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Case Kanakaria Mosaics – Autocephalous Greek Orthodox Church of Cyprus and Cyprus v. Goldberg

Autocephalous Greek Orthodox Church of Cyprus – Cyprus/Chypre – Goldberg – Antiquity/antiquités – Post 1970 restitution claims/demandes de restitution post 1970 – Judicial claim/action en justice – Judicial decision/décision judiciaire – Choice of law/droit applicable – Due diligence – Ownership/propriété – Statute of limitation/prescription – Unconditional restitution/restitution sans condition

Four mosaics were stolen from the Cypriot Church of the Panagia Kanakaria in Lythrankomi, following the Turkish invasion of 1974. Afterwards, they were purchased by an American art dealer, Peg Goldberg. In 1989, the Autocephalous Greek Orthodox Church of Cyprus and the Republic of Cyprus traced the mosaics to Indiana and filed a judicial claim to obtain restitution. The United States District Court of Indiana ordered that the mosaics be awarded to the plaintiffs.

I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.

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I. Chronology

Post 1970 restitution claims

- **1974:** Turkish military forces invaded Cyprus and seized control of the northern part of the island. By the end of 1976, all Cypriots living in Lythrankomi, in northern Cyprus, the village where the **Church of the Panagia Kanakaria** is located, fled to southern Cyprus.¹
- **August 1976-October 1976:** Four mosaics were removed from the apse of the Church of the **Panagia Kanakaria**.
- **November 1979:** The Department of Antiquities of the Republic of Cyprus learned that the mosaics of the Panagia Kanakaria Church had been removed.
- **1 July 1988:** Goldberg, an American art dealer, flew to Amsterdam, to meet Fitzgerald, another American art dealer, Michael van Rijn, a Dutch art dealer, and Ronald Faulk, an attorney from California. Van Rijn showed a photograph of the four mosaics to Goldberg.
- **1 and 2 July 1988:** At Goldberg's direction, Faulk went to Munich to meet the seller of the mosaics, Aydin Dikman, who showed him documents that, in his view, proved the licit exportation of the mosaics from Cyprus.
- **3 July 1988:** Goldberg, van Rijn and Fitzgerald negotiated an agreement whereby "the parties agree[d] to acquire the mosaics for their purchase price of \$1,080,000 (U.S.)". The agreement also provided that the parties will divide the profits made on any future resale of the mosaics.
- **4 July 1988:** This agreement was executed. Probably on the same day, Goldberg and Fitzgerald travelled to Geneva to inspect the mosaics.
- **5 July 1988:** Faulk and Dikman transported the mosaics by airplane from Munich to Geneva free port. Goldberg borrowed \$1,2 million loan from Merchants Bank to purchase the mosaics. The loan was only delivered on 7 July 1988 in a Swiss bank.
- **7 July 1988:** Goldberg kept \$120,000 in cash and gave \$1,080,000 to Faulk and Fitzgerald.
- **8 July 1988:** Goldberg shipped the mosaics to Indiana.
- **October 1988:** Goldberg offered to sell the mosaics to Geza von Habsburg, an art dealer operating in New York and Geneva. Geza von Habsburg then offered the mosaics to Marion True, the former antiquities curator of the Getty Museum in Malibu.
- **January 1988:** The Autocephalous Greek Orthodox Church of Cyprus and the Republic of Cyprus learned that the mosaics were in Indianapolis in Goldberg's possession. They wrote to Goldberg requesting the return of the mosaics. The Church offered Goldberg the reimbursement for the purchase price in exchange for the restitution. She refused, so the Church and the government of the Republic of Cyprus instructed their attorneys to file suit to recover the mosaics.
- **3 August 1989:** The United States District Court of Indiana decided that the four mosaics should be returned to the plaintiffs.

¹ Without specific indication, the source of the Chronology is the decision *Autocephalous Greek-Orthodox Church of Cyprus and Cyprus v. Goldberg & Feldman Fine Arts and Goldberg*, United States District Court, Indianapolis Division, No. IP 89-304-C, 3 August 1989.

- **24 October 1990:** The United States Court of Appeal affirmed the decision of the District Court.
- **1991:** The mosaics were returned to Cyprus and welcomed by a crowd of 50,000 people.² They are now in the Byzantine Museum of the Archbishop Makarios III Foundation.³

II. Dispute Resolution Process

Judicial claim – Judicial decision

- Cypriot authorities, after being contacted by Marion True, started to research the mosaics in the United States. They finally learned that the mosaics were in Goldberg's possession. Goldberg refused to return the mosaics, despite the fact that the Church offered Goldberg reimbursement for the purchase price. As a result, the Autocephalous Greek Orthodox Church of Cyprus and the Republic of the Cyprus filed a suit in Indiana to recover the mosaics.

