptance in lieu of taxation that owners of art may negotiate with HMRC. Another example is the provision of public indemnity for travelling art, a realm in which the exercise of reaching agreement on the valuation of the work can provoke intense negotiation. State or public indemnity has of course become a common feature of modern art loans and a central element in the successful accomplishment of cross-border exhibitions. In its simplest form, it comprises an undertaking by a relevant authority in the borrowing state to compensate for harmful events occurring during the loan period. The undertaking may be given to the lender or owner of the work of art, or to the borrower. An undertaking to the borrower may be expressed to be for the benefit of the lender or owner. It need hardly be said that sound valuation principles are pivotal to the success of this process.

There are many reasons why the public authorities responsible for the management of cultural objects may require them to be valued, and many of these may have a significant impact on the mobility of the object. An object that has full clearance and unblemished credentials in matters affecting its valuation is a more confident and welcome visitor to foreign destinations than one whose proprietary and ethical identity is in doubt. Such doubt can indeed affect the value of an object and render the task of insuring it, whether by commercial cover or public indemnity, much more challenging.

SPECIAL ADVISORY PANELS

Sometimes national authorities such as Ministries of Culture find it appropriate to enlist the assistance of outside advisers in determining the value of a cultural object.

The Spoliation Advisory Panel

A case of such enlistment is the Spoliation Advisory Panel (SAP). This body is entrusted with the task of making recommendations to the Minister for the Arts concerning cultural objects whose owners ceased to have possession during the period 1933 to 1945. On several occasions the SAP has recommended that claimants seeking redress in respect of Holocaust-related cultural objects situated in UK museums be granted an *ex gratia* sum to reflect their former ownership and the circumstances of their loss. Such sums are recommended where the claimants' title has now ceased through the expiry of the limitation period or other legal event but where moral considerations are considered to necessitate a remedy. The Panel arrives at the recommended capital sum after taking the advice of professional practitioners in the art market. In the past, those whom the Panel have consulted have included senior personnel at Christie's and Sotheby's and a prominent fine art dealer who was for many years the Chairman of the Acceptance in Lieu Panel and a member of the Reviewing Committee for the Export of Works of Art.

In the Report of the Spoliation Advisory Panel on a Claim relating to a Painting by Jan Griffier the Elder, delivered on 18 January 2001, the SAP found it necessary to quantify the *ex gratia* payment that it should recommend for payment to the descendants of a former owner of the work in question. The work, which had a sufficient association with the Nazi Holocaust in order to persuade the Panel to recommend a remedy to the descendants of the former owner, had been since 1961 in the collection of the Tate Gallery, from which it could not be legally alienated without legislative change. The Panel emphasised that the claimant's title had long been extinguished and that there was no subsisting legal right to specific restitution or damages. For that reason, the Panel regarded it as inappropriate to recommend the conferment of that category of redress that is identified as compensation in the Panel's terms of reference, but did recommend an *ex gratia* payment. The Panel further decided that it was appropriate to recommend the payment of that *ex gratia* sum from general public funds rather than from the Gallery's own resources. In quantifying that amount, the Panel paid primarily in regard to its current market value, which it broadly assessed at £140,000. That figure was then adjusted to reflect (negatively to the claimants) the expenditure incurred by the Tate in insuring and conserving it and (positively to the claimants) the value to the public of having access to the work over the preceding forty or so years. '[W]e take into account the substantial benefit de-

rived by the Tate and the public from its possession of the work over the past four decades. This benefit would not have been enjoyed had the claimant and his family not been deprived of the work in the circumstances already described.’ (Paragraph 64 of the Report). The global figure that the Panel recommended to the Minister for the Arts (and which the Minister accepted) was £125,000.

