

# Binding advice on dispute over the painting Road to Calvary

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Advice: Binding advice on dispute over the painting Road to Calvary

Number: 3.95

Date: 3-5-2010

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## Binding advice concerning the dispute over the painting *Road to Calvary*

Case number: RC 3.95

Date of binding advice: 3 May 2010

### **BINDING ADVICE**

in the dispute between:

The heirs of Oppenheimer and the company  
Van Diemen & Co. in the process of being wound up  
represented by  
Ms E. Sterzing, Avocat à la cour  
in Paris  
hereafter referred to as: ‘the Oppenheimer family’,

and:

Ms J.F.K.  
represented by Mr J.W.A. Vesterink  
in Amsterdam  
hereafter referred to as: ‘Ms K.’,

given by the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War in The Hague (the Restitutions Committee), hereafter referred to as ‘the Committee’, with the application of Article 2, paragraph 2 of the Decree Establishing the Restitutions Committee.

### **1. INTRODUCTION**

The reason for the dispute is a possible division of the proceedings from the sale of the painting Road to Calvary, Brunswijker Monogrammist, also known as the Bearing the Cross, Hans van Wechelen, hereafter referred to as: (the painting) Road to Calvary or the work of art. During the Nazi regime in Germany, the Oppenheimer family lost possession of this painting as a result of an order by Nazi authorities to have their art property auctioned. The painting is currently owned by Ms K., who would like to sell it. The parties are divided on how the proceeds from the sale of the painting should be shared between Ms K. and the Oppenheimer family.

### **2. PROCEDURE**

2.1 The parties have submitted a joint request to the Minister for Education, Culture and Science (hereafter referred to as: ‘the Minister’) to have the dispute settled by the Committee. The Minister submitted a written request to the Committee on 2 October 2008, asking the Committee to advise the parties on the dispute in

accordance with the procedure laid down in Article 2, paragraphs 2 and 3 of the Decree Establishing the Restitutions Committee of 16 November 2001 (hereafter referred to as: 'the Decree'). In accordance with Article 2, paragraph 5 of the Decree, the Committee issued advice in this procedure according to the standard of reasonableness and fairness.

2.2 In letters dated 8 March 2009 and 13 March 2009 respectively, Ms K. and the Oppenheimer family declared that they deferred to the regulations established by the Committee concerning the binding advice procedure and that they would consider the Committee's recommendation to be binding. The Committee has verified the identities of the parties and has received powers of attorney from the representatives which attest to their authority to act on behalf of the parties in this procedure.

2.3 The representative of the Oppenheimer family, Ms Sterzing, is not only acting as the lawyer for the Oppenheimer heirs, but also as the liquidator of the company Van Diemen & Co., charged with winding up the art dealership. The Committee has also received documentation which shows that a German court has appointed Ms Sterzing as Nachtragsliquidatorin. On 19 April 2010, Ms Sterzing explained to the Committee in person that her role of Nachtragsliquidatorin of Van Diemen & Co is 'only for the purpose of claiming works of art that were the property of the company [art dealership Van Diemen & Co., addition by Committee]' and that in the event of successful claims, it would be her 'obligation to distribute money among the heirs'.

2.4 The Committee informed the parties about the procedure in a letter dated 2 February 2009. After being invited to do so, both parties explained their positions in two written rounds, by providing documentation and by responding to one another: the Oppenheimer family doing so in letters dated 18 May and 12 October 2009 and Ms K. in letters dated 5 July and 5 December 2009. On 28 January 2010, the Committee wrote a letter to Ms K. requesting information concerning the value of the painting. Ms K. responded in writing on 15 and 27 February 2010. The enclosed valuation report, drawn up by Mr Broekhof of Amsterdam Auctioneers Glerum on 25 February 2010, valued the painting at €80,000. The dispute was heard at the hearing in The Hague on 1 April 2010 in the presence of both parties.

2.5 During the hearing, the Committee ascertained that the parties still disagreed on the desired resolution of the dispute. For this reason, the Committee concluded the hearing with the announcement that it would formulate a solution to end the dispute. After the hearing, a document discussed at the hearing was exchanged in letters dated 20 April 2010, after which the Committee informed the parties in writing on 22 April 2010 that the procedure is closed and confirmed that it would now proceed to issue a binding recommendation.

