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Case Pulcinell Sculpture – Budge Heirs v. Anonymous Purchaser

Budge Heirs – United Kingdom/Royaume-Uni – Artwork/oeuvre d'art – Nazi looted art/spoliations nazies – Ownership/propriété – Procedural issue/limites procédurales – Institutional facilitator/facilitateur institutionnel – Conciliation – Request denied/rejet de la demande

A sculpture of Pulcinell was purchased by an anonymous buyer at auction in London in 2016. The buyer applied for an export license and the case came before the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest of the United Kingdom. During the review, it was discovered that the sculpture had been subject to forced sale by Nazis in 1937. The heirs of Emma Budge, the dispossessed owner of the sculpture, discovering what had become of the sculpture, attempted to secure its restitution. However, without the permission of the purchaser, the case could not be heard by the Spoliation Advisory Panel. Unable to find a solution that would allow the item to remain in the United Kingdom, the Reviewing Committee ultimately granted the export license.

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

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I. Chronology

Nazi looted art

- **September 1937:** The sculpture “Meissen Böttger stoneware figure of Pulcinell, from the *Commedia dell’arte*”, created at the Meissen factory (Germany) at the beginning of the eighteenth century,¹ was sold at auction in Berlin. The works in the auction belonged to Emma Budge, a Jew from Hamburg, whose collection was seized by the Nazis. At the auction, the Pulcinell sculpture was purchased by art dealer Isaac Rosenbaum, who later passed or sold it to his friend and business partner Arthur Kauffmann.²
- **1938:** Kauffmann fled Nazi Germany for the United Kingdom (UK).³
- **2016:** The sculpture was sold by Kauffman’s heirs at a London auction. It was acquired by an anonymous Japanese purchaser for £270,000, with an additional £4,500 in VAT.⁴ Soon after the sale, the purchaser made an application for the sculpture to be exported to Japan. This application was considered by the UK Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest.⁵
- **14 December 2016:** The case came before the Reviewing Committee, who heard information regarding the sculpture’s forced sale in Germany during the Nazi regime. The Committee recommended the Secretary of State defer the granting of an export license for a period of four months, to allow a buyer in the UK to make an offer to match the purchase price.
- **2017:** The Budge heirs discovered what had become of the sculpture and made a claim to the Spoliation Advisory Panel.⁶ However, the Panel could not heard the case.⁷
- **2017-2018:** Following the expiration of the deferral period, during which no offers were made, nor any desires to raise appropriate funds indicated, the export license was granted.⁸

¹ Executive Summary, 2016.

² Note of hearing on Meissen figure of ‘Pulcinell’ (Case 2, 2015-2016), para 11.

³ Bailey, “UK Permits Nazi-Looted Meissen Figure to Leave for Japan Despite Spoliation Claim”.

⁴ Note of hearing on Meissen figure of ‘Pulcinell’, p. 1.

⁵ The Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest is a part of the Department of Digital, Culture, Media and Sport, which is tasked with protecting and nurturing the cultural heritage of the UK.

⁶ 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”.

⁷ See *infra* sections II and III.

⁸ No exact date has been given to indicate when the deferral period expired.

II. Dispute Resolution Process

Institutional facilitator – Conciliation

- At the time the sculpture was purchased in 2016, the only information available regarding its provenance was that it had formed a part of an English private collection.⁹ There was no evidence it had been publicly exhibited,¹⁰ and no evidence of restoration, with all decorations appearing to be “contemporaneous with the period of manufacture”.¹¹
- After purchasing the Pulcinell sculpture, the anonymous purchaser applied for an export license. The application was heard by the UK Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest. According to the requirements of the Department for Culture, Media and Sport’s “Export Controls on Objects of Cultural Interest”, when granting an individual export license for objects valued at or above the financial threshold for an Open General Export License (OGEL), which have been in the UK for a period of more than 50 years, an expert advisor must assess whether the object meets the Waverley Criteria of a “national treasure” before the license can be granted.¹² As the sculpture had been in the UK since 1939, and was valued at £270,000, it exceeded both the 50 year time period, and the £65,000 value limit for the relevant object category.¹³ At the time, the buyer was aware of the possibility that the license could be refused.¹⁴
- Prior to the hearing, additional information came to light regarding the sculpture’s provenance. It was discovered that after Emma Budge’s death on 14 February 1937, Nazis seized the entirety of her art collection, selling it in two separate auctions. At the auction, the Pulcinell sculpture was purchased by art dealer Isaac Rosenbaum, who later passed or sold it to his friend and business partner Arthur Kauffmann. Mr Kauffmann brought the sculpture to the UK. In addition to the forced sale, the Nazis substituted the original executors of Mrs Budge’s will with their own, thus facilitating the seizure of her assets. All proceeds from the auctions were paid into blocked Nazi accounts, allowing the money to be kept for the Third Reich. No money reached her true heirs.¹⁵
- On 14 December 2016, the case came before the eight members of the Reviewing Committee and three independent assessors.¹⁶ The applicant and expert advisors presented submissions regarding the extent to which the sculpture met the Waverly Criteria, with both concluding the sculpture satisfied two of the three requirements of the Criteria, and should therefore be kept in the United Kingdom. Although the Committee was concerned about the item’s provenance, their powers do not extend to the protection of looted or otherwise misappropriated works. The Committee was therefore required to conduct their assessment of the work’s eligibility for export based solely on its significance to the UK.