III. Legal Issues

Statute of limitation – Choice of law – Due diligence – Ownership

1. Statute of limitation

- The Indiana code provided that lawsuits “shall be commenced within six years after the cause of action has accrued and not afterwards”.⁴ The code left the question of the triggering event for the accrual up to courts. Indiana law also recognized a **discovery rule** and the doctrine of **fraudulent concealment**.

A. Discovery Rule

- The discovery rule prevents “the statute of limitation from running until the plaintiffs knew or reasonably should have known who possessed the mosaics”.⁵ This means that a plaintiff cannot file a claim for the restitution of a stolen cultural property if he is unable to determine and locate the possessor. Moreover, the plaintiff is required to exercise due diligence to locate the stolen property. The Court acknowledged that from the time the Autocephalous Greek Orthodox Church of Cyprus and the Republic of Cyprus learned that the mosaics disappeared they engaged “in an organized and systematic effort to notify those who might assist them and to seek the return of the mosaics [...]: the United Nations, UNESCO,

² See Mark Rose, “From Cyprus to Munich,” *Archeology*, April 20, 1998, accessed January 2, 2012, <http://www.archaeology.org/online/features/cyprus/index.html>.

³ See “Byzantine Museum,” University of Cyprus, accessed January 2, 2012, <http://www.cs.ucy.ac.cy/projects/museums/team2/index.php?langId=2>.

⁴ *Autocephalous Greek-Orthodox Church of Cyprus and Cyprus v. Goldberg & Feldman Fine Arts and Goldberg*, United States District Court, Indianapolis Division, No. IP 89-304-C, 3 August 1989.

⁵ *Ibid.*

museums, museums organizations, leading Byzantine scholars and curators, and the press”.⁶ The Church and the Republic of Cyprus also dispatched a press release and made many personal contacts. Furthermore, it was stated that the strategy of recovering the mosaics at the point of destination, on the art market, was consistent with the art world at the moment of the facts. The Court concluded that the Church and the Republic of Cyprus had exercised due diligence. So the cause of action did not accrue until late 1988 and therefore the lawsuit was filed in time.

- The defendants argued that the plaintiffs could have located the mosaics at an earlier time if they had taken account of two incidents. The first one was a Turkish press article about Dikman and looted art from Cyprus. But the Court estimated that the article did not connect the mosaics and Dikman. The second one was the recovery of frescoes and portions of the original Kanakarian mosaics in 1983 and 1984 with the assistance of the Menil Foundation of Texas. Similarly, the Court held that the Autocephalous Greek Church and the Republic of Cyprus were not put reasonably on notice of who may have the mosaics in possession by these events. Interestingly, the Court stated that “it would be pointless and destructive to require the plaintiffs to have taken additional steps to investigate the recovery of its property if it was reasonable that such steps might result in physical harm or destruction to human life or the art itself”.⁷
- In summary, the plaintiff has a duty to actively research the lost cultural property which must be organized and systematic. In addition, if some information could lead to the property’s location, the plaintiff has a duty to take reasonable steps to investigate further.

B. Doctrine of fraudulent concealment

- If the discovery rule was not applicable *arguendo*, the Court decided that the action was filed in time under the doctrine of fraudulent concealment because “the mosaics were actively and fraudulently concealed from the plaintiffs [...] by its very nature”. Moreover, the plaintiffs exercised due diligence to investigate the claim and discover the fraud which is a requirement to invoke the doctrine of fraudulent concealment.

2. Choice-of-Law

- The choice-of-law rules of Indiana, namely the *lex loci delicti commissi* rule, establishes that the applicable law is the law of the place where the wrong was committed or, alternatively, if the latter “bears little connection” to the legal action, the law of the State with the “most significant contacts”. The District Court concluded that the State of Indiana had the closest connection with the legal action and that Indiana law and rules governed every aspect of this action.
- The conclusion that Indiana substantive law applied in this case was confirmed by the analysis of Swiss choice-of-law principles conducted by the District Court. As a general rule, Swiss law applied the *lex rei sitae* principle. According to this rule, a domestic court must apply the substantive law of the place where the tangible, movable property was located at the time of the last transaction (Article 100 LDIP).⁸ However, this rule was not

⁶ Ibid.

⁷ Ibid.

