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Attorney General v Trustees of the British Museum (Commission for Looted Art in Europe intervening)

Chancery Division

[2005] EWHC 1089 (Ch), [2005] Ch 397

HEARING-DATES: 24, 27 May 2005

27 May 2005

CATCHWORDS:

Charity - Disposal of asset - Power - Museum's collection including looted objects - Heir of previous owner having moral claim to their return - Statutory prohibition on museum disposing of objects in collection - Whether Attorney General or court having power to authorise return - Whether trustees having power to ignore limitation defence to effect return - British Museum Act 1963 (c 24), s. 3(4) (as amended by Museums and Galleries Act 1992 (c 44), s. 11(2), Sch. 8, Pt I, para 5(a))

HEADNOTE:

The trustees of the British Museum considered a claim brought by the heirs of F that four old master drawings in the museum's collections had been the property of F and had been stolen from him by the Gestapo during the Nazi occupation of Czechoslovakia. The trustees were sympathetic to the claim and asked the Attorney General to permit the restitution of the drawings to F's heirs on the ground that it was morally right to do so. There was a principle which permitted the Attorney General or the court to authorise a payment out of charity funds where there was a moral obligation to make such a payment, however, the Attorney General was concerned that the prohibition in section 3(4) of the British Museum Act 1963 n1 on the disposal of objects comprised in the museum's collections prevented the application of that principle to authorise the restitution of the drawings. By a Part 8 claim the Attorney General sought the determination of the court as to whether the trustees could dispose of objects which formed part of the collections of the museum where, by reason of the circumstances surrounding their acquisition, there was a moral obligation to do so. The Attorney General also sought the court's determination as to whether, in circumstances where they were sued for the return of the objects, the trustees could omit to rely on a limitation defence in order to effect a transfer they believed they were morally obliged to make. It was assumed for the purposes of the Part 8 proceedings that F's heirs did not have a legal claim against the trustees.

On the claim-

Held, that the extent of the prohibition on the disposal of objects in section 3(4) of the British Museum Act 1963 was clear and prevented the recognition of implied exceptions; that there was no express statutory exception to justify ignoring on moral grounds the prohibition on dispositions; that since the word "disposition" was of its nature of wide import and did not exclude omissions, a failure by the trustees to rely on a limitation defence in order to effect the transfer of an object was as prohibited by section 3(4) as a delivery by the trustees; that the drawings were part of the collections of the museum; and that, accordingly, no moral obligation could justify their restitution to F's heirs (post, paras 40-47).

In re Shipwrecked Fishermen and Mariners' Royal Benevolent Society [1959] Ch 220 distinguished.

In re Snowden, decd [1970] Ch 700 considered.

CASES-REF-TO:

Attorney General v Governors of Christ's Hospital[1896] 1 Ch 879

Attorney General v Great Eastern Railway Co (1880) 5 App Cas 473, HL(E)

n1 British Museum Act 1963, s. 3(4), as amended: see post, para 3.

Berkhamstead School Case (1865) LR 1 Eq 102

Binder v Alachouzos [1972] 2 QB 151; [1972] 2 WLR 947; [1972] 2 All ER 189, CA

Construction Industry Training Board v Attorney General [1973] Ch 173; [1972] 3 WLR 187; [1972] 2 All ER 1339, CA

Hazell v Hammersmith and Fulham London Borough Council [1992] 2 AC 1; [1991] 2 WLR 372; [1991] 1 All ER 545, HL(E)

National Anti-Vivisection Society v Inland Revenue Comrs [1948] AC 31; [1947] All ER 217, HL(E)

Royal Society's Charitable Trusts, In re [1956] Ch 87; [1955] 3 WLR 342; [1955] 3 All ER 14

Shipwrecked Fishermen and Mariners' Royal Benevolent Society, In re [1959] Ch 220; [1958] 3 WLR 701; [1958] 3 All ER 465

Shrewsbury Grammar School, In re (1849) 1 Mac & G 324

Snowden, decd, In re [1970] Ch 700; [1969] 3 WLR 273; [1969] 3 All ER 208

CASES-CITED:

The following additional cases were cited in argument:

Attorney General v Brettingham (1840) 3 Beav 91

Freeston's Charity, In re [1978] 1 WLR 120; [1978] 1 All ER 481

Gouriet v Union of Post Office Workers [1978] AC 435; [1977] 3 WLR 300; [1977] 3 All ER 70, HL(E)

London County Council v Attorney General [1902] AC 165, HL(E)

The following additional cases, although not cited, were referred to in the skeleton arguments:

P v P (Ancillary Relief: Proceeds of Crime) [2003] EWHC 2260 (Fam); [2004] Fam 1; [2003] 3 WLR 1350; [2003] 4 All ER 843

R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte [2000] 1 AC 61; [1998] 3 WLR 1456; [1998] 4 All ER 897, HL(E)

R (Jackson) v Attorney General [2005] EWCA Civ 126; [2005] QB 579; [2005] 2 WLR 866, CA

Strickland v Weldon (1885) 28 Ch D 426

INTRODUCTION:

