



UNIVERSITÉ
DE GENÈVE

FACULTÉ DE DROIT
Centre du droit de l'art



United Nations
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October 2015

Two Souza paintings – Kurtha v. Marks

Aziz Kurtha – Michael Marks – Francis Newton Souza – Artwork/oeuvre d'art – Post 1970 restitution claims/demandes de restitution post 1970 – Ad hoc facilitator/facilitateur ad hoc – Judicial claim/action en justice – Judicial decision/décision judiciaire – Criminal offence/infraction pénale – Ownership/propriété – Unconditional restitution/restitution sans condition

In 1982, Dr Aziz Kurtha purchased two paintings from the Indian artist Francis Souza. They were stolen years later and their ownership changed a number of times, before Michael Marks purchased them on 10 January 2006. He did this after receiving confirmation from the Art Loss Register (ALR), that there was no claim to the paintings' title. In fact, Kurtha had registered the paintings as stolen in 2005. The case went to court in 2007, after Kurtha discovered through the ALR, that Marks was in possession of the paintings. Kurtha's claim to the painting's title was affirmed and Marks was required to return the paintings.

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

- **1982:** Indian art dealer and businessman based in London and Dubai, Aziz Kurtha (Kurtha), purchased two paintings from Indian artist Francis Souza (Souza). They were Chalice with Host, 1953 and Head of a Portuguese Navigator, 1961, worth an estimated £350,000 (Paintings)¹. Kurtha kept the paintings either in his London home or warehouse², amongst over 200 artworks he owned by Souza, and other artists.
- Sometime during the **1990s**, some of the artworks were stolen, according to Kurtha's claim.
- **2002:** Kurtha claimed to have recognized five of his Souza paintings that were included in a sale of Islamic and Indian art by Bonhams of London³. Four of the pictures were removed from sale, the fifth was sold. Kurtha sued Bonhams, discovered the names of the consignors, Demetriou and Baxter, and joined them as defendants in his action against Bonham's. They were dealers in second hand furniture who knew one another. A settlement was reached, by which Kurtha paid the consignors and they returned the four unsold works to him⁴.
- **4 May 2005:** Kurtha registered the two contested Paintings with the ALR database in London, after discovering they were missing from his collection⁵.
- **10 January 2006:** Upon Demetriou's suggestion, Michael Marks (Marks), his business partner in a separate venture, telephoned the ALR to enquire about Souza's Paintings. Marks was not alerted to any problem surrounding their title. On that same day, he subsequently purchased the two Paintings for £124,000, from Demetriou. Demetriou had purchased the Paintings the day before, from another dealer in second hand furniture, Christopher Martin (Martin)⁶.
- **11 January 2006:** Marks collected the Paintings in exchange for a cash deposit. As a result of the sale, Kurtha learnt from the ALR that Marks had possession of the paintings. A few days later, Marks contacted the ALR again, in order to receive the expected written

¹ Georgina Adam, "London dealer forced to return Souzas," The Art Newspaper, No. 190, April 1, 2008, accessed February 11, 2015, <http://www.aristitle.com/news/docs/Souza.pdf>.

² *Kurtha v Marks* [2008] EWHC 336 (QB) (27 February 2008), pp.

³ *Ibid*, 41.

⁴ Kurtha was not able to prove that the paintings were stolen at this time. Demetriou and Baxter both claimed to have bought those paintings from Dobkins, and he claimed to have acquired them in a clearance sale, which was not identified. There was no further evidence of provenance. There was an absence of any police investigation. Kurtha subsequently came to believe that there were further artworks stolen from his collection, including the two contested Paintings.

⁵ *Kurtha v Marks* [2008] EWHC 336 (QB) (27 February 2008), pp. 41.

⁶ It was furthered inferred that Martin had concealed the works in his home, because he "suspected or believed that they were stolen and wished to have available a limitation defence before they were sold to an innocent collector", *Kurtha v Marks* (2008), pp. 27. When Demetriou noticed the paintings he proposed to purchase them. Martin claimed to have purchased the two paintings in November 1999 for £200 from Jennifer Banarse. Banarse claimed to have received the paintings as a gift from her grandmother sometime before that date. Her grandmother died in 2005 and the evidence as to the earlier provenance of the two paintings could not be found.

confirmation of title. ALR founder Julian Radcliffe (Radcliffe) then informed Marks that there was in fact a dispute as to title, and that Kurtha was claiming the paintings as his own⁷.

- **January-March 2006:** Marks, Kurtha and Radcliffe exchanged communication, in an attempt to settle who rightfully owned the paintings. Marks denied and challenged Kurtha's claim over the title of the Paintings, and accused Radcliffe of misleading him⁸.
- **26 February 2007:** An action was commenced by Kurtha, in the High Court of Justice, Queen's Bench Division, in the United Kingdom, in order to recover the Paintings in the possession of Marks.
- **27 February 2008:** Justice Tugendhatt granted Kurtha's claim. Marks was required to return the Paintings to Kurtha⁹.

