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August 2019

Case Portrait of Greta Moll – Moll Heirs v. National Gallery of London

Oskar Moll – Margrete Moll – National Gallery (London) – The American Friends of the National Gallery – United Kingdom/Royaume-Uni – Artwork/oeuvre d'art – Nazi-looted art/spoliations nazies – Post 1970 restitution claims/demandes de restitutions post 1970 – Conciliation – Judicial claim/action en justice – Judicial decision/décision judiciaire – Criminal offence/infraction pénale – Deaccession – Due diligence – Statute of limitation/prescription – Jurisdiction/conflict de juridiction – Ownership/propriété – Procedural issue/limites procedurals – State immunity/immunité des Etats – Request denied/rejet de la demande

The “Portrait of Greta Moll”, which hangs in the National Gallery, London, has been subject to a claim for return. The heirs of the painting’s subject argued the painting was stolen and sold to various owners in the aftermath of the Second World War. They claimed the National Gallery did not purchase the work in good faith. The case has been heard in two courts of the United States. Both courts found in favour of the National Gallery.

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 – Nazi-looted art

- **1947:** Margarete Moll became the owner of the painting “Portrait of Greta Moll” following the death of her husband, Oskar Moll.¹ As she lived in allied-occupied Berlin, Margarete feared the painting would be looted by allied or Soviet troops. She entrusted it to Gertrude Djamarani, one of her husband’s former art students, who was travelling to Switzerland, to ensure the work’s safety. However, upon arrival in Switzerland, Djamarani sold the painting without Mrs Moll’s authorisation, retaining all the profits from the sale.
- **1947-1978:** The painting passed between a number of galleries and private collectors.
- **1979:** The portrait was purchased by the National Gallery, London, from Alex Reid & Lefevre Gallery.² Information regarding the sale was available to the public.³
- **9 March 2011:** Margrete Moll’s grandchildren and heirs wrote to the National Gallery and made their first request for the return of “Portrait of Greta Moll”.
- **15 November 2012:** The National Gallery refused to adhere to the heirs’ requests.⁴
- **14 March 2014:** The heirs filed a request for return with the Spoliation Advisory Panel (SAP).⁵
- **25 March 2015:** The SAP refused the heirs’ request.
- **27 April 2015:** The heirs wrote to the National Gallery demanding the painting’s return a second time. Again, the Gallery refused.
- **6 September 2016:** The heirs initiated a lawsuit against the United Kingdom (UK), the National Gallery and the American Friends of the National Gallery in the United States (US) in the District Court for the Southern District of New York.
- **21 September 2017:** The District Court dismissed the case.⁶
- **10 September 2018:** The 2nd Circuit Court of Appeals in New York affirmed the aforementioned decision, dismissing the claims of the heirs.⁷
- **18 March 2019:** The US Supreme Court rejected the heirs’ appeal.⁸

¹ Oskar Moll commissioned the portrait of her wife (Margarete also went by the name Greta) to Matisse, which was completed in 1908.

² *Williams v. Nat’l Gallery Art*, 16-CV-6978 (VEC) (S.D.N.Y. Sep. 21, 2017), 2-3.

³ Helene Deslauriers, “The Portrait of Greta Moll, the National Gallery and Quintessentially British Statements”.

⁴ *Williams v. Nat’l Gallery Art* (2017), 20-21.

⁵ *Ibid.*, 3. The Spoliation Advisory Panel was established by the UK Government’s Department for Culture, Media and Sport in 2000. It consists of a group of expert advisors, appointed by the Secretary of State, in accordance with section 3 of the Holocaust (Return of Cultural Objects) Act 2009. Article 2 of the Panel’s Rules of Procedure states: “The task of the Panel is to consider claims from anyone (or from any one or more of their heirs), who lost possession of a cultural object during the Nazi era (1933 to 1945) where such object is now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit [...]. The Panel shall advise the claimant and the institution on what would be appropriate action to take in response to such a claim. The Panel shall also be available to advise about any claim for an item in a private collection at the joint request of the claimant and the owner”.

⁶ *Ibid.*, 3, 28.