⁹ Executive Summary, 2016, 1.

¹⁰ Ibid.

¹¹ Note of hearing on Meissen figure of ‘Pulcinell’ (Case 2, 2015-2016), para 13.

¹² Export Controls on Objects of Cultural Interest, 2015, 5.

¹³ OGEL limits for the export of cultural goods, 2017.

¹⁴ Note of hearing, as above, para 4.

¹⁵ Export of Objects of Cultural Interest: 2016-2017, 54.

¹⁶ Note of hearing, as above, para 1-2.

- In 2017, the Budge heirs discovered what had become of the statue and sought advice from British authorities regarding its recovery. They were advised to make a claim for repatriation with the Spoliation Advisory Panel, however the Panel was unable to hear the case, as the anonymous Japanese buyer did not give permission for the matter to be investigated.¹⁷

III. Legal Issues

Ownership – Procedural issue

- The first legal issue in this case was whether or not the sculpture met the three requirements of the Waverley Criteria.
- There are three aspects of the Waverley Criteria, each of which, if satisfied, constitute a ground upon which an export license can be denied. The first criteria is that the work must be “so closely connected” with the UK’s “history and national life”, that “its departure would be a misfortune”. The second criteria is that of “outstanding aesthetic importance”, and the third is “outstanding significance for the study of some particular branch of art, learning or history”. The applicant submitted that although the sculpture bore no connection with the history or national life of the UK, it did have “some aesthetic value” and “some significance” to the study of Meissen sculptures and Böttger stoneware.¹⁸ The expert advisors used stronger language to argue in support of the sculpture’s meeting categories two and three of the criteria. They described the sculpture’s pose as being of “outstanding aesthetic importance”. The fact the sculpture came from a leading ceramics factory, which employed pioneering techniques, and demonstrated evidence of experimental techniques, which later developed into a recognised genre in the field, was cited as evidence of the sculpture’s importance for the study of Meissen stoneware. The expert advisors also argued that, at present, the UK does not possess an “outstanding” collection of Meissen porcelain and stoneware, arguing “British collections are weak in those items of elaborate design, craftsmanship, ingenuity and skill”.¹⁹ Given its rarity, and the fact there is only one other coloured sculpture of this model currently known to exist, it is likely that this example is the first of its kind, and the forerunner to a number of well-known eighteenth century porcelain designs.²⁰ On account of the evidence provided, the Reviewing Committee concluded the sculpture met the second and third elements of the Waverley Criteria.²¹
- Despite meeting the Waverley Criteria, the question of how the sculpture could remain in the UK, given its German origins and purchase by an overseas buyer on the basis of limited information as to the item’s provenance, remained. Despite new information about the items provenance coming to light, this information was only made available in the aftermath of the

¹⁷ Bailey, “UK Permits Nazi-Looted Meissen Figure to Leave for Japan Despite Spoliation Claim”.

¹⁸ Statement in relation to the Waverley Criteria, 2016.

¹⁹ Executive Summary, 2016, 1-2.

²⁰ Ibid, 4.

²¹ Note of hearing on Meissen figure of ‘Pulcinell’ (Case 2, 2015-2016), 2017, para 17.

sale, and thus the Committee concluded that the only way in which the item could be retained in the UK was for the £270,000 purchase price, plus the £4,500 VAT, to be matched by a UK bidder. The purchaser indicated they would accept such an offer if it were to be made. As a result, the Committee recommended the export license should be deferred for four months, to allow the Arts Council England to receive notification of a serious offer or indication of intention to purchase the sculpture. In the event of such an offer being made, the Committee recommended the granting of the license be deferred for an additional three months in order for the offer to be finalised.²²

- The question of whether the Budge heirs could repatriate the sculpture, given its forced sale by the Nazis during the Second World War was a significant legal issue in this case, but one which could not be dealt with effectively. In order to bring a claim before the UK's Spoliation Advisory Panel, the object concerned must fall within one of three categories: it is possessed by a UK national collection; it is possessed by a UK museum or gallery created for public benefit; or it forms part of a private collection, following the joint request and consent of both the claimant and owner.²³ As the sculpture was not a part of a national collection or museum, the initial two criteria did not apply, and the anonymous purchaser declined to comply with the third ground, refusing to participate in the procedure. Therefore, no application could be made to the SAP.