⁸ Swiss Code on Private International Law (LDIP) of 18 December 1987, RS 291.

applied in *Goldberg* because Swiss law recognized an exception for goods in transit: in situations in which the goods, though physically present, have only a fortuitous or casual connection with the Swiss legal order, the *lex rei sitae* gives way to the *lex destinationis*, the law of the place of destination (Article 101 LDIP). In the case *sub judice*, the law of Indiana. However, the American judge's interpretation of Article 101 seems wrong since a good in transit means, for the purposes of this article, a good in transportation, which did not reach yet the place of destination.⁹

3. Substantive Law

A. Indiana substantive law

- In Indiana, to prove a claim for the return of an allegedly stolen property (replevin action), the plaintiff must show that he has title or right to ownership, that the property has been unlawfully detained, and that the defendant is in wrongful possession of the property. The Court decided that the plaintiffs offered sufficient evidence: first, they testified that the mosaics were owned by the Archbishop of the Church of Cyprus; second, they stated that the mosaics were removed without the consent of the Republic of Cyprus; third, the mosaics were improperly removed from the church and were considered to have been stolen and unlawfully taken; finally, under Indiana law, a thief can never obtain title to stolen property, “and that one can pass no greater title than one has”.¹⁰ Therefore Goldberg never obtained title or right to the mosaics.

B. Swiss substantive law

- The Court also considered the issue of the case under Swiss substantive law assuming (*arguendo*) that Indiana law was not applicable.
- Under Swiss law a bad faith purchaser of a stolen item can never acquire title. The plaintiff should therefore prove the bad faith by demonstrating that the defendant knew the illicit origin of the item or should prove that “an honest and careful purchaser in the particular circumstances would have doubts with respects to the capacity of the seller to transfer property right”.¹¹ The Court then stated that if the plaintiff proves the alleged circumstances, the defendant then has the burden to prove that he took steps to examine the seller’s capacity and that such steps reasonably resolved the doubts which emerged about the seller’s capacity.
- The Court decided that the plaintiff demonstrated the suspicious circumstance by showing: First, that Goldberg knew that the mosaics came from an occupied military area; second, that the mosaics came from an immovable property and are of unique cultural and economic value and therefore an explanation is required to how that came about; third, the low price of the purchase (US \$1.08 million) in comparison of the market price (US \$20 million); fourth, the fact that Goldberg knew little about the salesman Dikman and about the others intermediaries; finally, the extremely rapid timing of the sale which occurred between 2 and 7 July. In return, Goldberg failed to prove that she effectively made any of the inquiries that

⁹ Bernard Dutoit, *Droit international privé suisse : commentaire de la loi fédérale du 18 décembre 1987*, (Bâle ; Genève [etc.] : Helbing & Lichtenhahn, cop. 2001), 296.

¹⁰ *Autocephalous Greek-Orthodox Church of Cyprus and Cyprus v. Goldberg & Feldman Fine Arts and Goldberg*, United States District Court, Indianapolis Division, No. IP 89-304-C, 3 August 1989.

¹¹ *Ibid.*

she alleged and moreover she didn't make any reasonable inquiries such as contacting the Cyprus authorities. For all these reasons, Goldberg failed to resolve the doubt about the property right of Dikman.

IV. Adopted Solution

Unconditional restitution

- The Court decided that the mosaics should be returned to the plaintiffs.¹²

V. Comment

- The decision of the Court seems fair because it demonstrated that Goldberg acted in bad faith and that Dikman and Van Rijn were part of an organized illicit traffic ring involving Cypriot cultural property on a massive scale.
- Furthermore, we can also appreciate the extremely well structured analysis of the Court and the “*éclairage*” on Swiss law which provides an interesting comparative analysis. The American judge was not obliged to provide such a comparative analysis, however he may have chosen to do so to show that the result would be the same (the mosaics would be returned to Cyprus to even if the applicable law was the Swiss one). Still, one may ask why the law of the State of origin, the Cypriot law, was absent in this elaborate analysis.

VI. Sources

a. Court decisions

- *Autocephalous Greek-Orthodox Church of Cyprus and Cyprus v. Goldberg & Feldman Fine Arts and Goldberg*, United States District Court, Indianapolis Division, No. IP 89-304-C, 3 August 1989.
- *Autocephalous Greek-Orthodox Church of Cyprus and Cyprus v. Goldberg & Feldman Fine Arts and Goldberg*, United States Court of Appeal, Seventh Circuit, No. 89-2809, 24 October 1990.

b. Media

- Rose, Marc. “From Cyprus to Munich.” *Archeology*, April 20, 1998. Accessed January 2, 2012. <http://www.archaeology.org/online/features/cyprus/index.html>.
- “Byzantine Museum.” University of Cyprus. Accessed January 2, 2012. <http://www.cs.ucy.ac.cy/projects/museums/team2/index.php?langId=2>.

¹² The decision was confirmed in appeal: *Autocephalous Greek-Orthodox Church of Cyprus and Cyprus v. Goldberg & Feldman Fine Arts and Goldberg*, United States Court of Appeal, Seventh Circuit, No. 89-2809, 24 October 1990.