### **3. BASIC PRINCIPLE OF THE BINDING ADVICE**

On the basis of the letters sent by the parties to the Minister, enclosed with the request for advice to the Committee dated 2 October 2008, the letters from the parties to the Committee during the procedure and the discussion of the dispute during the hearing with the parties, the Committee assumes the following facts with regard to this case:

- i) During the Nazi regime, the grandparents of the Oppenheimer heirs, Rosa and Jakob Oppenheimer, involuntarily lost possession of the painting Road to Calvary as a result of what was known as a 'Judenauktion' [Jewish auction] that took place at Paul Graupe auction house in Berlin on 25/26 January 1935.
- ii) Rosa and Jakob Oppenheimer were the owners of the Berlin-based Margraf group, which included the art dealership Van Diemen & Co., also known as Galerie Van Diemen & Co. At the time of the auction mentioned under (i), Road to Calvary belonged to the trading stock of this art dealership. The current applicants on the side of the Oppenheimer family are all grandchildren of Jakob and Rosa Oppenheimer.
- iii) After the proclamation of what are known as the Washington Principles in 1998, the Oppenheimer family registered the painting Road to Calvary in the late 1990s in the public registers of looted art, the Art Loss Register and Lost Art Register.
- iv) The Oppenheimer family discovered the location of the painting in 2006 after a report by Sotheby's auction

house in Amsterdam (hereafter referred to as: ‘the auction house’), where Road to Calvary had been taken by Ms K. to be valued.

v) Ms K. is the current owner of the painting Road to Calvary. She took possession of the painting under universal title (as a result of inheritance) from her father, who died in 1999. Ms K.’s father had acquired the painting under singular title (sale), probably at a jumble sale or fair in the province of Noord-Holland in the period between 1985 and 1995, for the approximate sum of one hundred guilders (approx. €45). He also acquired a painting by Paulus Bril there during this period, which Ms K. also inherited.

vi) During the 2006 valuation mentioned under item (iv), it came to light that the two paintings mentioned under item (v) were stolen from their former owner, the Stichting P. & N. de Boer in Amsterdam (hereafter referred to as: ‘the foundation’) in or around 1984. The foundation was informed of this and had the paintings seized in 2006. Later that same year, the foundation had the seizure reversed and has since made no claim to either Road to Calvary or the other painting. The police also had the paintings seized during an investigation into Ms K.’s ownership. The case was dismissed, however, and the seizure reversed. Road to Calvary is currently housed in Ms K.’s residence.

vii) The foundation acquired the painting Road to Calvary in the Netherlands in 1964. The identity of the painting’s owner(s) prior to this, going as far back as the auction in 1935, is unknown. After her father, Ms K. is (at least) the fourth owner of the painting Road to Calvary since the auction in 1935.

viii) The conclusions from the recommendations of the Committee of 4 February 2008 (NK 1771 and NK 2244, RC 1.67 Oppenheimer), in particular with regard to the suffering of the Oppenheimer family as a result of Nazi rule and the involuntary loss of their art collection in connection with the above-mentioned auction, have not been called into question by either party, nor has the subsequent decision to grant restitution.

ix) The Committee has also ascertained under item (viii) of the advice that research failed to uncover any evidence that the Oppenheims received any of the proceeds from the Judenauktion held in 1935. The Committee adds that given the nature and aim of the auction as well as all the other circumstances, it is highly unlikely that the Oppenheims, having fled the country, ever received any of the proceeds.

#### **4. THE ESSENCE OF THE DISPUTE AND A BRIEF ACCOUNT OF THE DIFFERENT STANDPOINTS**

4.1. Ms K. would like to sell the painting Road to Calvary and the parties are disputing about the proportion of the proceedings that Ms K. should give to the Oppenheimer family. The parties would like the Committee to issue a binding recommendation with regard to this. In a letter dated 8 January 2007, the Oppenheimer family sought ‘eine faire und gerechte Lösung und (...) eine Teilung des Kaufpreises (...)’ [a fair and just resolution and (...) a share of the purchase price (...)]. In a letter dated 6 March 2008, Ms K. expressed the wish ‘to allow [the Restitutions Committee] to determine a possible distribution of the sales proceeds between the owner and the Oppenheimer heirs’.