CLAIM

By a Part 8 claim form the claimant, the Attorney General, sought the determination of the court as to the following questions. (1) Whether, as a matter of law, where the defendants, the trustees of the British Museum, considered that they were under a moral obligation to return an object which formed part of the collections of the British Museum to a previous owner of the object or his heirs by reason of the circumstances leading up to their acquisition of the object, it would be possible for the principle in In re Snowden, decd[1970] Ch 700 to be applied to permit such a return (a) whether or not the object was one to which section 5(1) or 5(2) of the British Museum Act 1963 applied? (b) whether the object was one to which section 5(1) or section 5(2) of the British Museum Act 1963 applied? (c) or at all? (2) Whether, in circumstances where: (a) the defendants were sued for the return of an object comprised in its collections by the object's former owner or his successors; and (b) but for the provisions of the British Museum Act 1963 the principle in In re Snowden might have been applied so as to permit such return of the object, the defendants might properly on the ground (and only on the ground) that they regarded themselves as under a moral obligation to return the object to the person or persons suing them for its return, omit to plead or to rely upon a defence based upon the provisions of the Limitation Act 1980 or some earlier limitation Act which would or might be available to them and, if so, whether they

could do so (i) with or(ii) without the approval of the Attorney General. (3) On the footing that four drawings which were looted from a Dr Feldmann in 1939 and which were subsequently acquired by the defendants formed part of the collections of the British Museum, whether, in the event that (i) the defendants should consider themselves, by reason of the fact of the drawings having been looted, under a moral obligation to return the drawings to the heirs of a Dr Feldmann, and (ii) the Attorney General should approve such return, the In re Snowdenprinciple would be capable of being applied so as to permit the defendants (if the Attorney General approved) properly to return the drawings to the heirs of Dr Feldmann.

Sir Andrew Morritt V-C gave the Commission for Looted Art in Europe leave to intervene.

The facts are stated in the judgment.The court will not direct or approve anything which is inconsistent with a statute: see Construction Industry Training Board v Attorney General [1973] Ch 173, 187. The powers of a statutory corporation such as trustees extend no further than what is expressly stated in its governing statutes, is necessary and properly required for carrying into effect the purposes of its incorporation or may fairly be regarded as incidental to or consequential on those things which the legislature has authorised. The Berkhampstead School Case (1865) LR 1 Eq 102 is explicable on the basis that the relevant statute had become impractical. The court may take a broad view of what is consistent with the terms of the statute and what aids or supplements those terms: see In re Shipwrecked Fishermen and Mariners' Royal Benevolent Society [1959] Ch 220.

The existence of a comprehensive code defining what a statutory corporation can do in a particular respect is a bar to its having power to do other things in the same respect: see Hazell v Hammersmith and Fulham London Borough Council [1992] 2 AC 1, 33-34. It is inappropriate to construe section 3(4) of the British Museum Act 1963 as permitting any kind of disposal not expressly authorised. Where Parliament has specified by statute where the public interest lies, neither the court nor the Attorney General may take a different view: see National Anti-Vivisection Society v Inland Revenue Comrs [1948] AC 31.

There is a question as to whether the principle in In re Snowden, decd [1970] Ch 700 operates positively by vesting a power in the trustees and/or the Attorney General, or merely negatively by allowing the Attorney General to waive his right to sue for what would otherwise be a breach of duty. If the principle operates negatively then the Attorney General was simply choosing not to enforce a right that the statute gave him and arguably was not acting contrary to the statute. Cross J in that case referred to the power in terms which indicate that it is a freestanding positive power rather than a mere negative power not to complain. Charity proceedings can be brought by persons other than the Attorney General. If the "waiver of the Attorney General's right to sue" theory were of general application, it would obviate the need for court or Charity Commission involvement in many cases where it was assumed or held to be necessary: see In re Royal Society's Charitable Trusts [1956] Ch 87 and In re Freeston's Charity [1978] 1 WLR 120. If the power is merely an example of the Attorney General's choosingnot to sue for breach of duty, the object disposed of in breach of trust would be recoverable by new trustees.

The Attorney General cannot bind his successors. It is unclear, however, whether a person can bring judicial review proceedings to prevent the Attorney General going back on what his predecessors agreed: see Gouriet v Union of Post Office Workers[1978] AC 435.

There is a distinction between an enabling provision in a statutory constitution and a restrictive one. A provision enabling a statutory charity to do something positive in the way of dispositions may be construed as not implying a restriction which negatively prevents a disposition from being authorised by way of a court scheme or Snowden power: compare the Shipwrecked Fishermen case [1959] Ch 220 with Hazell v Hammersmith and Fulham London Borough Council [1992] 2 AC 1.

Trustees have power to dispose of an object which forms part of their collections by way of a bona fide compromise of a claim to that object. Because of its corporate status the museum has power to sue and to be sued in its corporate name. That power has to include a power to compromise litigation in which the museum is involved. If the claim had been made for restitution of an object comprised in the collection of the museum it might have been compromised on terms which included a disposal of the object by the trustees in favour of the claimant. In such a case if the claim had been made good it would have been established that the object in question was not and never had been an object to which the prohibition in section 3(4) applied.

If the Snowden principle is not capable of application then the same result cannot properly be achieved indirectly by the trustees deliberately failing to plead a limitation defence which would otherwise be open them.

Christopher McCall QC for the Trustees of the British Museum. In In re Snowden, decd [1970] Ch 700 Cross J expressed his conclusions in terms which applied to charities at large, not just to charitable trusts.

