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FACULTÉ DE DROIT
Centre du droit de l'art



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Anne Laure Bandle, Alessandro Chechi, Marc-André Renold

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Case Road to Calvary – Oppenheimer Heirs and Private Person

Jakob and Rosa Oppenheimer – Private person/personne privée – Nazi-looted art/spoliations nazies – Artwork/œuvre d'art – Settlement agreement/accord transactionnel – Institutional facilitator/facilitateur institutionnel – Due diligence – Ownership/propriété – Sale/vente

In 1935, Nazi authorities took from Jakob and Rosa Oppenheimer a painting entitled “Road to Calvary” by Brunswijker Monogrammist and sold it at auction. The painting resurfaced in 2006 when a Dutch private individual brought it to Sotheby’s determined to sell it. Instead of asking for the painting’s restitution, the Oppenheimer heirs demanded a portion of the sale’s proceeds. The Dutch Restitutions Committee issued a binding opinion on the matter, as requested by the parties.

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

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PLATFORM ARTHEMIS

art-adr@unige.ch - <http://unige.ch/art-adr>

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I. Chronology

Nazi looted art

- In **1935** the Nazis looted Jakob and Rosa Oppenheimer's painting "Road to Calvary" by Brunswijker Monogrammist. The painting had been previously attributed to Hans van Wechelen and entitled "Bearing the Cross". On **25 and 26 January** it was sold by Paul Graupe auction house as ordered by Nazi authorities.
- In **1964** the Foundation "Stichting P. & N. de Boer" (hereafter "the Foundation") in Amsterdam acquired the painting. It was stolen around **1984**¹.
- **Between 1985 and 1995** a private individual purchased the painting at a garage sale or flea market. His daughter (hereafter the Daughter) inherited the painting upon his death in **1999**.
- In the **late 1990s** the Oppenheimer heirs registered the painting in the public registers of looted art: the Art Loss Register (London) and the Lost Art Register (Magdeburg).
- In **2006** the Daughter brought "Road to Calvary" to Sotheby's Amsterdam for valuation, which Sotheby's reported to the Oppenheimer heirs. The heirs contacted the seller and demanded a portion of the sale's proceeds. The amount of which, however, the parties contested.
- **In 2007-2008** the Oppenheimer heirs and the current possessor submitted a joint request to the Dutch Minister for Education, Culture and Science seeking a settlement from the Restitutions Committee.
- In **March 2009** the parties consented to be bound by the Committee's advice.
- On **3 May 2010** the Restitutions Committee issued its binding advice entitling the Oppenheimer heirs to a one-third share of the sale proceeds.

II. Dispute Resolution Process

Settlement agreement – Institutional facilitator (Restitutions Committee, binding opinion)

- The Oppenheimer heirs expressed their disinterest in obtaining the restitution of the painting from the current possessor. Instead, both parties asked the Committee to find a just and fair solution in accordance with the 1998 Washington Principles² and to apportion the sale proceeds³. Interestingly, neither the Oppenheimer heirs' ownership title nor the looted nature of the painting was disputed. The Daughter "acknowledged the severity of the circumstances

¹ The Foundation requested the seizure of the painting in 2006 when it re-surfaced on the market, but it eventually had the seizure reversed and made ever since no claim to the painting.

² Washington Conference Principles on Nazi-Confiscated Art, released in connection with The Washington Conference on Holocaust Era Assets, Washington, DC, December 3, 1998, available on the Website of the Commission for Looted Art Europe, accessed November 8, 2012, <http://www.lootedartcommission.com/Washington-principles>.

³ During the hearings, the heirs expressed that they would be satisfied with receiving 40% of the sale proceeds, whereas the daughter was willing to offer the heirs 20%.

in which the Oppenheimer family lost possession of the painting in 1935.”⁴ However, she emphasized that the previous history of the painting “[could not be] attributed to her given the time that ha[d] elapsed”⁵ since the unfortunate events of 1935.

