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Case Chagall Gouache – Solomon R. Guggenheim Foundation and Lubell

The Solomon R. Guggenheim Foundation – Rachel and Jules Lubell – United States/Etats-Unis – Artwork/œuvre d'art – Pre 1970 restitution claims/demandes de restitution pre 1970 – Judicial claim/action en justice – Judicial decision/décision judiciaire – Negotiation/négociation – Settlement agreement/accord transactionnel – Due diligence – Ownership/propriété – Procedural issue/limites procédurales – Statute of limitation/prescription – Tort/acte illicite – Financial compensation/indemnisation – Repurchase/rachat

In 1993, the Guggenheim Foundation, Mrs. Rachel Lubell, and other interested parties reached a settlement regarding a Marc Chagall painting that had been stolen from the Museum and purchased by Mrs. Lubell almost thirty years prior. Though a trial court had originally held the Guggenheim's suit seeking recovery was time-barred, the Appellate Division reversed the lower court's decision and clarified New York's "demand and refusal" rule. On remand, the parties settled just one day after the new trial began.

I. Chronology

Pre 1970 restitution claims

- **Mid-1960s**: An unknown thief stole a rare gouache painting by Marc Chagall from the Solomon R. Guggenheim Museum.[1]
- **May 1967**: Rachel Lubell, and her late husband, purchased the painting from the reputable Robert Elkon Gallery (hereafter Gallery) in Manhattan for $17,000. The invoice and receipt indicated that the gouache had been "formerly in the collection of George A. Frankiel, Paris," who later turned out to be the museum mailroom employee suspected of the theft.[2] The painting's provenance stated that Frankiel had sold the painting to another Manhattan art dealer, Gertrude Stein, before Elkon had sold it to the Lubells.[3] Meanwhile, the Guggenheim took no steps to confirm that the painting had been stolen when it realized the painting was missing. In the following years, the Museum failed to report the theft to the police or to industry organizations, collect insurance for the loss, or take any other action to publicize its loss.[4]
- **1974**: The Guggenheim formally deaccessioned the painting from its collection after a comprehensive inventory.[5]
- **August 1985**: A private art dealer brought a transparency[6] of the painting to Sotheby's for an auction estimate on behalf of Mrs. Lubell. A former Guggenheim employee recognized the gouache and notified the museum of the painting's location.[7]
- **9 January 1986**: The Museum demanded the gouache's return and Mrs. Lubell refused.[8]
- **1987**: The Guggenheim brought an action for replevin seeking return of the Chagall gouache, or in the alternative, its fair market value of $200,000. Mrs. Lubell attached the Elkon estate and Ms. Stein as defendants, and filed for summary judgment arguing that the claim was time-barred. The trial court granted Mrs. Lubell's motion, reasoning that by failing to report the

[1] Chagall had created the gouache in 1912 as a study for the oil painting "Menageries" or "Le Marchand de Bestiaux" (The Cattle Dealer). Aaron Milrad, "Statutes of Limitations," *Art Cellar Exchange*, accessed August 8, 2013, http://www.artcellarexchange.com/artlaw3.html.
[2] *Solomon R. Guggenheim Foundation v. Jules Lubell*, 569 N.E.2d 426, 428 (N.Y. 1991); see also Richard Perez-Pena, "Guggenheim Presses Case on a Stolen Painting," *The New York Times*, December 27, 1993, accessed August 8, 2013, http://www.nytimes.com/1993/12/27/nyregion/guggenheim-presses-case-on-a-stolen-painting.html?pagewanted=all&src=pm.
[3] Richard Perez-Pena, "DEC. 26-31 – Stolen Chagall – An Art Museum and a Collector Reach a Quiet Compromise," *The New York Times*, January 2, 1994, accessed August 8, 2013, http://www.nytimes.com/1994/01/02/weekinreview/dec-26-31-stolen-chagall-an-art-museum-and-a-collector-reach-a-quiet-compromise.html.
[4] *Guggenheim Foundation v. Lubell*, 569 N.E.2d at 428.
[5] See Andrea E. Hayworth, "Stolen Artwork: Deciding Ownership Is No Pretty Picture," 43 *Duke Law Journal* (November 1993): 337.
[6] Before digital files of artwork became available, owners often sent a color slide transparency film of their artwork to auction houses for valuation. These transparencies contained a detailed colored image of the artwork, enabling large-scale projection for enhanced visibility and valuation.
[7] *Guggenheim Foundation v. Lubell*, 569 N.E.2d at 428.
[8] Ibid.

theft or take other appropriate measures to find and recover the painting, the Guggenheim had been insufficiently diligent as a matter of law.[9] The Museum appealed.