The court has no inherent jurisdiction to vary the provisions governing the administration of a statutory charity in a way which conflicts with the relevant statute: see In re Shrewsbury Grammar School (1849) 1 Mac & G 324, 333. However, Snowden was not concerned with changing the constitution of the charity but simply sanctioned a one-off transaction where the trustees and the Attorney General were satisfied that it was not in the public interest to abide by the strict letter of the charity's constitution. That transaction fell within the discretion of the Attorney General: see Attorney General v Brettingham (1840) 3 Beav 91 and London County Council v Attorney General [1902] AC 165. The application of the principle in such circumstances does not contradict the relevant statute but is supportive of it.

If the Snowden principle is a problem for a statutory charity then it is a problem for every charity, since all charities are limited to stated purposes.

The Snowden jurisdiction is justified on the basis that in appropriate cases it is right that charities should be able to recognise moral obligations because it is the public acceptance of moral obligations which is the fundamental on which charity is based. It is contrary to the public interest to say that there are some categories of charity which lack the fundamental ability to respect the underlying tenets of charity.

Section 3(4) does not oust the Snowden jurisdiction but is a factor to be considered in determining whether in the exercise of that jurisdiction theAttorney General should permit the trustees to give effect to the moral obligation they feel. A statutory trust is of particular force and a departure from such a trust has to be justified with particular clarity. The test is very high.

If the Snowden principle does not apply it is not open to the trustees to fail to plead a limitation defence which would give them good title to the drawings.

Guy Newey QC and Clare Ambrose for the Commission for Looted Art in Europe. The Shipwrecked Fishermen-case [1959] Ch 220 suggests that the court has jurisdiction to make a scheme in relation to a statutory charity so as to aid and supplement the statutory scheme. The exercise of the Snowdenjurisdiction involves authorising trustees to act outside the literal terms of the statutory framework provided for the charity. In each case, however, Parliament must be taken to have intended to have legislated in the context of the Attorney General's role as protector of charity. Accordingly, the British Museum Act 1963 should be read as impliedly qualified to allow the Attorney General to fulfil his normal functions as protector of charity and to exercise the Snowden jurisdiction.

National Anti-Vivisection Society v Inland Revenue Comrs [1948] AC 31 is not incompatible with the proposition that a statute should be read in such a way as to further, and not frustrate, the public interest.

Section 15 of the Trustee Act 1925 confers a power on trustees to reach a compromise "if and so far only as a contrary intention is not expressed in the instrument ... creating the trust": see section 69(2). Section 3(4) of the British Museum Act 1963 should not be interpreted as denying the museum the power to compromise. No more should it be read as excluding the Snowdenjurisdiction.

Cross J in Snowden held that when considering whether to sanction compromises judges should take account of the moral merits of the claim. If moral merits are relevant to issues of compromise on legal merits they are suitable for consideration alone and in the absence of legal merits.

COUNSEL:

William Henderson for the Attorney General.

JUDGMENT-READ:

Cur adv vult 27 May.

PANEL: Sir Andrew Morritt V-C

JUDGMENTBY-1: SIR ANDREW MORRITT V-C:

JUDGMENT-1:

SIR ANDREW MORRITT V-C: handed down the following judgment.

Introduction

1 The trustees of the British Museum were incorporated by section 14 British Museum Act 1753 (26 Geo 2, c 22). By section 9 of the same Act it was provided that the "several collections, additions and library" of the museum "shall remain and be preserved ... for public use to all posterity". Subject to various powers of disposal conferred on the trustees by subsequent enactments, none of which is presently relevant, the obligation imposed by section 9 of the 1753 Act remained in force until the enactment of the British Museum Act 1963.

2 In 1946 the trustees bought at auction at Sotheby's for the aggregate sum of nine guineas three old master drawings, namely The Holy Family by Niccolo dell'Abbate, An Allegory on Poetic Inspiration with Mercury and Apollo by Nicholas Blakey and Virgin and infant Christ, adored by St Elizabeth and the infant St John by Martin Johann Schmidt. At about thesame time the Keeper of Prints at the British Museum, Mr Campbell Dodgson, acquired a fourth, St Dorothy with the Christ Child by a follower of Martin Schongauer. This drawing was part of the bequest made by Mr Dodgson in favour of the British Museum which took effect in 1949. Since 1946 and 1949 respectively those drawings have been held by the trustees as part of the collections of the British Museum.

3 On 30 September 1963 the British Museum Act 1963 came into force in the place of inter alia the 1753 Act. It provided for the trustees to continue as a body corporate (section 1) and conferred on them power, subject to the restrictions imposed on them by virtue of any enactment (whether contained in that Act or not) to enter into contracts and other agreements, to acquire and hold land and other property, and to do all other things that appear to them necessary or expedient for the purposes of their functions (section 2). Section 3(1) to (3) require the trustees to keep the objects comprised in the collections at the places and in the manner there specified. Section 3(4) provides:

"Objects vested in the trustees as part of the collections of the museum shall not be disposed of by them otherwise than under section 5 or 9 of this Act or section 6 of the Museums and Galleries Act 1992."

Section 5 authorises the trustees to dispose of duplicates, objects made after 1850 and objects unfit to be retained in the collections of the museum. It also entitles the trustees to destroy useless objects. Section 9 of that Act and section 6 of Museums and Galleries Act 1992 entitle the trustees to transfer objects comprised in the collections of the British Museum to the trustees of any other of the specified national museums.

4 In 1970 Cross J determined that the court or the Attorney General may authorise

"a payment ... out of charity funds which is motivated simply and solely by the belief of the trustees or other persons administering the funds that the charity is under a moral obligation to make the payment": see In re Snowden, decd [1970] Ch 700, 709.