4.2. Referring to the Washington Principles, the Oppenheimer family have based their claim to the painting Road to Calvary primarily on the involuntary loss of possession in connection with the Judenauktion held in Germany in 1935 mentioned under 3 above. The Oppenheimer family therefore believe they still have a right to claim (ownership of) the painting. The Oppenheimer family derive an additional argument from the uncertainties that surround the purchase of the painting at a jumble sale or fair by Ms K.’s father, in connection with the unsolved theft of the painting from its former owner (not the Oppenheimer family) in 1984. According to the Oppenheimer family, Ms K.’s father and Ms K. herself cannot be considered to be in good faith. The claim by the Oppenheimer family is specifically aimed at receiving a proportion of the proceeds from the sale of the painting by Ms K.. The family is not interested in acquiring or purchasing the painting. The Oppenheimer family lastly stated during the hearing that they would be satisfied with 40% of the proceeds.

4.3 Ms K. has stated that her father was unaware of the title, the painter, the value and the provenance of the painting Road to Calvary, and that she was not aware of this herself until the work was valued in 2006 (item 3

above). Ms K. also stated that there is no question about her father acting in good faith when he purchased the painting. Furthermore, she has acknowledged the severity of the circumstances in which the Oppenheimer family lost possession of the painting in 1935. Ms K. has also added that the relationship with the events of 1935 has since become diluted and that the previous history of the painting cannot be attributed to her given the period of time that has elapsed. During the hearing, however, Ms K. declared that she was willing to give the Oppenheimer family 20% of the proceeds from the sale, the reason for this being her compassion for what the Oppenheimers suffered during the Nazi regime.

## 5. CONSIDERATIONS OF THE COMMITTEE

5.1 In accordance with the regulations mentioned under 2.2 above, the Committee may, in any event, take the following into consideration:

- a. the government's line of policy concerning the restitution of stolen works of art in so far as they apply by analogy;
- b. the circumstances in which possession of the work was lost;
- c. the extent to which the applicant has endeavoured to trace the work;
- d. the circumstances in which the owner acquired the work and the inquiries the owner made when acquiring it;
- e. the significance of the work for the applicant;
- f. the significance of the work for the owner;
- g. the significance for the public art collection.

The Committee hereby states that the line of policy mentioned under a is based on the Washington Principles.

5.2 The dispute between the parties focuses on the extent to which Ms K. should share the proceeds from the sale of the painting Road to Calvary – currently owned by Ms K. but deemed to be looted art due to the Judenauktion mentioned under 3 above – with the Oppenheimer family.

5.3 Given that Ms K., through her representative at the hearing, agreed to acknowledge the Oppenheimer family's entitlement to the painting, the Committee sees it as its limited task to determine the measure of this entitlement. The Committee hereby takes into account that Article 2, paragraph 1 of the regulations mentioned under 2.2 above do speak of 'disputes concerning the restitution of items of cultural value', but that an agreement concerning the division of the sales proceeds could constitute a logical alternative in a situation such as this one, in which the heirs of the former owner have no interest in acquiring possession of the work and the current owner is planning to sell it. The Committee will now outline the steps that led to its binding recommendation.

5.4 Ms K. inherited the painting from her father, who probably bought it at a jumble sale or fair in the province of Noord-Holland sometime between 1985-1995. Further details concerning the time and place are unknown. The Committee sees no reason to doubt the good faith of either Ms K. or her father. With regard to the ownership of the painting Road to Calvary, Dutch civil law stipulates that Ms K.'s right of ownership is inviolable.

5.5 According to Ms K., her father probably paid around 100 guilders (approx. €45) for the painting. She base this on conversations she had with her father, in which he stated that he normally did not want to spend more than 100 guilders on purchases at jumble sales and fairs. Ms K. thinks it unlikely that her father would have paid more for Road to Calvary given her father's limited, if not lack of, capital. The Committee assumes that an amount to the tune of €45 was paid.