The Treasure Valuation Committee

The Treasure Valuation Committee (TVC) is the body charged by the United Kingdom Government with the recommendation of rewards to be paid to the finders of those portable antiquities that constitute treasure for the purposes of the Treasure Act 1996. Subject to possible abatement on the grounds of inappropriate conduct by a finder or landowner, the TVC essentially grounds its recommendations on the notional market value of the treasure item in question. Market value is defined for this purpose as the price that a willing buyer would pay to a willing seller, and is generally quantified by reference to the hammer price that would be achieved at a public auction.

The techniques and resources available to the TVC were subjected to particular demand in the case of the Staffordshire Hoard of Anglo-Saxon material, which was the subject of a valuation by the TVC in November 2009. In recommending a reward slightly in excess of £3,285,000 for this extraordinary collection of over 1,600 objects, the TVC drew upon expert assessments that it had commissioned from three independent valuers, all of whom had proceeded based on a detailed and systematic prior cataloguing of the material by a distinguished archaeologist and museum practitioner. In reaching its conclusion as to the quantum of the reward to be recommended (a sum to be divided equally between the finder and the landowner), the Committee took account of numerous factors, including the possibility that the renown that the Hoard had already achieved through media coverage might encourage individual one-off collectors to bid strongly for small individual items in order to gain a piece of this historic assemblage. Of course, the notion of a public auction of the Hoard was entirely hypothetical, but it was upon this hypothesis that the TVC reached its conclusion as to the proper measure of the reward. The Secretary of State accepted the valuation and contemporary emphasis has now shifted to the challenge of raising the required sum from charitable and other sources.

The Significance of the Foregoing Cases

The practices exemplified, albeit perhaps in exceptional conditions, by the Griffier and Staffordshire episodes are significant in two respects.

First, they illustrate the occasional pragmatic resort by governmental authorities to panels of specialist advisers, whose own deliberations on value may in turn be informed by the opinions of expert valuers employed by commercial organisations or cultural institutions.

Secondly, they demonstrate the operation of the valuation process in a context that involves no legal wrongdoing or liability on the part of any of the participants, and in which the payment of the evaluated sum to the relevant recipients is, notionally at least, an *ex gratia* exercise. While the presence of these distinguishing features does not significantly detract from the value of these assessments as indicators of the general market worth of cultural objects, those features do indicate that assessments by bodies such as the SAP and TVC represent a narrow band within a much larger field of evaluation by public authorities.

LIABILITY FOR LOSS OR DAMAGE

One of the commonest situations calling for a valuation of chattels arises where the owner of, or some other person entitled to the possession of, a cultural object seeks to recover damages for the loss or impairment of that object owing to the defendant party's alleged default. A clear example of such a case would be the claim of an owner of a painting or sculpture against a bailee (such as a borrowing museum, or a bank holding as security, or an art storage or transportation company) for some misadventure occurring to the object while in the bailee's possession.

In this context, the market value of the object may of course be a highly relevant consideration for several reasons. First, if the object is lost, stolen, or destroyed, the primary measure of damages payable to the owner will be the market value of the object. Establishing this can be highly problematic on a rising market where the object has not been seen or valued over a long period immediately preceding the misadventure and particularly, of course, where the object is now no longer extant and capable of direct assessment. Secondly, if the object is merely damaged or otherwise impaired, the primary measure of damages will be either the diminution in value as between the original worth of the object before the wrong was committed and its subsequent worth after the wrong, or (where this is a reasonable course to adopt) the cost of reinstating the object to the condition that it enjoyed immediately before the infliction of the wrong. Where reinstatement leaves the object in an irredeemably inferior condition compared to its state immediately before the wrong, the court may award damages based on that diminution in addition to the cost of reinstating the object to its present deficient condition.

In all of these contexts, market value plays a critical role and there are numerous modern decisions that illustrate the difficulties in which a claimant can become embroiled where concrete evidence of value is lacking. Two such illustrations are offered.