5 In 2002 the trustees considered a claim advanced by the Commission for Looted Art in Europe ("CLAE") on behalf of the heirs of the late Dr Feldmann that each of the four drawings had been the property of Dr Feldmann in Brno, Czechoslovakia and had been stolen from him on 15 March 1939 by the Gestapo. The claim was and is for restitution not compensation alone. At a meeting of the trustees held on 27 July 2002 it was agreed that:

"6.4.3. Having regard to the cogency of the evidence adduced within the context of what were acknowledged to be the exceptional atrocities committed during the 1933-1945 era, the claimants request for the return of these drawings ought to be acceded to if and to the extent permissible by law.

"6.4.4. With the agreement of the claimants and [Department for Culture, Media and Sport], this case should be referred to the Spoliation Advisory Panel for an opinion on the appropriate action to take in response to the claim given the fact that the claim is solely for restitution."

6 Before the claim was put before the Spoliation Advisory Panel the trustees sought the advice of counsel and in implementation of that advice wrote to the Attorney General on 29 August 2003. The trustees expressed the view that

"if the Attorney General were to take a positive view of his powers to sanction Snowden-type action in relation to objects now comprised in a national collection and subject to an acknowledged holocaust restitution claim, he would offer a straightforward solution to the debate in the present case, in respect of which equity requires a swift solution."

7 The Attorney General was concerned whether as a matter of statutory construction the express prohibition contained in section 3(4) of the British Museum Act 1963 on the disposal of objects comprised in the collections of the British Museum prevents the objects to which that prohibition applies from being disposed of under the In re Snowden

principle. To resolve that question he issued the Part 8 claim now before me. It seeks the determination of the court as to:

"(1) Whether, as a matter of law, where the defendants consider that they are under a moral obligation to return an object which forms part of the collections of the British Museum to a previous owner of the object or his heirs by reason of the circumstances leading up to their acquisition of the object, it would be possible for the principle known as the principle in In re Snowden, decd [1970] Ch 700 to be applied so as to permit such a return: (a) whether or not the object is one to which section 5(1) or 5(2) of the British Museum Act 1963 applies? (b) where the object is one to which section 5(1) or 5(2) of the British Museum Act 1963 applies? (c) or at all? (2) Whether, in circumstances where: (a) the defendants are sued for the return of an object comprised in its collections by the object's former owner or his successors; and (b) but for the provisions of the British Museum Act 1963 the principle in In re Snowden might have been applied so as to permit such return of the object, the defendants might properly on the ground (and only on the ground) that they regarded themselves as under a moral obligation to return the object to the person or persons suing them for its return, omit to plead or to rely upon a defence based upon the provisions of the Limitation Act 1980 or some earlier limitation Act which would or might be available to them and, if so, whether they could do so (i) with or (ii) without the approval of the Attorney General. (3) On the footing that four drawings which were looted from a Dr Feldmann in 1939 and which were subsequently acquired by the defendants form part of the collections of the British Museum, whether, in the event that (i) the defendants should consider themselves, by reason of the fact of the drawings having been looted, under a moral obligation to return the drawings to the heirs of a Dr Feldmann, and (ii) the Attorney General should approve such return, the In re Snowden principle would be capable of being applied so as to permit the defendants (if the Attorney General approved) properly to return the drawings to the heirs of Dr Feldmann."

8 I have been addressed on those questions by counsel for the Attorney General and for the trustees. In addition I gave leave to CLAE to intervene so that counsel on its behalf might address me. I accepted a short witness statement made on behalf of CLAE by its solicitor. The Attorney General,the trustees and CLAE all accept that I must approach the issues on the assumption, which CLAE does not admit, that the heirs of Dr Feldmann do not have a claim, whether at law or in equity, against the trustees for restitution of the drawings or any of them. It must follow that in the terms of section 3(4) I must treat each drawing as "vested in the trustees as part of the collections of the museum".

The background

9 The issues for my determination are, ultimately, bare issues of law but they arise against a background to which the trustees and CLAE attach the greatest importance. It is right that I should draw attention to it.

10 On 5 January 1943 the Government joined with 16 others to make the Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control (Cmd 6412). The declaration contained a formal warning "to all concerned" of the declarers' intention "to do their utmost to defeat the methods of dispossession". They reserved "all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever". As pointed out in note 6 it had been decided "as a first step" to establish a committee of experts to "consider the scope and sufficiency of the existing legislation ... for the purpose of invalidating transfers or dealings ... in all proper cases".

11 On 7 May 1944 the Government formed the British Committee on the Preservation and Restitution of Works of Art, Archives and Other Material in Enemy Hands, otherwise known as the Macmillan Committee. It was dissolved in 1946 because the chairman, Lord Macmillan, considered that it could do little until an international restitution commission was established.

12 In July 1944 the Bretton Woods Agreement Order 1946 (SR & O 1946 No 38), in article VI, recommended all governments represented at the United Nations Monetary and Financial Conference held from 1 to 22 July 1944 to call upon the governments of all neutral countries to take immediate measures to prevent disposition of looted property and to prevent its fraudulent concealment.