⁷ *Williams v. Nat’l Gallery*, 17-3253-cv (2d Cir. Sep. 10, 2018), 5-6.

II. Dispute Resolution Process

Conciliation – Judicial claim – Judicial decision

- Margrete Moll herself was fully aware that her painting had not been dealt with as per her requests, and she knew it had been purchased by the National Gallery. She acknowledged this to her family and friends and to the public in a number of lectures and essays in which she described the painting as lost. During her lifetime, Margarete did not express a desire to have the painting returned to her. Similarly, Margarete's children did nothing to assert any rights to the painting. Certain of her children acted in a manner which suggested they condoned the portrait remaining with the National Gallery, including posing for photographs with the painting, as it hung in the Gallery.⁹
- Margarete Moll's grandchildren took a different stance, as they sought the return of "Portrait of Greta Moll". Their legal counsels wrote to the National Gallery, inquiring about the painting's provenance and claiming the Gallery lacked good title to the painting. The Gallery asserted that it had carried out all relevant due diligence during purchase proceedings and formally rejected the heirs' claim, stating that it could not be justified as a matter of law or on ethical grounds.¹⁰
- As a result, the heirs filed a complaint with the SAP demanding the return of the portrait. The SAP formally refused the application for the reason that the case did not fall within its jurisdiction. As the Panel deals with claims relating to art stolen during the Nazi Era, it was unable to hear the case at hand as the painting was misappropriated after 1945.¹¹
- Seeking an alternative remedy, the heirs brought a suit against the National Gallery in the US, as the case could not be brought in the UK (see Section III). To enable the case to be brought in the US, the American Friends of the National Gallery were joined as defendants, to act as the "alter-ego" of the National Gallery.
- The suit was ultimately unsuccessful, as the court held that the heirs failed to demonstrate that the principal's control over the alter ego was used to facilitate fraud or wrongdoing, resulting in injury to the plaintiff.¹²

⁸ *U.S. Supreme Court Review of Petition for Writ of Certiorari in Oliver Williams, et al. Petitioners v The National Gallery, London, et al.*, New York, 2019.

⁹ *Williams v. Nat'l Gallery Art* (2017), 26-27.

¹⁰ *Ibid.*, 20-21.

¹¹ *Ibid.*, 3.

¹² *Ibid.*, 5.

III. Legal Issues

Criminal offence – Deaccession – Due diligence – Immunity – Jurisdiction – Ownership – Procedural Issue – Statute of limitation – State immunity

- The case could not be brought in the UK due to the British Museums Act of 1963 and the Museums and Galleries Act of 1992. These acts only permit the disposal (deaccessioning) of objects which are the property of any British museums, including the National Gallery, in a limited number of specific circumstances.¹³
- The District Court for the Southern District of New York held the heirs' claim was time-bound and subject to the statute of limitations. Under New York law, the time period for recovering chattels is three years from the date of accrual, in the case of a good faith purchaser. The Court assumed the National Gallery to be a good faith purchaser and held that accrual should begin from the time at which the National Gallery first refused to return the painting, in November 2012.¹⁴ The Court also cited the plaintiff's failure to diligently pursue their rights as another reason why the statute of limitations precluded their recovery, given there was clear evidence the plaintiffs and their family members had knowledge of the whereabouts and ownership of the portrait from as early as the 1970s. The plaintiffs were therefore prevented from recovering by virtue of the doctrine of laches, as the heirs were aware of the claim, but delayed taking action, thus prejudicing the defendant.¹⁵
- The Foreign Sovereign Immunities Act (FSIA) of 1976 and the extent to which it was capable of protecting the UK (and the National Gallery) from suit was considered by both the District and Appeals courts. The FSIA stated that, excluding a number of exceptions, "a foreign state shall be immune from the jurisdiction of the courts of the United States".¹⁶ The FSIA extended the definition of foreign States to include agencies and instrumentalities of a State.¹⁷ As a result, the District Court held that both the National Gallery and the UK were immune from the jurisdiction of US courts by virtue of the FSIA.¹⁸
- In the District Court the heirs attempted to rely upon the "commercial activity exception" to the FSIA. They claimed the National Gallery met the requirements for the commercial activity exception of the FSIA, arguing that their commercial activities in the US – including the incorporation and operation of the American Friends of the National Gallery Inc,¹⁹ the publication of catalogues featuring the disputed portrait, and the National Gallery's letter to

¹³ In particular, section 5(1) of the British Museums Act and section 4(3) of the Museums and Galleries Act. *Williams v. Nat'l Gallery Art* (2017), 3.