In *Scheps v Fine Art Logistics* [2007] EWHC 541 (QB), the claimant Scheps owned a sculpture by Anish Kapoor (*Hole and Vessel II*). He instructed Fine Art Logistics to take possession of it and deliver it to Kapoor's studio in London for restoration. Scheps did not insure the work, which he had bought in June 2004 for around US \$35,000. Between the collection and delivery, the sculpture vanished from the Fine Art Logistics' warehouse, the judge finding that an employee had probably jettisoned it in a skip while the premises were being renovated.

Scheps sued Fine Art Logistics for either the return of the work or its value in damages, which he claimed to be some £600,000. There was no question that Fine Art Logistics had broken both their contractual duty, and their duty as a bailee, to care for the sculpture, and Teare J also held that certain limitation clauses in their contract with Scheps had failed to successfully limit their liability to a specified amount. That being so, Scheps was entitled to damages equivalent to the value of the sculpture at the date of conversion (September 2004), plus any further consequential losses.

The figure of US \$35,000 at which Scheps had bought the sculpture in June 2004 was not a reliable indicator of its market value even as early as September 2004, because there was cogent evidence that Scheps had acquired it at well below the going market rate. There was a considerable range of expert opinion as to the value of *Hole and Vessel II* both in September 2004 and at the time of judgment, the reasons being the subjective nature of art valuation generally as well as the highly conjectural pricing of modern art in particular. In reaching a figure, Teare J relied (in line with the submissions of expert witnesses) on evidence adduced as to the sale prices realised by other sculptures by Kapoor in recent sales.

Comparing the price for a work from Kapoor's 'transitional phase' (named *Untitled 1984*, which had been sold for £80,000 in May 2004) and a more modern, and ultimately more marketable sculpture (titled *Mother as a Ship*, which had been sold for £47,500 in 1998), and taking into account that the market value was shown to be increasing between May and September 2004, the judge determined the value of *Hole and Vessel II* at September 2004 to be some £132,000 (£135,000 minus the £3,000, which Scheps would have incurred through the contemplated repair costs). Taking into account the notional increase in value since September 2004 (which the experts agreed was a multiple in the region of two or three), the judge held that the value of the sculpture at the date of judgment was some £371,250.

Having concluded that the proper date for the assessment of the value of the sculpture was the date of the wrong and not the date of the judgment, Teare J nevertheless held that the later rise in value that the sculpture would have experienced after the date of its consignment to the skip was recoverable as a consequential loss. He rejected an argument that the defendant could not reasonably have foreseen this increase in market value and, therefore, should not be liable for it.

One interesting feature of this decision is that, for tactical reasons related to the increasing value of the work, Fine Art Logistics argued that they had converted the sculpture by disposing of it early in the bailment, whereas Scheps was arguing that Fine Art Logistics still had possession of it and were liable for its value at the date of judgment. Teare J upheld Fine Art Logistics on the technical point but (as we have seen) went on to hold that the later increase in value was recoverable as a consequential loss.

In *Kamidian v Holt and Others* [2008] EWHC 1483 (Comm) Mr Kamidian claimed damages for the depreciation in value of an alleged Faberge egg clock, which he had agreed to bail to a US exhibition organiser named Broughton International Inc (now insolvent). The clock had been damaged in transit between London, where the claimant had placed the clock under the supervision of the exhibition's guest curator, and Delaware, the place of the exhibition. The damage affected a bud and two stems on the decorative foliage adorning the clock. The trial was marked by a sharp conflict of expert evidence, counsel calling into question the proficiency and credibility of certain experts. The claimant gave no evidence as to carriage and insurance costs associated with the repair. There was, however, a repair estimate from the respected firm of Plowden and Smith, dating from 2001, which pitched the cost of repair to the broken bud at £740–£780.