- **1990**: The Appellate Division reversed the lower court's decision, holding that the use of the statute of limitations was incorrect and the trial court had erred in imposing a duty of reasonable diligence on the museum. Instead, it would have substituted a laches standard regarding the Museum's diligence and required a showing of resulting prejudice on Mrs. Lubell's part.[10]
- **1991**: The New York State Court of Appeals affirmed the Appellate Division's decision and adopted its reasoning on the statute of limitations issue.[11] Accordingly, it remanded the suit to the trial court.
- **28 December 1993**: After the first day of trial, the parties settled. Though its exact terms were secret, the final settlement required compromise from all sides: Mrs. Lubell retained possession the Chagall work, but in return, she and the two art dealers paid the Guggenheim more than $200,000.[12]

II. Dispute Resolution Process

Judicial claim – Judicial decision – Negotiation – Settlement agreement

- The Guggenheims failure to report the theft facilitated the painting's entry into the art market and the Lubells' subsequent purchase. At the time, the Museum could have contacted the Art Dealers Association, which maintained a registry of stolen art, or even notified Chagall and the cataloguer of his works, Franz Meyer, both of whom had been contacted by the Lubells when purchasing the gouache.[13] Regardless, the Museum defended its inaction by asserting that the decision not to report the loss to authorities was made in the belief that doing so would not help locate the gouache, but hinder its recovery by driving it further underground.[14] This inaction became particularly relevant to each court's analysis.
- The Guggenheim filed suit soon after Mrs. Lubell refused to return the painting. In her response, Mrs. Lubell claimed valid ownership under the statute of limitations, the laches defense, and through adverse possession and moved for summary judgment. Mrs. Lubell's motion to dismiss argued that the statute of limitations had expired since the theft, and that the Guggenheim had sat on its rights without taking any effort to obtain the painting's return.[15] In fact, the Museum officials admitted that they had done nothing more than to conduct an in-

[9] *Solomon R. Guggenheim Foundation v. Jules Lubell*, 550 N.Y.S. 2d 618, 621-22 (App. Div. 1990).
[10] Ibid.
[11] *Guggenheim Found. v. Lubell*, 569 N.E.2d at 429.
[12] See Richard Perez-Pena, "DEC. 26-31 – Stolen Chagall."
[13] See Richard Perez-Pena, "Guggenheim Presses Case on a Stolen Painting."
[14] *Guggenheim Found. v. Lubell*, 550 N.Y.S. 2d at 619-620.
[15] Laches states that a plaintiff who sits on his rights loses them. For the defense of laches, a court determines whether the claimant delayed unreasonably and whether that delay caused legal prejudice to the current possessor, ultimately balancing the conduct of *both* parties. See Patty Gerstenblith, *Art, Cultural Heritage and the Law*, 3rd edition, Durham, North Carolina: Carolina Academic Press (2012), 471-473.

house investigation and send a few letters to the former mailroom employee's parents to inform them they were looking for him.[16]

- The trial court held in favor of Mrs. Lubell, finding the Museum's inaction unreasonable as a matter of law. However, the Appellate Division reversed and certified a question to the New York Court of Appeals.[17] After affirming the Appellate Division's decision, the Court of Appeals remanded the case back to the trial court with instructions to consider the Museum's conduct in Mrs. Lubell's defense of laches. In December of 1993, the parties reached a settlement allowing Mrs. Lubell to retain possession of the painting while financially compensating the Guggenheim for its loss.

III. Legal Issues

Due diligence – Ownership – Procedural issue – Statute of Limitation – Tort

- Set out in *Menzel v. List*,[18] the New York "demand and refusal" rule requires that a lawsuit to recover stolen property be filed within three years of the original owner discovering its whereabouts, demanding its return, and being refused.[19] This is because the law believes that an innocent purchaser of stolen goods becomes a wrongdoer, for purpose of a conversion or replevin claim, only after refusing the owner's demand for their return.[20] It was uncontested that the Lubells were good-faith purchasers: they had investigated the painting's provenance, paid fair market value, and publicly displayed the painting.
- Even so, the Museum argued that the Lubells maintained an obligation to diligently research the background of the painting, and had they properly done so, they would have seen "several red flags indicating there was a problem," including a Chagall catalog that said the gouache belonged to the Guggenheim.[21] Regardless, Mrs. Lubell maintained that at no time were she or her husband aware of any defects on the Gallery's title. Instead, she claimed the Guggenheims failure to use reasonable diligence to recover the painting after discovering its theft prevented suit.[22]
- In granting Mrs. Lubell's motion and dismissing the action, the trial court held the Guggenheim's claim fell outside the statute of limitations pursuant to the decision of the