13 It is evident from the correspondence and other documents produced by Mr Neil Macgregor, the Director of the British Museum, that the Director and trustees in the 1940s were concerned for the plight of monuments in war zones and works of art in enemy occupied Europe and recognised that the scale of destruction and looting of historic monuments and private and national collections fell into a category which by the standards of the time was exceptional and required urgent mitigation during and extensive redress after the war. Mr Macgregor adds:

"When the trustees acquired the drawings in 1946 and 1949 they did so on the mistaken assumptions that title was in each case in order, and given all the facts it is clear that, had they discovered that the drawings had been stolen by the

Nazis, they would have expected to return them to their rightful owner in accordance with the declared policy intentions of His Majesty's Government, which they had helped to shape. In the circumstances prevailing at the time and in view of the professional integrity of the people concerned, I think it likely that the assumptions about title were reasonably and honourably made."

14 In 1998 there was a conference in Washington on Holocaust Era Assets. The conference endorsed 11 non-binding principles designed to assist in resolving issues relating to Nazi-confiscated art. Articles 8 and 11 provide:

"8. If the pre-war owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognising this may vary according to the facts and circumstances surrounding a specific case."

"11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues."

15 On 17 February 2000 the Department for Culture, Media and Sport set up the Spoliation Advisory Panel, to which I have already referred, under the chairmanship of Sir David Hirst. Its purpose is to assist claimants, museums and galleries in the consideration of claims and to recommend appropriate action to resolve particular claims. On 8 June 2000 the trustees submitted evidence to the House of Commons Select Committee Inquiry into Cultural Property: Return and Illicit Trade. It explained that if it were established that the museum was holding objects looted by the Nazis during the holocaust the museum would wish to find a way to achieve a return of those objects to the victim's family.

16 Thus if the jurisdiction to authorise the disposition of objects forming part of the collections of the museum based on the decision in In re Snowden, decd[1970] Ch 700 is made out there are good reasons to think that the moral obligation needed to justify its exercise will be established too. But that will be a matter for the Attorney General on which he has reserved his position.

In re Snowden, decd

17 Before considering the submissions of counsel it is convenient to describe the circumstances and decision in In re Snowden, decd [1970] Ch 700 in more detail. There were two summonses before Cross J, one relating to the will of Norman Snowden, the other concerning the will of Florence Henderson. In the case of the will of Norman Snowden, due to sales made in his lifetime, bequests of his shareholdings in specific companies had been adeemed but, in consequence, pecuniary legacies and bequests of shares of residue were much greater than the testator could have contemplated. The pecuniary and residuary legatees were six charities. They agreed, if the Attorney General had no objection, that various sums should be paid to the specific legatees. In the case of the will of Florence Henderson a manuscript but unattested addition to the will was omitted from probate. Under the will, as proved, the residue after payment of various pecuniary legacies was left to charity generally. The administrators sought the approval of the court, if the Attorney General consented, to give effect to the manuscript alteration. Thus, in each case, approval was sought for a transaction in which charity would forego money to which it was entitled.

18 The argument of counsel for the Attorney General, as reported, included the following passage, at p 706:

"It has been a long established view that the Attorney General has no power to authorise application of the funds of a charity for non-charitable purposes. This precise problem has been put to counsel for the Attorney General for over 40 to 50 years. Each counsel has treated it as clear law. In the present case the point of moral obligation has been raised."

19 In his judgment Cross J, at p 708, indicated that he would not be justified in dissenting from that view unless he was satisfied that it was wrong. He was so satisfied. He said, at p 710:

"In the result I am satisfied that the court and the Attorney General have power to give authority to charity trustees to make ex gratia payments out of funds held on charitable trusts. It is, however, a power which is not to be exercised lightly or on slender grounds but only in cases where it can be fairly said that if the charity were an individual it would be morally wrong of him to refuse to make the payment."

20 Cross J had earlier, pp 709-710, given four reasons for arriving at that conclusion. They may be summarised as follows. (1) As charity depends for its continued existence on the recognition by others of moral obligations to give it would be odd if a charity could not likewise give effect to its own moral obligations. (2) Analogous powers exist in other cases, such as the management of the property of mental patients and what is for the benefit of an infant. (3) In

sanctioning compromises on behalf of charities the court does pay regard to moral obligations. (4) The Attorney General has power to relieve trustees from their strict legal obligations to make full restitution for breaches of trust committed by them.

21 The authority of the Attorney General so found by Cross J has been exercised on many occasions since 1970. By section 27 of the Charities Act 1993 a comparable authority was given to the Charity Commissioners. So far as relevant that section provides:

"(1) ... the commissioners may by order exercise the same power as is exercisable by the Attorney General to authorise the charity trustees of a charity-(a) to make any application of property of the charity, or (b) to waive to any extent, on behalf of the charity, its entitlement to receive any property, in a case where the charity trustees-(i) (apart from this section) have no power to do so, but (ii) in all the circumstances regard themselves as being under a moral obligation to do so."

The submissions of counsel

22 It is common ground that none of the exceptions to the prohibition imposed by section 3(4) is applicable here. None of the drawings is a duplicate, unfit to be retained or useless. None of them was made after 1850 and the person in whose favour the disposition would be made is not another national museum. Counsel for the Attorney General submitted that in those circumstances the prohibition was absolute and precluded any disposition, whether by act or omission, by the trustees in favour of the heirs of the late Dr Feldmann. He contended that: (1) the court will not direct or approve anything which is inconsistent with a statute; (2) the powers of a statutory corporation such as the trustees extend no further than what is expressly stated in its governing statutes, is necessarily and properly required forcarrying into effect the purposes of its incorporation or such as may fairly be regarded as incidental to or consequential on those things which the legislature has authorised; (3) where Parliament has specified by statute where the public interest lies, neither the court nor the Attorney General may take a different view.