IV. Adopted Solution

Request denied

- The members of the Reviewing Committee voted on whether the Meissen sculpture met the Waverley Criteria. Of the eleven voting members, eight voted in favour of the sculpture meeting the second criteria (aesthetic importance) and eight voted in favour of the third (significance for study of a particular branch of art, learning or history). This was sufficient for the four-month deferral of the license application to be invoked.
- At the end of the deferral period, no offers or indications of intentions to raise funds were brought before the Arts Council. The Reviewing Committee had no other option but to grant the export license in 2017. Therefore, the sculpture remained the property of the anonymous purchaser.
- The Reviewing Committee had reached the limits of its power and could not do more to address the Budge heir's claim to the sculpture.²⁴

²² Ibid., 18-20.

²³ Guidance notes for the parties on providing information relating to a claim, 2016, para. 1.

²⁴ Note of outcome: Meissen figure of 'Pulcinell' (Case 2, 2015-2016), 2017, para. 17.

V. Comment

- This case calls into question the effectiveness of the Waverley Criteria as grounds for deferring or denying export applications. It demonstrates a clear disharmony between the Reviewing Committee's decision to classify the sculpture as an item of national importance, and the inability of its procedures to prevent the granting of an export license for works with a contentious provenance. According to a spokeswoman for Arts Council England, although the case highlights the limitations of the Committee's power, and inability to go beyond the Waverley Criteria in cases of instances of internationally disputed art, the Council has "no intention at present to change the current arrangements".²⁵ Similarly, the UK Government's Department for Culture, Media and Sport has confirmed the government "can only refuse an export license for an item on the basis of national importance".²⁶
- When an object is found to meet the Waverley Criteria, but a suitable buyer cannot be found, an object will be considered "lost from the UK" on the occasion of its export.²⁷ Wang argues that one potential cause of items being "lost" is the fact that in order to match the purchase prices of objects which have been designated eligible to remain in the UK, museums require funding.²⁸ The Waverley Committee, whose report established the Waverley Criteria in 1952, stated that one of the primary objectives of the criteria is to ensure that national institutions are given the opportunity to purchase important objects.²⁹ However, evidence suggests the UK's Treasury contributes less and less to ensuring museums have sufficient funds for their operations.³⁰ Without funds to purchase an item, it is likely more and more items satisfying the Waverley Criteria will be "lost" due to an inability of museums to step in and address the situation.
- However, in this situation, it may not necessarily have been funds that prevented museums or other collectors from demonstrating interest in the object. The provenance of the sculpture and its status as an example of Nazi looted art means that museums were likely unwilling to risk purchasing such an item, only to have it taken from them by the Spoliation Advisory Panel.
- Conversely, it is also arguable that protecting items which have fallen victim to Nazi looting should not be within the scope of the Export Committee's power. The Committee is a government body, responsible for protecting heritage within the UK, and thus applying a test of "national importance" is in line with their designated function.
- Another actor whose inability to act should be analysed is the Spoliation Advisory Panel. As the Panel requires the permission of both parties to address claims in the case of individual purchasers, the matter could not be heard in this instance, as the purchaser refused permission, and the Secretary of State cannot, for reasons of confidentiality provide the Panel with information received in the course of a license application.³¹ While the panel is

²⁵ Bailey, "UK Permits Nazi-Looted Meissen Figure to Leave for Japan Despite Spoliation Claim".

²⁶ Ibid.

²⁷ Wang, "Whose Responsibility? The Waverley System, Past and Present" 228.

²⁸ Ibid, 248.

²⁹ Maurice and Turnor, "The Export Licensing Rules in the United Kingdom and the Waverley Criteria" 278.

³⁰ Wang, "Whose Responsibility? The Waverley System, Past and Present" 248.

³¹ Export Controls on Objects of Cultural Interest, 2015, 54.

designed to assess claims based on “moral grounds” and has the power to hear matters otherwise barred by limitation periods,³² in the case of private parties, the refusal of permission from one party negates any moral claim an opposing party may have.³³ While the Panel’s approach is justifiable, the fact that some cases are prevented from being heard based on the desires of one party alone is concerning.

- The enactment of the Holocaust (Return of Cultural Property) Act 2009 demonstrates the UK government is committed, at least to an extent, to facilitating the repatriation of disputed items. Although this case can be considered anomalous, as the information giving rise to the spoliation claim arose following a good faith purchase, it highlights the fact that more should be done to prevent such difficult situations from arising in the future. In light of this, the UK government should consider means by which they can protect disputed art, and ensure that in the case of public methods of sale such as auctions, extensive information is available about the provenance of any works that could have been subject to looting or misappropriation, and to enable private purchasers to understand any potential issues with the items they wish to acquire. One feasible suggestion was raised by Maurice and Turnor who point out that, as of yet, the UK does not have a mechanism for listing works or types of art which are prohibited from export. By creating and making publicly available a register of certain types of art and cultural property, including art sold in specific countries during particular periods of history, known to have seen frequent misappropriation of art, the UK could do more to facilitate repatriation.³⁴

VI. Sources

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³² Woodhead, “Redressing Historic Wrongs” 114.

³³ Guidance notes for the parties on providing information relating to a claim, 2016, para 1.

³⁴ Maurice and Turnor, “The Export Licensing Rules in the United Kingdom and the Waverley Criteria” 294.

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