[16] See Richard Perez-Pena, "Guggenheim Presses Case on a Stolen Painting."
[17] In US law, courts may ask a sister court a "certified question." This constitutes a formal request for another court's opinion on a question of law. These cases typically arise when a court is required to decide a matter that turns on unclear or uncertain law. Lower courts often use this technique as an opportunity to clarify law and avoid making an error in its legal interpretation. For efficiency, the higher court issues an opinion in response to the certified question to resolve the interpretation for the lower court, instead of doing so on appeal. See Black's Law Dictionary, 6th ed., "Certification of Question of State Law."
[18] 253 N.Y.S. 2d 43 (1st Dept. 1964); 267 N.Y.S. 2d 804 (Sup. Ct. N.Y. 1966).
[19] See *Menzel v. List*, ibid; New York Civil Practice Law and Rules, Section 214(3).
[20] Ibid.
[21] Ibid.
[22] While the Lubells had not met all elements to prove adverse possession, the argument that Guggenheim should not get the painting back as a result of its failure to use reasonable diligence did support a claim of laches. See Richard Perez-Pena, "Guggenheim Presses Case on a Stolen Painting."

Second Circuit *DeWeerth v. Baldinger*.[23] In *DeWeerth*, the Second Circuit dismissed as time-barred a replevin action to recover a stolen painting from a good-faith purchaser on the ground that the plaintiff did not use "due diligence" in attempting to locate the painting. Accordingly, the trial court held that the museum's failure to undertake a diligent search and report to "the agencies which are routinely contacted when a work of art is stolen"[24] was unreasonable, and the Museum had delayed unreasonably in finally making its demand for the painting's return. The court reasoned that in order to avoid prejudice to a good-faith purchaser, any demand could not be unreasonably delayed. Thus, a true owner was obligated to use reasonable efforts to locate the missing property. Because the museum had done nothing for twenty years, the court found its conduct was unreasonable as a matter of law.[25]

- On appeal, the Appellate Division reversed the trial court's decision. First, the court dismissed the statute of limitations defense and concluded that Mrs. Lubell's reliance on the lack of diligence argument was only relevant to her defense of laches. According to the appellate court, the three-year limitations period did not begin to run until the traditional demand and refusal steps had been followed, because it was "plain that the relative possessory rights of the parties cannot depend on the mere lapse of time, *no matter how long*."[26] The court also clarified that, in this case, the demand and refusal was a substantive element of the cause of action, as opposed to a procedural element where it is necessary to measure the action's accrual. The court further concluded that the Second Circuit in *DeWeerth* should not have imposed a duty of reasonable care or due diligence on original owners for the purposes of the statute of limitations. While it recognized that a true owner who has discovered the location of a stolen or lost property cannot unreasonably delay making demand for the return of the property, it found such a delay irrelevant to the timing of the statute of limitations. Instead, laches determined the proper standard of consideration for unusual delay, which also requires injury to the defendant.[27] Under laches, which is based on issues of fundamental fairness, relief may be granted to one party when there has been negligence in performing a legal duty or in asserting a right on the part of another. While Mrs. Lubell had argued that the Guggenheim had sat around, she did not assert its wait had prejudiced her in any way. Finally, the Appellate Division issued a certified question to the highest court in New York, asking whether its modification of the trial court decision had been properly made. This modification overturned the Second Circuit's interpretation in *DeWeerth* that would have imposed a duty of reasonable diligence on the owners of stolen artwork for the purposes of the statute of limitations.[28]

[23] 836 F.2d 103 (2d Cir. 1987).
[24] *Guggenheim Found. v. Lubell*, 550 N.Y.S. 2d at 619-620.
[25] Ibid.
[26] *Guggenheim Found. v. Lubell*, 550 N.Y.S. 2d at 622.
[27] Ibid. The Appellate Division stressed the difference between the statute of limitations, where the defense is based on an unreasonable delay in making a demand upon a known possessor, and the defense of laches, which is based on a lack of diligence in searching for the stolen property; see Gerstenblith, *Art, Cultural Heritage and the Law*, 473.
[28] "The Second Circuit refused to certify the question to the New York Court of Appeals on the ground that the problem was not likely to recur with sufficient frequency to require a determination by that court." See Andrea E. Hayworth, "Stolen Artwork."