II. Dispute Resolution Process

Ad hoc facilitator (ALR) – Judicial claim – Judicial decision

- Marks claimed he bought the Paintings in good faith, in January 2006. As an unknown art dealer to the ALR, Marks was required to pay the ALR search fee in order to conduct a check against the ALR database. He was not notified of any doubt about the paintings ownership or stolen nature. Instead, when speaking with Radcliffe, Marks was told that if he were to buy the Paintings, Radcliffe had a client who was interested in buying them¹⁰. Both parties acknowledged it was "common ground, and Mr Radcliffe accepts, that he misled Mr Marks... about there being no problem to the title of the works"¹¹.
- Kurtha asserted his rightful ownership of the paintings during the 2006 correspondence with Marks, through Radcliffe acting on Kurtha's behalf. This included providing details of when he purchased the works and describing the frames of the paintings for authentication purposes¹². Kurtha claimed it "was 'preposterous' to suggest that he had never owned the Paintings in the first place"¹³. Therefore Radcliffe acted as an Ad hoc facilitator by personally interfering between Marks and Kurtha, with the goal of resolving the dispute. As noted in the facts, Marks, Kurtha and Radcliffe exchanged communication via email, in an attempt to ascertain who rightfully owned the Paintings. This shows that Radcliffe was in the middle of facilitating a resolution pre-court.
- With the continued disagreement barring any chance for a resolution between the parties, Kurtha sued Marks in an action commenced on 26 February 2007.

⁷ Kurtha v Marks [2008] EWHC 336 (QB) (27 February 2008), pp. 93.

⁸ Ibid, 98.

⁹ Ibid, 141.

¹⁰ Ibid, 79.

¹¹ Ibid.

¹² Ibid, 100.

¹³ Amit Roy, "Indian who felled Archer squabbles for art," The Telegraph, February 7, 2008, accessed February 10, 2015, http://www.telegraphindia.com/1080207/jsp/nation/story_8873339.jsp#.

III. Legal Issues

Criminal offence (theft) – Ownership

- The main issues in the case were: (1) was Kurtha the owner of the Paintings, and if so, (2) were they stolen from him (the burden of proving these two facts resting on him), and if so, (3) did Martin buy them in good faith from Banarse (the burden of proving this fact resting on Marks)¹⁴? Regarding the latter point, Marks had to prove that someone purchased the paintings in good faith, not less than six years before the action was commenced (before 26 February 2001)¹⁵.
- The judge had no hesitation in finding that Kurtha acquired title to the Paintings and was therefore the owner of them. Despite Kurtha's evidence seeming unreliable at times, but still honest, the judge took into account the difficulty in recalling how and when the Paintings may have been stolen years before. He relied on documentary and photographic evidence provided surrounding the 1982 purchase and subsequent exportation of the paintings from India to Britain¹⁶.
- The judge did find that the paintings were stolen from Kurtha. The period that had to be accounted for ended in 1999¹⁷, with Martin's purchase of the paintings from Banarse. Whilst little evidence could thoroughly justify this, Kurtha's counsel sought to remind the judge that the "standard of proof is not inflexible; 'the more serious the allegation the higher degree of probability that is required'"¹⁸. The judge acknowledged that he did "not think that theft is an improbable explanation for Kurtha's loss of possession of the paintings"¹⁹, despite other possibilities considered. As such, he was satisfied on the balance of probabilities.
- The judge was not satisfied that Martin bought the Paintings in good faith from Banarse before 26 February 2001. Rather he believed Martin thought the Paintings may have been stolen and as such hid them until an opportune moment arose to sell them. The judge explained that because Kurtha's legal action was commenced on 26 February 2007, if there was a good faith purchase, it must have been before 26 February 2001, in order for Marks is to succeed in his defense²⁰. The judge was not satisfied on the balance of probabilities that the sale of pictures by Banarse to Martin occurred before 21 February 2001, nor that the pictures sold were the two contested Paintings²¹. Furthermore, the judge found the evidence of Demetriou and Marks "incapable of belief as to what passed between them during 2005 up to 11 January 2006, and as to what happened on 10 and 11 January, but only that they were acting together"²². He

¹⁴ Kurtha v Marks [2008] EWHC 336 (QB) (27 February 2008), pp. 11

¹⁵ Six years is the normal period within which an action for the recovery of property or for damages, must be brought in England. There are special provisions in cases of theft, provided in s. 4, Limitation Act 1980, which require that the 'burden lies on the purchaser to show that the purchase of the goods was in good faith [at pp. 8]'

¹⁶ Kurtha v Marks [2008] EWHC 336 (QB) (27 February 2008), pp. 116.

¹⁷ Ibid, 121.

¹⁸ Ibid, 117.

¹⁹ Ibid, 124.

²⁰ Ibid, 9.

²¹ Ibid, 126, 127.

²² Ibid, 131

therefore stated that he did not need to consider whether Martin was in good faith when he acquired the Paintings²³.

IV. Adopted Solution

Unconditional restitution

- After hearing the case, the judge handed down his judgment in favour of Kurtha's claim. Marks was required to return the Paintings to Kurtha.