23 In relation to the first submission counsel for the Attorney General referred me to five authorities. I shall take them in chronological order. The first is In re Shrewsbury Grammar School (1849) 1 Mac & G 324. In that case the trustees had in their hands accumulations of income in excess of what was required to achieve the objects of the charitable trust. The question was how to apply them. Having upheld the contention that what was described as Sir Samuel Romilly's Act (52 Geo 3, c 101) conferred sufficient jurisdiction to deal with the matter, Lord Cottenham LC continued, at p 333:

"it is of constant occurrence that the court is asked to inquire whether an Act of Parliament shall be applied for. If it is in regard to such a matter as this court has no jurisdiction to alter, or which is already provided for by Act of Parliament, it is obvious it requires the authority of Parliament in such cases to enable the trustees to depart from that which is their prescribed duty, according to the rule existing."

24 The Berkhamstead School Case (1865) LR 1 Eq 102 concerned a school regulated, inter alia, by a statute of Edward VI. Sir William Page Wood V-C approved a scheme for its further regulation which permitted the charging of fees for all pupils, notwithstanding that the statute provided that some boys should be educated entirely gratuitously. While the scheme so approved appears to have been contrary to the provisions of the founding statute the question of jurisdiction was not raised but the variation was justified because the original purposes of the statute had become impractical.

25 In Attorney General v Governors of Christ's Hospital [1896] 1 Ch 879 the Attorney General propounded a scheme whereby certain endowments, excepted from the operation of the Endowed Schools Act 1869 (32 & 33 Vict c 56), would be made over to another governing body in augmentation of the endowments held by them subject to the provisions of that Act. Chitty J refused to do so. He said, at p 888:

"I hold that it is beyond the jurisdiction of the court to sanction the Attorney General's scheme in the face of the opposition of the existing governing body. Their title is founded on Royal Charter, and is established by Act of Parliament. To whatever lengths the court may have gone, it has never assumed legislative authority; it has never by a stroke of the pen at one and the same time revoked a Royal Charter and repealed an Act of Parliament. It has never ousted from its rights of administering the charitable trusts such a body as the present governors against their will, and that, too, in a case where no breach of trust is charged."

Later, at p 889, he observed that to establish such a scheme as that submitted by the Attorney General nothing less than an Act of Parliament would suffice.

26 In In re Shipwrecked Fishermen and Mariners' Royal Benevolent Society [1959] Ch 220 Danckwerts J approved a scheme conferring wider powers of investment than those authorised by the statute incorporating thecharity. The arguments and his conclusion are evident from the following passage from his judgment, at p 227:

"It is said on behalf of persons interested in the charity that the court is empowered to make a scheme to authorise a wider range of investments in this case, because the matter is not really covered by the very limited power of investment contained in section 11 of the 1850 Act. On the other hand, it is said on behalf of the Attorney General that that is not the right way to construe section 11 of the 1850 Act: that although in form it is a positive permission, it involves a negative prohibition and, therefore, to allow any wider power of investment of the trust funds would be to attempt to alter the statute by 'a stroke of the pen' and the court has no power to do that. The cases to which I have been referred are far from clear, but I think the general principle which emerges is that the court cannot alter the said statute by a stroke of the pen and cannot therefore direct anything which is inconsistent with the terms of the Act of Parliament in question. The conclusion which I reach is that to allow a wider power of investment is to confer additional powers of investment and is not, therefore, inconsistent with but is in aid of and supplemental to the powers of investment which are conferred by section 11 of the Act. On that view it would be open to the court to allow what has been done by settling a scheme conferring the necessary powers."

27 These cases were considered by Buckley LJ in Construction Industry Training Board v Attorney General [1973] Ch 173, 187 where he said:

"It has long been recognised that, where a charity is established by an Act of Parliament, the court will not exercise its jurisdiction in any way which will conflict with the provisions of the Act (In re Shrewsbury Grammar School (1849) 1 Mac & G 324, 333), but this does not mean that in such a case the jurisdiction of the court is entirely ousted. In In re Shipwrecked Fishermen and Mariners' Royal Benevolent Society [1959] Ch 220, Danckwerts J expressed the view (in which I respectfully concur) that the court has power to sanction a scheme in relation to a charity established by an Act of Parliament in respect of matters not in conflict with the provisions of the Act, and even in respect of those matters which are regulated by Act of Parliament the court can entertain an application by charity trustees to consider whether they should apply to Parliament for an amending Act: In re Shrewsbury Grammar School 1 Mac & G 324. It seems that the position may be similar in the case of a charity incorporated by Royal Charter: In re Whitworth Art Gallery Trusts [1958] Ch 461."

28 Thus the distinction is drawn between those cases where the relevant Act prohibits what is sought to be done and those, where no statutory prohibition is imposed but the trustees seek powers going beyond what is expressly authorised. The court may intervene in the latter case but not the former. In this connection it is convenient to record that counsel for the Attorney General accepted that if a claim is made for restitution of an object comprised in the collection of the museum it may be compromised on terms which include a disposal of the object by the trustees in favour of the claimant. In such a case if the claim had been made good it would have been established that the object in question was not and never had been an objectto which the prohibition contained in section 3(4) applied. I can see nothing wrong with a bona fide compromise to that effect, compare Binder v Alachouzos [1972] 2 QB 151.