- On certification, the New York State Court of Appeals affirmed the decision of the Appellate Division and adopted its reasoning on the statute of limitations issue, determining the limitations period *could not* begin prior to refusal. The highest court clearly outlined the differences between the statute of limitations and laches defense, reasoning that its strict application of demand and refusal agreed with the rule's purpose, which is to protect the original owner of the stolen artwork. Therefore, any imposition of a duty of diligence before the true owner had reason to know where the missing property was located was too great a burden. Instead, the burden was more appropriately placed on the potential purchaser of artwork to discover the work's provenance. The Court of Appeals stated its decision was influenced by the "reputation that New York enjoys a world-wide reputation as a pre-eminent cultural center. To place the burden of locating stolen artwork on the true owner and foreclose the rights of that owner to recover his property if the burden is not met would […] encourage illicit trafficking in stolen art."[29] In affirming the Appellate Division's decision, the court answered the certified question, stating that the Museum had no duty to diligently search for the missing painting as relevant to the statute of limitations.[30] The timing of the Museum's demand and Mrs. Lubell's refusal were the only relevant actions in assessing the merits of the defense. Conversely, the Museum's diligence should be considered within the laches defense, which looks to the reasonableness of *both* parties, particularly in determining prejudice. Finally, the court determined that any burden of proof for showing the painting was *not* stolen rested on Lubell, not the Guggenheim.[31] Though the court declined to set forth clear diligence standards opining such should be decided on case-by-case basis, it held relevant not only the conduct of each party, but also the relevant relationship between the conduct of the two parties. It then remanded the case to trial for consideration of Mrs. Lubell's laches defense.[32]
- The action was ultimately settled on 28 December 1993, before the issue could be resolved.

IV. Adopted Solution

Financial compensation – Repurchase

- The initial settlement ended with Rachel Lubell keeping the watercolor and paying the Guggenheim an additional $78,000 for the gouache she had already purchased at $17,000. Stein and the Elkon estate would each contribute $67,000 for a total of $212,000. This means that each party shared some form of loss. However, the parties' lawyers temporarily suspended the settlement after learning its details had been made public. Shortly after, the parties reached a final and confidential settlement expected to be very similar to the initial settlement.[33]

[29] *Guggenheim Found. v. Lubell*, 569 N.E.2d at 431.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] See Richard Perez-Pena, "Guggenheim Presses Case on a Stolen Painting."

- This outcome was significant to the Guggenheim because, by having Mrs. Lubell pay for the painting, the settlement reaffirmed the notion that the museum's claim to the work was legitimate.[34] Mrs. Lubell's main argument had been that the museum forfeited its claim by doing little over the years to find and retrieve the painting. As the Guggenheim's counsel stated, it had been very important that the museum's claim of ownership was not defeated as precedence for all museums moving forward with similar disputes.[35]

V. Comment

- Interestingly enough, the Appellate Division recognized that New York's "demand and refusal" rule did not apply when the stolen object is in the possession of a thief. In such a situation, the statute of limitations would run from the time of the theft, regardless of whether the true owner was unaware of the theft at the time it occurred. Practically, this means a thief might stand a better chance of retaining stolen property than an innocent purchaser. However, once the thief conveys the stolen property to an innocent purchaser, the true owner could once gain bring suit.[36]
- In *Guggenheim*, the court strongly rejected the imposition of a duty on the claimant because of the state policy to discourage trafficking in stolen artworks.[37] The New York "demand and refusal" rule gives a generous interpretation to the statute of limitations. Under it, the owner has no incentive to start looking for his lost or stolen property, but may merely wait until it turns up.[38] If demand is indefinitely postponed, the good-faith purchaser will remain exposed to a suit long after an action against innocent parties or even against a thief would be time-barred.[39] Some have argued this creates an unfair incentive for owners to sit and wait for the work to resurface somewhere in the future, while innocent parties become additional victims to the theft.[40] However, others have argued that *Guggenheim* promoted the formulation of the defense of laches as balancing the conduct of the owner against that of the purchaser, preventing owners from taking the previously mentioned approach to recovery.[41] Had the case gone to trial, a court might have answered that question and set a precedent for claims moving forward. In effect, the out-of-court settlement reached by the parties left open the question of whether the true owner's conduct, or rather, the lack of reasonably diligent conduct, might