V. Comment

- The involvement of Radcliffe, on behalf of the ALR, brings into question many concerns for the case and the role of organizations like the ALR. The judge in the case noted that "it is common ground, and Radcliffe accepts, that he misled Marks"²⁴. Whilst Radcliffe gave reasons for doing so, it was not important for the judge to set them out. By assuring Marks that there was no claim on the Souza artworks, Radcliffe undoubtedly caused Marks many problems. Georgina Adam noted that the reasoning provided for this, was that it was "sometimes necessary to mislead people who make enquiries about the database, in order to establish identity and bank details from the search fee"²⁵. The circumstances were exceptional in this case, apparently because Marks was an unknown art dealer to the ALR, who would not act in the same way to a known dealer on their contact list.
- The ALR takes law enforcement into its own hands, as there are too few resources prioritizing stolen art. Through earning hefty fees from insurers and theft victims the company has become an "increasingly integral part of art investigation around the world"²⁶. Many attempting to prevent art crime have acknowledged how the ALR serves an important role in the art market. Police are allowed to search the database for free, the company has helped train the F.B.I's Art Crime Team, and their private database, with more than 350,000 stolen, looted or missing works, has enabled the recovery of more than \$250 million worth of art²⁷. However, greater regulation of this private body may be necessary in order to prevent them perverting the course of justice, as they continue to forget that they are not the police. Criticism has been drawn for the ALR's "hardball questionable tactics which push ethical and sometimes legal boundaries, such as paying middlemen and informers for leads on stolen works"²⁸. Furthermore, Tom Flynn noted the ALR's "conflict of interest, where a company offering 'Due Diligence'

²³ Ibid, 132.

²⁴ Ibid, 79.

²⁵ Adam, "London dealer forced to return Souzas," 1.

²⁶ Kate Taylor and Lorne Manly, "Tracking Stolen Art, for Profit, and Blurring a Few Lines," New York Times, September 20, 2013, accessed February 9, 2015, http://www.nytimes.com/2013/09/21/arts/design/tracking-stolen-art-for-profit-and-blurring-a-few-lines.html?pagewanted=all&_r=1&.

²⁷ Ibid.

²⁸ Ibid.

checks also stands to profit when the recovered item comes back to market ... the fact that Justice Tugendhat admonished the ALR for being economical with the actualité, perhaps confirms that all is not right with this process”²⁹. Flynn called for the insurance companies and auction houses that “support such dubious instruments of ‘art recovery’ to wake up to the fact that ‘ruses’ of this kind do nothing to improve the public relations profile of the art trade”³⁰.

- Further caution on the part of art dealers to check the provenance history of artworks and antiques is being called for. Marks asserted that it was “normal not to ask where the seller had himself bought the disputed items”³¹. However, the judge rebuked Marks, by reflecting that “a dealer in valuable works of art who pays in large amounts of cash, keeps no records, and asks no questions as to provenance of his supplier, exposes himself, and those who buy from him, to other very serious risks, such as tax issues and criminal prosecution”³². It was not enough for Marks to simply check with the ALR, in order to be sufficiently exonerated from all responsibility of an allegation about dealing in stolen artworks. A large concern that creates problems for art dealers is client confidentiality, something that the auction houses fiercely protect. Moreover, with disputes like this on the rise, figures dealing in the art world may not remain so private. In order to reduce the movement of fraudulent and stolen artworks, greater transparency, integrity and due diligence in the global art market needs to occur.
- Personal reflections and thoughts on interesting issues regarding the dispute.

VI. Sources

a. Court Decisions

- Kurtha v Marks [2008] EWHC 336 (QB) (27 February 2008).

b. Legislation

- UK, Limitation Act, 1980.

c. Media

- Taylor, Kate and Lorne Manly. “Tracking Stolen Art, for Profit, and Blurring a Few Lines.” New York Times, September 20, 2013. Accessed February 9, 2015.
http://www.nytimes.com/2013/09/21/arts/design/tracking-stolen-art-for-profit-and-blurring-a-few-lines.html?pagewanted=all&_r=1&.

²⁹ Tom Flynn, “‘Due Diligence’ is just a ‘ruse’,” Artknows [BLOG], March 27, 2008, accessed February 10, 2015, http://tom-flynn.blogspot.ch/2008/03/due-diligence-pull-other-one_27.html.

³⁰ Ibid.

³¹ Kurtha v Marks [2008] EWHC 336 (QB) (27 February 2008), pp. 102.

³² Ibid, 140.

- Adam, Georgina. “London dealer forced to return Souzas.” The Art Newspaper, No. 190, April 1, 2008. Accessed February 11, 2015. <http://www.aristitle.com/news/docs/Souza.pdf>.
- Flynn, Tom. “‘Due Diligence’ is just a ‘ruse’.” Artknows [BLOG], March 27, 2008. Accessed February 10, 2015. http://tom-flynn.blogspot.ch/2008/03/due-diligence-pull-other-one_27.html.
- Roy, Amit. “Indian who felled Archer squabbles for art.” The Telegraph, February 7, 2008. Accessed February 10, 2015. http://www.telegraphindia.com/1080207/jsp/nation/story_8873339.jsp#.