29 In relation to his second submission counsel for the Attorney General referred me to Attorney General v Great Eastern Railway Co (1880) 5 App Cas 473 and the citations with approval from the speeches of Lord Blackburn and Lord Selborne LC made by Lord Templeman in Hazell v Hammersmith and Fulham London Borough Council [1992] 2 AC 1, 29. I did not understand counsel for either the trustees or CLAE to dispute the proposition in support of which these citations were relied on. I accept the proposition.

30 In relation to his third submission counsel for the Attorney General referred me to National Anti-Vivisection Society v Inland Revenue Comrs [1948] AC 31. Lord Wright and Lord Simonds, at pp 50 and 62, quoted with approval from Tyssen on Charitable Bequests, 1st ed (1888), pp 176-177:

"However desirable the change may really be, the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed. Each court in deciding on the validity of a gift must decide on the principle that the law is right as it stands."

So, submits counsel, the court cannot enter into the question whether the public interest is better served by observing the statutory prohibition contained in section 3(4) or permitting trustees to give effect to moral obligations at the expense of their trust funds.

31 Counsel for the trustees suggested in his written argument that the issue resolves itself into three questions: (1) does the Snowden principle apply to charities "enshrined in statute"; (2) if so is there anything special about the British

Museum to exclude the principle; and if so (3) may the Snowden principle be applied so as to permit the trustees to abstain from relying on the Limitation Acts 1939 and 1980. In relation to the third submission counsel accepted in oral argument that the trustees did not suggest that they could do indirectly what they could not achieve directly.

32 Counsel for the trustees developed these submissions in oral argument. He pointed out that the Snowden jurisdiction was exercisable altogether out of court so that the cases relating to court approved schemes on which counsel for the Attorney General relied were not directly in point. He suggested that the jurisdiction existed to deal with those exceptional cases in which a transaction in the public interest should not be inhibited by too strict a reliance on the constitution of the charity, be it statutory or merely fiduciary. He relied on the fact that the judgment of Cross J in In re Snowden, decd[1970] Ch 700 was unqualified in its application to charity generally whatever the nature of its foundation. He suggested by reference to In re Shipwrecked Fishermen and Mariners' Royal Benevolent Society [1959] Ch 220 that the Snowdenjurisdiction was in aid of and supplemental to the purposes of charity in permitting in very limited and unforeseen circumstances transactions which would otherwise constitute breaches of trust.

33 Counsel for the trustees also pointed to the lack of any direct remedy for one wishing to challenge the actions of the Attorney General or the trustees for he on behalf of the Crown as parens patriae is the sole representative of the beneficial interest. He relied on the circumstance thatthe exercise of the Snowden jurisdiction did not give rise to any permanent alteration in the nature of the charity. He asked rhetorically whether the Attorney General is precluded by the constitution of a charity from serving the public interest as he sees it. And why, he asked, should the trustees of a charity be bound by their trust to do what they consider to be morally wrong? He suggested that the statutory bar contained in section 3(4) did not oust the Snowden jurisdiction but was a material factor to be considered at the second stage, namely, whether in the exercise of that jurisdiction the Attorney General should permit the trustees to give effect to the moral obligation they feel.

34 Counsel for CLAE adopted the submissions of counsel for the trustees. In addition he observed that in In re Snowden, decd [1970] Ch 700 Cross J recognised the part played by moral merits and submitted that such observation must apply to both statutory and non-statutory charities. And if, as he submitted, moral merits may be relevant to issues of compromise on legal merits they must be suitable for consideration alone and in the absence of any legal merits. He suggested that the bar imposed by section 3(4) cannot be absolute because counsel for the Attorney General accepted that it did not apply in the case of a compromise. If it did not exclude cases of compromise then why, he asked, should it exclude the Snowden jurisdiction. Both, he submitted, are the normal incidents of a charitable trust.

35 In reply counsel for the Attorney General submitted that in no previous case was there any impediment to the exercise of the Snowden jurisdiction such as section 3(4). It is that provision, he submitted, which makes all the difference.

Conclusions

36 It is appropriate to acknowledge at the outset the evident sincerity of all parties to these proceedings. The circumstances give rise to a dilemma for each of them. It is in precisely those circumstances that it is essential to ascertain the relevant principles of law and to apply them so that the dilemmas are resolved by the law and not otherwise. It is convenient to start with a series of propositions, many of them elementary.

37 First, neither the Crown nor the Attorney General as a minister of the Crown has any power to dispense with due observance of Acts of Parliament. The pretended power of dispensing with or suspending Acts of Parliament was emphatically rejected by the Bill of Rights 1689 (1 Will & Mary, sess 2, c 2). Similarly the courts and the judges are committed to upholding the law, not sanctioning departures from it without lawful authority. Accordingly the first essential step is to ascertain what is prohibited by section 3(4) of the British Museum Act 1963.

38 Second, section 3(4) applies to "Objects vested in the trustees as part of the collections of the museum". There is no doubt that, given the basis on which this application is made, each of the four drawings is such an object. It is, of course, possible that in other proceedings the heirs of Dr Feldmann may establish title to the drawings with the consequence that they will never have been "part of the collections of the museum". In that event section 3(4) will not preclude a disposition by the trustees in their favour. This conclusion leads to two further propositions.