The claimant's only witness on the depreciation of the artefact gave no effective evidence as to the diminution in value that was attributable to the damage in transit, as opposed to diminution attributable to the rumour and innuendo precipitated by the present litigation. In the circumstances, the question resolved itself into the cost of repair. Much of the evidence turned on whether the broken parts of the clock had already been damaged and repaired on a prior occasion years before the exhibition bailment. Such earlier damage and repair would have weakened the clock's resistance to pressures in transit and would have affected its pre-exhibition value, a matter clearly relevant to an assessment of its depreciation. In holding that such prior damage and repair had taken place (probably before the clock was sold at auction in 1991) Tomlinson J further observed that the claimant had chosen not to effect the necessary contemporary repairs at any time between the discovery of the contemporary damage and the date of trial, a period of some eight years, remarking that 'There is of course no compelling reason why any defendant

herein should, if otherwise liable, pay more than what would have been the cost of repair in 2001 [*the year in which the damage was investigated after the clock returned from the US*].² The judge assumed for this purpose that the clock would have been repaired in London and that Mr Kamidian would have had to pay, and would not have been able to recover, VAT. In the event Tomlinson J held that £1,000 was the appropriate sum for the recoverable cost of repairing the damage to the bud. He further concluded that a misalignment in the clock (the slant) antedated the exhibition and was not attributable to it.

THE ARMORIE V DELAMIRIE PRINCIPLE

An ancient principle of the common law, recently discussed by the Court of Appeal in *Zabihi v Janzemeni* [2009] EWCA Civ 851, offers some assistance to the claimant who cannot establish by direct evidence the value of an art object belonging to him that has been lost, stolen or destroyed.³ In conventional form, the principle holds that where a person (such as a bailee) has committed a wrong upon another's chattel and by his fault deprived the innocent party of the ability to prove its value (or, presumably, in an appropriate case the amount of its depreciation), the court may resolve the lack of evidence by making any necessary presumption in the innocent party's favour. This principle was traditionally expressed in Latin through the adage *omnia praesumuntur contra spoliatorem*.

An early version of the principle was applied in the familiar case of *Armory v Delamirie* (1721) 1 Stra 505 where a chimney sweep's boy found a jewel that had been set in a socket, and took it to a jeweller for valuation. The jeweller's assistant only handed the socket back to the boy. In response to the boy's claim in conversion, the jeweller challenged the boy to prove the value of the missing jewel. Pratt CJ rejected this defence, saying that:

... unless the defendant did produce the jewel, and shew it not to be of the finest water, they [the jury] should presume the strongest against him, and make the value of the best jewels the measure of their damages....

In *Zabihi v Janzemeni* the Court of Appeal set some boundaries to the *Armory* principle. Those boundaries appear to be as follows:

1. If the court concludes that one party is telling the truth as to value, the presumption sanctioned by *Armory* has no place. *Armory* can neither compel the acceptance of evidence that the judge does not believe nor require the rejection of evidence that he finds to be truthful: [2009] EWCA Civ 851 at para 31 per the Chancellor, citing *Malhotra v Dhawan* [1997] Med LR 199 at 322. Any presumption indicated by the *Armory* principle must be consistent with the judge's findings of fact and the evidence before him: [2009] EWCA Civ 851 at para 51 per Moore-Bick L.J.

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2. Nor can the *Armory* presumption apply where, as here, the establishment of a true value is frustrated by the dishonest evidence of both parties, with the effect that any presumption against either party 'is matched by the equal and opposite presumption against the other.' A party who gives a dishonest and discredited version of the value of the goods cannot thereafter assert that it was the conduct of the defendant that disabled him from bringing the evidence necessary to establishing the true value. Such a party is hoist by his own petard.

3. Moreover, the *Armory* principle cannot, it appears, become engaged when the lack of underpinning evidence available to establish the parameters of value is so extreme as to make the application of the principle little more than guesswork. Such was the position in the present case, which differed sharply from *Armory* itself on this point:

... some facts must be established if the relevant assumption is to have any rational basis. In the present case all that the judge was told was that each set of jewellery comprised a matching necklace, earrings, bracelet and ring in diamonds and gold. In view of the evidence of the expert witnesses about the different characteristics that affect the value of diamonds alone, I agree that that did not provide a sufficient basis for making any assumption of about its quality or value. [2009] EWCA Civ 851 at para 52 per Moore-Bick L.J.