5.6 Given this low purchase price, the Committee is of the opinion that (with hindsight) the purchase price by no means reflects the true value of the painting, which is currently assessed at many times the purchase price. It is noted here that Ms K. stated that her father was unaware of what he had purchased and had no special knowledge of the art of painting. Given the low purchase price combined with the place of purchase (a jumble sale) and the fact that to a layman the painting lacks any striking characteristics, the Committee is of the opinion that it could not be reasonably expected or demanded of Ms K.'s father, or later of Ms K. herself, to have instigated research into the provenance of the painting.

5.7 The Committee deems it inexpedient in this dispute to assess the entitlement of the Oppenheimer family at

a particular sum of money based on the valuation of the painting at a certain moment. It deems it more appropriate to express that entitlement in a proportion or percentage of the future sale proceeds, linking the entitlement to the actual proceeds from the sale of the painting. In this way, the Oppenheimer family will acquire an economic interest in the painting, which will remain the legal property of Ms K. until it is sold to a third party.

5.8 In establishing the percentage of the proceeds that Ms K. will have to give to the Oppenheimer family, the Committee takes into consideration that as a Jewish family, the Oppenheimer family must have had to endure considerable personal and professional suffering as a result of the Nazi regime. At a professional level, this led to the liquidation of Jakob and Rosa Oppenheimer's companies, including the renowned art dealership Van Diemen & Co. The couple involuntarily lost possession of property that belonged to these companies, including the painting Road to Calvary at a Judenauktion held in Germany in 1935. The proceeds from this auction did not accrue to the Oppenheimers. The Oppenheimer family members represented in this procedure, who are direct, second generation descendents of Jakob and Rosa Oppenheimer, are not especially attached to the painting. The Oppenheimer family do not wish to acquire possession of the painting, but rather to receive a proportion of the sale proceeds as recognition of the original rights of Jakob and Rosa Oppenheimer.

5.9 That said, the Committee also takes into consideration that Ms K.'s father bought the painting in good faith many years ago, namely in the period between 1985 and 1995. He was unaware of the nature or value of the painting when he bought it at a jumble sale or fair for an amount that was far too low to reflect the value the painting appeared to have some 10 years after his death. As stated in section 5.6, it cannot be reasonably expected or demanded of either Ms K.'s father or Ms K. herself to have instigated research into the provenance of the painting. Furthermore, the Committee concludes that Ms K. is also not especially attached to the painting and wishes to sell it. She is willing to give a proportion of the proceeds to the Oppenheimer family, the motive for which is based on a sense of moral obligation.

5.10 In weighing up the positions of each party in considerations 5.8 and 5.9, the Committee has come to the conclusion that according to the standards of reasonableness and fairness, Ms K.'s share should be twice that of the Oppenheimer family, meaning that in the event of a sale, Ms K. must relinquish a one-third share of the net proceeds to the Oppenheimer family. This conclusion reflects that Ms K.'s right of ownership is beyond all doubt and, all in all, carries the most weight for the Committee, but that the ownership of Road to Calvary as a looted work of art has brought forth a moral obligation towards the Oppenheimer family, which will now be met in the above-mentioned manner, thanks to the cooperation of Ms K. in working towards a solution.

## 6. BINDING ADVICE

The Committee issues the following binding advice:

- a. In the event that the painting Road to Calvary, Brunswijker Monogrammist (also known as the Bearing the Cross, Hans van Wechelen) is sold, Ms K. will, upon submission of verificatory documents, relinquish a one-third share of the net proceeds to Ms Sterzing in her capacity as Nachtragsliquidatorin for Van Diemen & Co, or her legal successor in this position;
- b. the Oppenheimer family will do all they can to effect the sale of the painting in question by Ms K., including deletion of the entry from the Lost Art Register, Art Loss Register or any other such register.

This binding advice was given on 3 May 2010 by W.J.M. Davids (chair), J.Th.M. Bank, P.J.N. van Os, E.J. van Straaten, H.M. Verrijn Stuart, I.C. van der Vlies (vice-chair) and signed by the chair and the secretary.

(W.J.M. Davids, chair)

(E. Campfens, secretary)

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### Relevant press release:

[Press release RC 3.95 \(/en/pressreleases/press\\_release\\_rc\\_395.html\)](http://www.restitutiecommissie.nl/en/pressreleases/press_release_rc_395.html)