39 Third, the compromise of a claim by the heirs of Dr Feldmann to be entitled to the drawings does not involve any breach of section 3(4). A bonafide compromise of the issues of fact involved in the claim is as binding as the decision of the court to that effect, see Binder v Alachouzos [1972] 2 QB 151. It may involve a recognition that the drawings have never been part of the collections. In that event they have never been subject to the prohibition contained in section 3(4). For this reason I reject the argument which suggests that the power to compromise is somehow an

unexpressed exception to section 3(4). It is not an exception but the consequence of the limited application of section 3(4) only to objects which are part of the collections.

40 Fourth, for similar reasons I reject the argument that as moral considerations may be relevant to an exercise of the power to compromise they may alone justify the non-observance of section 3(4) in relation to objects which are part of the collections. They are, alone, incapable of disapplying section 3(4) or justifying a failure to observe its terms.

41 Fifth, it follows that any disposition by the trustees in favour of the heirs of Dr Feldmann can be justified, if at all, only by reference to a statutory exception to section 3(4). It is not suggested that the drawings fall within any of the express exceptions provided for in sections 5 or 9 of the British Museum Act 1963 or in section 6 of the Museums and Galleries Act 1992. It was submitted that cases falling within the Snowden jurisdiction constitute an implied exception. I reject that submission. The very existence of the express exceptions negatives the recognition of further but implied exceptions. It is true that at the time the British Museum Act 1963 was before Parliament Cross J had not decided In re Snowden, decd [1970] Ch 700. But the enactment of the Museums and Galleries Act 1992 provided a parliamentary opportunity to insert a further exception if that had been thought desirable.

42 Sixth, if the drawings are part of the collections of the museum and there is no express or implied exception in the British Museum Act 1963 itself it would require some other statutory authority to justify ignoring the prohibition on dispositions. None has been suggested in this case. There are provisions in the Charities Act 1993 whereby schemes in relation to the funds of a charity regulated by statute may be made subject to obtaining the requisite parliamentary approval, see sections 15(3) and 17. Similarly there is the jurisdiction to authorise applications to Parliament described by Lord Cottenham LC in In re Shrewsbury Grammar School 1 Mac & G 324, 333. Though such jurisdiction is rarely exercised now its existence demonstrates that nothing less than some statutory authority is required to justify a departure from statutory obligations imposed on trustees.

43 Seventh, section 3(4) prohibits any disposition by the trustees. The word "disposition" is not defined. It is of its nature a word of wide import. The context in which it is used does not require a restrictive interpretation; quite the reverse. I see no reason, and none was suggested in argument, to limit its operation to acts so as to exclude omissions. Property in goods may be passed by a failure to act as well as by an active delivery. Consequently I consider that a failure to rely on relevant provisions of the Limitation Acts 1939 and 1980, otherwise than on legal advice, in order to effect a transfer of the drawings to the heirs of Dr Feldmann is as prohibited by section 3(4) as is a delivery by the trustees. I did not understand the trustees in the oral argument of their counsel to contend otherwise.

44 Eighth, the cases in which the court has altered the trusts or other provisions of a charity regulated by statute, namely, In re Shipwrecked Fishermen and Mariners' Royal Benevolent Society [1959] Ch 220 and In re Royal Society's Charitable Trusts [1956] Ch 87, depend on the proposition that the conferment of a limited power did not in those cases give rise to an implied prohibition against any action outside that limit. The proposition may or may not have been justified in the particular case but that can have no effect on a case such as this when the statutory provision plainly imposes a prohibition and the extent of the prohibition is clear.

45 For all these reasons I conclude that no moral obligation can justify a disposition by the trustees of an object forming part of the collections of the Museum in breach of section 3(4). There is nothing in the decision of Cross J in In re Snowden, decd [1970] Ch 700 to suggest otherwise. The fact, if it be one, that the four considerations which led Cross J to decide that case in the way that he did apply in this case cannot justify a breach of section 3(4). What is required is some statutory authority by way of exception. There is none and it is beyond the power of the Attorney General to provide one. It follows that I reject the submission that section 3(4) only becomes relevant at the stage when the Attorney General decides whether or not to exercise the Snowden jurisdiction. The existence of section 3(4) excludes any such jurisdiction in relation to acts or omissions it prohibits.

46 In the case of the Benevento Missal the Spoliation Advisory Panel concluded that restitution by the Trustees of the British Library was barred by section 3(5) of the British Library Act 1972 applying section 3(4) of the British Museum Act 1963. In the report dated 23 March 2005 (HC 406), at para 77, the panel under the chairmanship of the Sir David Hirst, recommended to the Secretary of State that legislation should be introduced to amend the British Museum Act 1963, the British Library Act 1972 and the Museums and Galleries Act 1992 so as to permit restitution of cultural objects of which possession was lost during the Nazi era (1933-1945). The panel also recognised the possibility that legislation might relate to a specific object or objects. I have, in effect, reached the same conclusion. In my judgment only legislation or a bona fide compromise of a claim of the heirs of Dr Feldmann to be entitled to the four drawings could entitle the Trustees to transfer any of them to those heirs.

47 Accordingly, subject to any further argument as to the form of my order, I will answer questions 1(a), 2 and 3 raised by the Attorney General in the Part 8 claim form in the negative. Questions 1(b) and 1(c) do not arise and I heard no separate argument on them. Accordingly I shall not answer those questions.

DISPOSITION:

Order accordingly.

SOLICITORS:

Treasury Solicitor; Head of Legal Services, British Museum; Harbottle & Lewis.

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Print Request: Current Document: 2
Time Of Request: Monday, August 30, 2010 12:27:04