¹⁴ *Ibid.*, 25.

¹⁵ *Ibid.*, 24-28.

¹⁶ Foreign Sovereign Immunities Act 1976, 28 U.S.C. § 1604. For further examples of the application of the FSIA to art cases see the Altmann case (Caroline Renold, Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, "Case 6 Klimt Paintings – Maria Altmann and Austria," Platform ArThemis (<http://unige.ch/art-adr>)), Art-Law Centre, University of Geneva) and the Orkin case (Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, "Case View of Les Saintes-Maries-de-la-Mer – Mauthner Heirs v. Switzerland," Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva).

¹⁷ *Ibid.*, 28 U.S.C. § 1603(1).

¹⁸ *Williams v Nat'l Gallery Art* (2017), 4.

¹⁹ *Williams v Nat'l Gallery* (2018), 14.

the plaintiff's counsel in New York indicating the Gallery's refusal to return the painting – constituted sufficient grounds for the invocation of the exception. The Court rejected this ground, stating that none of the aforementioned aspects bore any connection with the foundation of the heirs' claim, or provided any indication that the Gallery was wrongfully retaining the painting.²⁰

- On appeal, the heirs argued the “expropriation exception” to the FSIA applied to the case, and should allow them to assert their rights.²¹ The exception applies in instances where rights to property are in issue and where this property has been “taken” in a manner which violates international law, if that property is owned by an agency or instrumentality of the foreign State, which is involved in commercial activity within the US.²² Thus, the heirs argued the painting had been “taken”. Given the National Gallery had commercial interests in the US, they argued they should be liable under US law. This argument was rejected by the 2nd Circuit Court of Appeals in New York, according to which the taking of property in violation of international law entails an act of a sovereign, not of a private enterprise.²³ Given that the painting was taken by a private actor and not by the National Gallery or another State entity, the Court rejected the heirs' argument.²⁴

IV. Adopted Solution

Request denied

- The 2nd Circuit Court of Appeals in New York handed down a unanimous 3-0 summary order which upheld the decision of the District Court for the Southern District of New York, and rejected all elements argued by the heirs.²⁵
- The US Supreme Court rejected the heirs' application for appeal against the decision.²⁶
- The heirs have now exhausted all opportunities for legal recourse open to them in the US. With no option to bring an action in the UK, it is unlikely the dispute about the “Portrait of Greta Moll” will come before a court again.

²⁰ Ibid., 15-16.

²¹ Ibid., 4.

²² Foreign Sovereign Immunities Act 1967, 28 U.S.C. § 1605(a)(3).

²³ *Zappia Middle E Const. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000), 251.

²⁴ *Williams v Nat'l Gallery* (2018), 4.

²⁵ Ibid, 6.

²⁶ *U.S. Supreme Court Review of Petition for Writ of Certiorari in Oliver Williams, et al. Petitioners v. The National Gallery, London, et al.*, New York, 2019.