- Throughout the Restitutions Committee’s binding advice procedure, the parties exchanged information as to their interested positions. However, since they could not independently reach an agreement, the Committee intervened to formulate a binding solution.
- In its advice, the Committee outlined the steps of its decision-making process. It took into consideration (1) the validity of the purchase by the father despite the questionable circumstances of the sale⁶; (2) the Oppenheimer family’s entitlement (and the corresponding moral obligation of the possessor) to a portion of the painting’s value considering the context surrounding the loss in 1935; (3) the fact that Oppenheimer’s heirs had no other interest in the painting than a pecuniary one; and (4) the standards of reasonableness and fairness.

III. Legal Issues

Due Diligence – Ownership

- The central legal issue of this case resided in the question of ownership. The Oppenheimer heirs contested the validity of the Daughter’s ownership title by casting doubts on the good faith acquisition on several grounds. First, the painting was purchased at an amount far below its market value⁷. Second, the painting’s provenance included evidence of an unsolved theft. Third, the painting was registered as looted during WWII by the Oppenheimer heirs at about the time the Daughter inherited the painting.
- The Daughter contended that neither she nor her father had knowledge of the title, author, value, or provenance of the painting until it had been appraised in 2006. Moreover, she argued that there was no question regarding her father’s good faith when purchasing the painting.
- A due diligence standard is imposed on any purchaser of an art object. Compliance with this standard is assessed by examining the circumstances surrounding an acquisition such as the character and connoisseurship of the parties, the price paid, and the consultation of agencies and accessible registers on stolen cultural objects⁸. In the present case, the Restitutions Committee determined that it could not be reasonably expected of the father or Daughter to investigate the painting’s provenance since it had been purchased for a nominal amount at a garage sale or flea market. Further, neither individual possessed connoisseurship in art. Thus, the Committee decided that the painting had been acquired in good faith. Under Dutch civil

⁴ Restitutions Committee, Binding advice concerning the dispute over the painting *Road to Calvary*, RC 3.95, May 3, 2010 (para. 4.3), accessed November 8, 2012,

http://www.restitutiecommissie.nl/en/recommendations/recommendation_395.html.

⁵ Ibid.

⁶ See also below under Chapter III.

⁷ The painting was bought for approximately € 45 and valued prior to the beginning of the hearings at € 80,000.

⁸ Cf. Article 4.4 of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995, accessed November 8, 2012, <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.pdf>.

law, the Daughter's property right was hence inviolable⁹. Her consent to share its proceeds was solely based upon a moral obligation to the Oppenheimer family.

IV. Adopted Solution

Sale

- The Restitutions Committee issued the following binding advice:
- Should the owner sell the painting "Road to Calvary," one third of the sale proceeds have to be relinquished in favour of the Oppenheimer heirs.
- In turn, the Oppenheimer heirs must withdraw all registrations of the painting in the Art Loss Register, the Lost Art Register, or any other such register.

V. Comment

- The present case differs from other disputes regarding WWII looted property in two ways.
 - (1) The possessor of the painting rapidly acknowledged the heirs partial entitlement to the painting and her moral obligation to seek an arrangement. This enabled both parties to find a solution regardless of the applicable law and of the Daughter's rightful property title to the painting.
 - (2) The Restitutions Committee was asked to determine the extent to which the owner should share the sale proceeds of the painting with the heirs. Under Article 2.2 of the Decree establishing the Advisory Committee on the Assessment of Restitution Applications¹⁰, the Committee may issue a binding opinion "on disputes concerning the restitution of items of cultural value". In complying with this grant of authority, the Committee reasoned "an agreement concerning the division of the sales proceeds could constitute a logical alternative in a situation 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"¹¹.
- The present case was submitted to a new channel of alternative dispute resolution through the Dutch Restitutions Committee, namely, by its binding opinion procedure. Under this procedure, the Committee is asked to render "a binding opinion within the meaning of Section 7:900 of the Netherlands Civil Code (settlement agreement) or [to promote] a settlement or

⁹ Restitutions Committee, Binding advice concerning the dispute over the painting *Road to Calvary*, RC 3.95, May 3, 2010 (para. 5.4).

¹⁰ Decree issued by the State Secretary for Education, Culture and Science, F. van der Ploeg, establishing a committee to advise the government on the restitution of items of cultural value of which the original owners involuntarily lost possession due to circumstances directly related to the Nazi regime and which are currently in the possession of the State of the Netherlands (Decree establishing the Advisory Committee on the Assessment of Restitution Applications), WJZ/2001/45374(8123), 16 November 2001.