The exact scope of the residual territory governed by the *Armory* principle after these boundaries have been marked may still be uncertain. Moore-Bick L.J., at least, seemed inclined to think even some 'relatively imprecise' but credible description of the jewellery delivered to Mr Janzemini 'would probably have been sufficient to enable a valuation to be made...'; a position that could not be reached, however, where each party was 'equally responsible for holding the truth from the court.' However, Moore-Bick L.J. also suggested that the only clear field of operation for the *Armory* principle (and even here there may be doubt) exists where a defendant 'wilfully' suppresses evidence that would otherwise have been available to the claimant to enable him to prove his case. His Lordship had difficulty in accepting that a mere 'inability to make the goods available for inspection' would suffice for that purpose. He went on to observe at para 51:

In the absence of evidence to the contrary, it would seem more logical to assume that the goods were of fair average quality rather than the best or worst of their kind.

The position is not entirely clear, but it appears from the context of this observation that Moore-Bick L.J. was limiting his preference for a middle-range or 'fair average' value to cases where the defendant was guilty of a non-wilful failure to produce the chattel (or relevant evidence of its value). In fact, it is possible to detect in Moore-Bick L.J.'s judgment a lack of enthusiasm even for the core principle in *Armory*, which he described it as 'difficult

to reconcile' with two fundamental tenets of the law of damages: the indemnity rule and the rule that a claimant must prove his loss. Any principle that potentially granted a claimant the benefit of a presumption of 'facts most favourable' to him sat uneasily alongside those tenets (unless, one might suggest, the parties can be deemed to have agreed to that effect). What is clear is that the *Armory* principle is delimited at two extremes. At one extreme, it cannot withstand or controvert real positive evidence as to the value of the object, to which the application of the principle itself would run counter. Indeed, it has been held that where a witness gives positive evidence as to value (for example, by testifying that the lost object was gold), the judge should grasp the nettle and accept or reject that evidence, rather than fall back on the *Armory* principle. On the other hand, it seems that the principle cannot get to the starting line without some form of contextual catalyst or reference point.

LOSS OF EVIDENCE OUTSIDE THE REALM OF LEGAL CLAIMS

It might be questioned as to whether a principle akin to that in *Armory v Delamirie* might justifiably be invoked to illuminate certain claims that do not base themselves on legal title. An example might be a claim before the Spoliation Advisory Panel, where the parties accept that the claimant's original title (if any) has been extinguished through the expiry of the limitation period. If the current possessor challenges the claimant to prove his original ownership, arguing that there is no sufficient contemporary evidence to that effect, and the claimant can show that reasonable vigilance and pertinacity on the part of the current possessor at the time of acquisition would have enabled such now-lost evidence to be brought to light, the Panel might in theory consider making an adverse presumption against the current possessor. However, such prospects belong, at present, solely to the realm of conjecture.

ANTI-SEIZURE LEGISLATION AND DAMAGES CLAIMS

So far as can be determined, all the national anti-seizure statutes that are currently in force seek only to immunise a borrowed cultural object from seizure by court order or from some other legally-imposed restraint on its physical movement. Such statutes do not (at least explicitly) prevent the claimant from claiming some other form of legal remedy from the borrower, such as damages for conversion, or monetary restitution based on unjust enrichment. A claim for damages in conversion may offer a particularly effective way of circumventing an anti-seizure statute that debars only physi-

cal recovery. Since the primary measure of damages in conversion is the market value of the object, this again represents a zone where valuation could become critical.

PAYMENT FOR USE AND THE VALUE OF PUBLIC BENEFIT

The monetary remedies provided by law do not aim solely to compensate loss: they may alternatively grant the victim of a wrong monetary restitution to reflect the wrongdoer's unjust enrichment. Such a remedy can be observed in the doctrine of the reasonable hiring charge that can apply in favour of an owner of goods against a party who has wrongfully detained them. Such a remedy may award to the innocent party a reasonable sum to reflect the outlay that the wrongdoer would have had to expend to gain the use and enjoyment of the object over the period of detention.