V. Comment

- The judgments in this case largely rest on procedural and jurisdictional issues. This has resulted in certain key substantive issues remaining unaddressed.
- One such issue is the question of whether the National Gallery can be considered a good faith purchaser. A footnote in the District Court decision states “The Court does not address whether Plaintiffs have adequately alleged that the National Gallery is a good faith purchaser, an issue the parties dispute”.²⁷ The issue is not mentioned by the Court of Appeal. The question of whether the Gallery can be considered a good faith purchaser was only considered by the District Court to the extent that it was necessary to determine the application of limitation periods to the case. In this instance, although the Court assumed the standard of a good faith purchaser was relevant to the National Gallery, their conclusion that the statute of limitations applied rested primarily on their belief that the heirs failed to “diligently pursue their rights to the Painting”.²⁸
- Generally, most jurisdictions presume the good faith of a purchaser or acquirer, and this is always paired with a requirement that the party alleging bad faith must shoulder the burden of proof and provide evidence for their argument.²⁹ This requirement is exemplified in Article 4(4) of the 1995 UNIDROIT Convention, which establishes that, “[i]n determining whether the possessor exercised due diligence [at the moment of the acquisition], regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances”.³⁰
- Furthermore, in some jurisdictions the “discovery rule” also applies, which entails that the original owner’s cause of action should not accrue until after the injured party discovers or should have discovered the circumstances which cause the action to be raised.³¹ Therefore, the conduct of both the original and current owners must be considered.
- The National Gallery has argued it was a good faith purchaser, as it was well aware of the painting’s whereabouts and history prior to its purchase. In a press release from September 2018, the Gallery stated: “At no point was it ever suggested to us that the painting had been stolen from the family, or that the family had any concerns with the painting being on display here at the National Gallery. We only became aware of these when we received a letter from US lawyers acting for them in 2011”.³² This argument was accepted in Court. The Court also upheld their assertion that the family did not lose the painting as a result of Nazi looting, but rather as a result of a dishonest act by a family friend, many years before it was sold to the National Gallery, a circumstance of which the family was aware.

²⁷ *Williams v Nat’l Gallery Art* (2017), 16.

²⁸ *Ibid*, 25.

²⁹ Mara Wantuch-Thole, *Cultural Property in Cross-Border Litigation*, 256-257.

³⁰ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, adopted 24 June 1995.

³¹ Wantuch-Thole, *Cultural Property in Cross-Border Litigation*, 258.

³² “National Gallery and the British Public Are Rightful Owners of the Portrait of Greta Moll”, 11 September 2018.

- However, before the Court of Appeals the heirs claimed the National Gallery ignored the red flags which should have indicated the painting was transferred immediately after the Second World War, and failed to adhere to governmental warnings to act with caution when purchasing works transferred in that era.³³ While it is true that the initial sale of the painting did not take place during the Second World War, it can be argued that the sale occurred as a result of it. Had the heirs been able to bring a case in an appropriate jurisdiction, a court may have considered the issue in more depth. However, as the Molls were not Jewish, and the sale was not a result of persecution, it is difficult to know whether a court would accept that the National Gallery's title to the painting is affected by its provenance.
- However, given that little was done by Margarete Moll or her immediate descendants to prevent further sale and transfer of the paintings, it is likely that a court would have sided with the National Gallery. When considering the purpose of the discovery rule, it is arguable that Mrs Moll herself "discovered" what had become of her painting, including that it had been sold to the National Gallery, but failed to act on or show any intention to act on this information. Thus, even if the case had focused on questions of law, the outcome would have likely been the same.
- Additionally, this case can be interpreted as an example of "forum shopping",³⁴ as the connection between the National Gallery and the US can be considered somewhat tenuous. As Roodt points out, forum shopping is not illegal, however it should not be used to "maximise the inconvenience and expense of the opposing party".³⁵ There is reason to believe that the heirs brought their case in the New York jurisdiction as a result of its more flexible approach to the law relating to discovery of claims. The application of such laws in this case did lead to inconvenience and expense to the opposing party, as the case made its way through two levels of the court hierarchy, before being refused by a third. The "demand and refusal" rule, which is unique to the State of New York, means that the limitation period for a claim does not begin to run until the owner demands the return of the property from the possessor. Therefore, New York law gave the heirs the opportunity to argue that the relevant limitation period for their claim had not expired, and also provided them with a forum to test the limits of the Foreign Sovereign Immunities Act.

³³ *Williams v Nat'l Gallery* (2018), 3.

³⁴ Christa Roodt, *Private International Law, Art and Cultural Heritage* 82.

³⁵ *Ibid.*

VI. Sources

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b. Court decisions

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c. Legislation

- British Museums Act 1963.
- Museums and Galleries Act 1992.
- Foreign Sovereign Immunities Act 1967.
- UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 24 June 1995.

d. Documents

- Caroline Renold, Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, “Case 6 Klimt Paintings – Maria Altmann and Austria,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.
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e. Media

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