[34] Ibid.
[35] Statement by Owen C. Pell, reported by Richard Perez-Pena, "Suit Over Chagall Watercolor Is Settled Day After Trial Starts," *The New York Times*, December 29, 1993, accessed August 8, 2013, http://www.nytimes.com/1993/12/29/nyregion/suit-over-chagall-watercolor-is-settled-day-after-trial-starts.html.
[36] See Andrea E. Hayworth, "Stolen Artwork."
[37] *Guggenheim Found. v. Lubell*, 569 N.E.2d at 431; Gerstenblith, *Art, Cultural Heritage and the Law*, 472-473.
[38] See Richard Perez-Pena, "Suit Over Chagall Watercolor".
[39] Ibid.
[40] See Aston Hawkins, Richard A. Rothman, and David B. Goldstein, "A Tale of Two Innocents: Creating an Equitable Balance between the Rights of Former Owners and Good Faith Purchasers of Stolen Art", 64 *Fordham Law Review* (October 1995): 49.
[41] See Gerstenblith, *Art, Cultural Heritage and the Law*, 472-473; Andrea E. Hayworth, "Stolen Artwork."

later prevent that owner from recovering stolen property from an innocent party who purchases the stolen property in good faith. Regardless, Mrs. Lubell might have experienced trouble in court overcoming the long-established US legal principle that a person cannot, even in good faith, gain good title to stolen property.[42]

- For these reasons, legal experts and museum representatives have stated that it was more important to the Guggenheim to avoid an unfavorable precedent than to recover the Chagall.[43] The balance of principles and responsibilities is a serious matter to lawyers and art collectors, and the present case could have been instructive to all those who buy and sell art with questionable provenance.[44] Even so, instead of encouraging owners to report and solve thefts, the *Guggenheim* result enabled owners to avoid taking steps to recover stolen art, which would, in effect, prevent innocent purchasers from becoming new victims of the theft.[45] As a result, former innocent owners will prevail over the present innocent owner even after decades of inaction or neglect to recover the art.[46]
- According to the Museum, some members of the art community believe that publicizing a theft exposes gaps in security and can lead to more thefts. The Museum also contested that publicity could push a missing painting further underground, which could be embarrassing to the Guggenheim and also deter benefactors from donating art to the museum.[47] For policy reasons, the court in *Guggenheim* refrained from establishing rules of conduct applicable to all true owners of stolen art who wanted to preserve their right to pursue a cause action in replevin. It recognized that too many variables affect the manner in which an owner of stolen property should behave. The court further stated it would be difficult, if not impossible, to craft a reasonable diligence requirement that could take into account all variables and while not unduly burdening the true owner.[48] Finally, the court reasoned it would make no sense to place the burden of locating artwork on the true owner, and foreclose the rights of that owner to recovery if the burden was not met. Even though the court rejected any reasonable diligence requirement for purposes of the statute of limitations, it clarified that its decision should not be seen as either sanctioning the Museum's conduct or suggesting the Museum's conduct was no longer at issue.[49]

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[42] *Porter v. Wertz*, 416 N.Y.S. 2d 254 (App. Div. 1979). See also Gerstenblith, *Art, Cultural Heritage and the Law*, 472.
[43] See Richard Perez-Pena, "Suit Over Chagall Watercolor Is Settled Day After Trial Starts."
[44] Ibid.
[45] See Aston Hawkins, Richard A. Rothman, and David B. Goldstein, *A Tale of Two Innocents.*
[46] Ibid.
[47] A 1970 memo shows that the gouache was one of at least five paintings, including a Picasso and a Leger, which disappeared during a nine-year period. In a deposition, Thomas M. Messer, the former director of the Museum, stated that the museum kept silent "so as not to drive the stolen item underground." The Museum's counsel, Owen C. Pell, stated the decision was "standard practice for museums in those days," especially when the stolen item was a little-known work that was thought likely to resurface quietly within a few years. Conversely, Vivian Endicott Barnett, the museum curator, said in a deposition, "I am told that the fear of adverse publicity was an important factor" in the decision not to reveal the disappearance. "It would be embarrassing," she said. "It might be in the newspapers." Frank Feldman, a leading expert on art law, opined that the museum may have kept the matter quiet because "they did not want to indicate that their security wasn't the best," an admission that could have scared off potential donors. See Richard Perez-Pena, "Guggenheim Presses Case on a Stolen Painting."
[48] *Guggenheim Found. v. Lubell*, 569 N.E.2d at 431.
[49] Ibid.

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