There are glimmerings of such a remedy in the first Report of the Spoliation Advisory Panel. In almost every case, the concern of the Panel has been to assess the capital market value of the work, and to adjust that value in the light of benefits conferred or expenditure incurred by the possessing museum over the period of its possession, at least where these forms of expenditure or benefit have worked to the advantage of the claimant or represent money that the claimant might otherwise have paid personally. In the Griffier case, however, the Panel made a further positive allowance in the claimant's favour, to reflect the benefit accruing to the public from the presence of the work in a major public collection. While the Panel operated with a broad brush, and while this was in no sense a legal case attracting a legal remedy, there were clear resonances between the juridical doctrine of the reasonable hiring charge and the inclusion of an *ex gratia* sum for public use and benefit in the Griffier case.

ILLICIT ARCHAEOLOGY AND THE VALUE OF INFORMATION

Claims for loss of information (for example, damage to the context of a cultural object caused by illicit excavation) may offer a useful alternative or collateral remedy to claims for deprivation of tangible assets. Suppose, for instance, that the archaeological authority of a state having ownership and rights of possession over below-ground antiquities receives evidence that antiquities belonging to that state have been illegally excavated from a previously unknown site, and manages to apprehend the parties who converted them, only to find that the objects themselves have disappeared. The archaeological authority can prove only the place and dimensions of the excavation

and the broad historical nature of the site but cannot prove the specific character and value of the objects removed. The value of the context destroyed by the illicit excavation may have been beyond price: the primary loss will have been the deprivation of knowledge and not the financial value of the artefacts. A willingness on the part of the courts to treat the unlawful destruction of intangible information as attracting a liability akin to that in conversion, and to make creative use of case law relating to damages for loss of opportunity, might offer a remedy in this context. As the author has observed in the third edition of his treatise on Bailment:

The time may be fast approaching when a country whose national law confers on it the right to possession of previously undiscovered archaeological objects might sue for damages to compensate it for the non-material harm caused by an unlawful excavation. The basis of the claim would be the destruction and loss of irreplaceable contextual information about the country's historical identity: those 'keys to its ancient history' that a lawful professional excavation would have yielded and preserved for future generations. Such damages might be claimed in addition to the return of the tangible antiquities themselves and/or other damages for their conversion. Claims might arise on facts akin to those in *Government of the Islamic Republic of Iran v Barakat Galleries Ltd* [2007] EWCA Civ 1374, [2009] QB 22, or from the looting of archaeological sites in areas of armed conflict like Iraq or Afghanistan. It need hardly be said that the challenge of attaching a value to the lost information would loom large in any such inquiry.

The bringing of such a claim would require courage, not least in economic terms. However, given the willingness of states like Iran and Turkey to adopt an assertive stance on the recovery of looted antiquities, and given the creative reasoning adopted by modern courts in sympathy with states dispossessed of their material past, the occasion for such an argument may not be far distant.

SOME CONCLUSIONS

The present paper has attempted to show that authoritative valuation can be a pivotal element in resolving the identity, reputability, security, marketability, and mobility of a work of art. The law has developed highly complex principles in order to determine value and to recognise the particular nature of art as a market phenomenon. Mastering these principles is no easy task, even for lawyers, but it can be vital to the successful management of art transactions, whether those transactions are sales, loans, or other bailments. Few museums could contemplate involvement in a case like *Scheps* or *Kamidian* with anything other than horror.⁴

*An object that has
full clearance and
unblemished credentials
in matters affecting its valuation
is a more confident and welcome
visitor to foreign destinations
than one whose proprietary
and ethical identity
is in doubt.*

A number of further considerations underline the importance of knowing how to value a work of art. First, not all cases involve adversarial contests with the obligatory panoply of judges, advocates, and ‘win or lose’ solutions. Questions of valuation, and the selective transposition of valuation principles into situations outside the courtroom, can further the ends of justice and national policy even in cases where no legal claim or obligation lies: an example in England is the work of the Spoliation Advisory Panel. In certain contexts, moreover, an appreciation of the value of art means taking account of something more than its mere economic or market worth, as can be seen in cases about national treasures and family heirlooms.