¹¹ Restitutions Committee, Binding advice concerning the dispute over the painting *Road to Calvary*, RC 3.95, May 3, 2010 (para. 5.3).

- the formation of a mediation agreement between the parties”¹². The parties are asked to explain and exchange their positions in writing. During this exchange, the parties may express their wish to submit the dispute to mediation, and ask the Committee to conduct further investigations and hold oral proceedings¹³. The Committee may also independently decide to conduct these investigations and proceedings¹⁴. Should the parties reach a settlement, the Committee include its terms in the binding opinion¹⁵.
- The outcome of this case has been criticized for not leading to the restitution of the painting (or the payment of its full value) to the Oppenheimer heirs¹⁶. Critics argue that the Oppenheimer heirs were robbed a second time¹⁷. However, considering that the Restitutions Committee confirmed the Daughter and father’s valid ownership title, any restitution requests by Oppenheimer’s heirs based upon law probably would have been unsuccessful. Instead, the heirs could only claim a portion of the sale amount based upon the moral merits.
 - In its binding opinion, the Restitution Committee did not explain how it reached the 1/3 to 2/3 division of the sale proceeds. Neither party requested this apportionment, nor was it assigned by taking the average of each party’s requested amount¹⁸.

VI. Sources

a. Legislation

- Decree issued by the State Secretary for Education, Culture and Science, F. van der Ploeg, establishing a committee to advise the government on the restitution of items of cultural value of which the original owners involuntarily lost possession due to circumstances directly related to the Nazi regime and which are currently in the possession of the State of the Netherlands (Decree establishing the Advisory Committee on the Assessment of Restitution Applications), WJZ/2001/45374(8123), 16 November 2001.
- UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995. Accessed November 8, 2012, <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.pdf>.

¹² Regulations on binding opinion procedure under Article 2, paragraph 2 and Article 4, paragraph 2 of the Decree establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (art. 2.2), accessed November 8, 2012,

<http://www.restitutiecommissie.nl/en/system/files/Regulations%20binding%20opinion%202011-website.pdf>.

¹³ Ibid (art. 6.3).

¹⁴ Ibid. (art. 7 and 8).

¹⁵ Ibid (art. 10).

¹⁶ Ray Dowd, “Nazi Looted Art Panel: Dutch Have "Moral Obligation" To Steal 2/3 of Christian Painting from Jews,” Copyright Litigation Blog, accessed November 8, 2012, <http://copyrightlitigation.blogspot.ch/2010/06/nazi-looted-art-panel-dutch-have-moral.html>.

¹⁷ Ibid.

¹⁸ As a reminder, the heirs asked for receiving 40% of the sale proceeds, whereas the daughter was ready to offer the heirs 20%.

b. Documents

- Restitutions Committee, Binding advice concerning the dispute over the painting *Road to Calvary*, RC 3.95, May 3, 2010. Accessed November 8, 2012, http://www.restitutiecommissie.nl/en/recommendations/recommendation_395.html.
- Regulations on binding opinion procedure under Article 2, paragraph 2 and Article 4, paragraph 2 of the Decree establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War. Accessed November 8, 2012, <http://www.restitutiecommissie.nl/en/system/files/Regulations%20binding%20opinion%202011-website.pdf>.
- Washington Conference Principles on Nazi-Confiscated Art, released in connection with the Washington Conference on Holocaust Era Assets, Washington, DC, December 3, 1998. Available on the Website of the Commission for Looted Art in Europe. Accessed November 8, 2012, <http://www.lootedartcommission.com/Washington-principles>.

c. Media

- Restitutions Committee, Press Release RC 3.95. “Binding Advice on Dispute over the Painting *Road to Calvary*.” May 31, 2010. Accessed November 8, 2012, http://www.restitutiecommissie.nl/en/pressreleases/press_release_rc_395.html.
- Ray Dowd. “Nazi Looted Art Panel: Dutch Have "Moral Obligation" To Steal 2/3 of Christian Painting from Jews.” Copyright Litigation Blog. Accessed November 8, 2012, <http://copyrightlitigation.blogspot.ch/2010/06/nazi-looted-art-panel-dutch-have-moral.html>.