Claims for monetary compensation following episodes of damage or loss have always been a commonplace in the art world, but they appear if anything more likely to arise in modern conditions. So much is suggested by the spate of modern case law clustered around the *Armory v Delamirie* principle. Claims for damages might help claimants to overleap the barriers on the physical restitution of art that are imposed by anti-seizure statutes, while the value of information squandered by irresponsible excavation or the abstraction of cultural objects may itself one day become a fit candidate for compensation.

In considering such innovations, it is important to appreciate that not all financial claims against museums need take the form of demands for the reparation of losses, as opposed to the restitution of unjust benefits. The time may not be far distant when we shall see claims against museums for a reasonable hiring charge to represent the museum’s benefit and enjoyment of a work of art during a period in which it had possession without the true owner’s consent. One wonders how many museums are prepared for such a claim.

The ultimate message advocated by this paper is a simple one. It is an appeal for greater awareness on the part of those who administer collections. All museum practitioners should be equipped to anticipate and avert legal problems. They should be trained to foresee potential disputes about matters of responsibility and value as well as to respond constructively to ominous signals before they degenerate to a state of legal gridlock. Such ability can be achieved through imaginative cross-disciplinary education and the development of a more positive instinct to think ‘outside the box’.

Few, if any, of the issues discussed in this paper are beyond the reach of careful and well-informed advance provision. Much of the litigation that has been discussed could have been neutralised or abated had the parties been prepared to predict risks and tackle potential misadventures at the pre-contentious stage. A deeper understanding of legal principle in this field might not only rescue museums and other collectors from corrosive controversy and massive cost, but also encourage new insights into the personality and worth of their own collections.

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ENDNOTES

- 1 The claimant may be a foreign state alleging that its domestic laws grant it superior rights of possession over undiscovered portable antiquities or other cultural objects unlawfully removed from its territory; or a museum having independent legal status and rights of ownership in its country of location; or a private collector whose premises have been burgled. Some claimants are victims of persecution (or their successors) whose loss may have occurred in circumstances of gross violation of human rights.
- 2 So much can be inferred from authorities on wrongs to pets and other animals: see Palmer and Hudson, Bibliography.
- 3 See generally Palmer, *Bailment* (3rd edn, 2009) Chapter 37, paras 37–010 to 37–012, on which the following account is based.
- 4 Curators who remain sceptical only need to look to the *Blundell* case in New South Wales to understand the sorts of blunder that can occur in borrowing art and the advisability of keeping disputes out of court: *Blundell v New South Wales* (unreported, 18 June 1998, NSW District Court), analysed by Palmer (1998) 2 *Art Antiquity and Law* 417.

BIBLIOGRAPHY

- Kant, I. (1952) *The Critique of Judgment*, trans. Meredith, Oxford: Clarendon.
- Palmer, N. (ed.) (1998) *The Recovery of Stolen Art*, Kluwer Law International and the Institute of Art and Law.
- Palmer, N. (2009) *Bailment*, 3rd edn, Chapter 37, London: Sweet and Maxwell.
- Palmer, N. and Hudson, A. (1998) 'Claims for Distress and Loss of Enjoyment involving Chattels', in N. Palmer and E. McKendrick (eds) *Interests in Goods*, 2nd edn, London: Informa.
- Sigmond, J.P. (2005) 'Some Thoughts on the Importance of Cultural Heritage and the Protection of Cultural Goods', *X Art Antiquity and Law* (Institute of Art and Law), 63.
- Tolstoy, C. (1980) *What is Art?*, trans. Maude, London: OUP.