

Art matters

Karen Sanig explains how trustees holding art can limit their risk of liability with thorough checks and research into the art in trust



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The art world is a law unto itself. Trusts or foundations containing art ought to be aware of the dangers lurking within this asset class to avoid potential pitfalls.

A trustee's role (with all its incumbent duties) may include buying, selling, exhibiting, maintaining, moving or loaning art. In each case, different considerations arise that require detailed and separate examination. The use of carefully drafted agreements for the sale and purchase, storage and shipping, and loaning of art ought to limit a trustee's exposure. Such agreements cover, for example, liability for tax, compliance with import and export regulations, payment of artists' resale rights, copyright, risk and insurance as well as much more. The art market does not always embrace such agreements. With or without them, particular attention must also be paid to those issues that most often affect the value of art. They are ownership, provenance, attribution authenticity, and condition. A brief examination of these may go some way to aid the unsuspecting trustee to avoid liability for negligence.

Few collections have been thoroughly vetted. It is unusual to find a full inventory of art appended to a trust deed or elsewhere. It is rare to see complete documentary evidence of sale and purchase, ownership history, a precise record of proportions, an accurate description of the work or up-to-date valuations. Such information was not always easily available in a market that historically relied on trust alone for the purposes of

transactions. Today, there is much more readily accessible data. It needs to be sought out and regularly updated. If art is lost or stolen, the chances of recovery or adequate compensation are greatly reduced without such information. A trustee could be exposed to a claim for negligence for failing to obtain and maintain adequate records in this regard.

Ownership and provenance

Art transcends national boundaries. Rights to ownership are won and lost as it changes hands in different jurisdictions. Often it is not until an artwork appears for public sale that the question of ownership arises. Artworks may hang for many years in private collections or remain in storage as part of the assets of a trust or foundation. The assumption is that they are legally owned by that entity. This is not always so.

Establishing ownership of artworks is essential. There is no central registry of art ownership, but there are various stolen art databases. Failure by a trustee to register stolen art may in some circumstances be negligent.

Recent challenges to ownership demonstrate the dramatic effect on the saleability of art, for example in the attempted sale by the Andrew Lloyd Webber foundation of Picasso's *The Absinthe Drinker*, which was pulled from sale at a Christie's auction in New York. It had been estimated for sale at USD40 million–USD60 million. A claim was made to ownership by a member of a family from whom the work had been allegedly either forcibly sold or stolen by the Nazis during World War Two. A court application to stop the sale was unsuccessful, but the moral pressure meant that it could not be sold.

This incident may have been avoided if any of the stolen art databases had contained information that this artwork was a Nazi-era looted piece and if they had been searched

prior to consignment for sale. The consignor to auction usually has to give a warranty and indemnity in relation to title. No trustee ought to do so without having carried out adequate due diligence.

However such searches are not always conclusive, as in the case of the sale of 14 miniatures at Christie's London, which included works by John Smart, Richard Cosway and Horace Hone. They had been the subject of a search on two stolen art databases prior to auction. The fact that they had been stolen two years' prior to the auction was, however, only discovered after the sale had taken place.

Often the buyer places too much reliance on auction catalogue entries alone. Auction house terms and conditions contain provisions excluding their own liability and encouraging independent checks. The auction house terms state (in the small print) that they do not carry out 'exhaustive due diligence'. Auction houses are usually acting as agents for the seller in his contract with the buyer. Their information may only be as good as the seller's.

There is also a common misconception that a good faith purchaser automatically acquires title to an artwork. In the UK, no one can transfer title that he does not have. This is known as the 'nemo dat' rule and embodied in s12 of *Sale of Goods Act 1979*. However once a good faith acquisition has been made the right to sue will be lost after six years (*Limitation Act 1980*) and accordingly the right to title is extinguished. 'Good faith' turns on all the facts. Ten years ago, stolen art databases were not so commonplace or easily accessible. Today, due diligence is required to support an assertion of good faith, which means at the very least checking one of the databases. Much more detailed research is, however, advisable given that art is so easily portable and moves around the world.

Laws transferring ownership vary from country to country. An artwork may be stolen in the UK, but sold abroad in a common law jurisdiction where title immediately passes on a good faith acquisition. In *Winkworth v Christie Manson and Woods Ltd and another* [1980] All ER 1121, for example, artworks stolen in the UK were sold to an unsuspecting purchaser in Italy. They were returned to the UK by him for sale at auction. A case brought by the original owner for recovery decided that the English law of ownership did not apply once the art had left the jurisdiction. Ownership had therefore been legally transferred to the new owner in Italy.

In France, for example, Article 2279 of the code civil states: '*possession vaut titre*' – possession is title. There are, of course, exceptions. Artworks could be hanging in the home of someone who only has the right to lifetime enjoyment of them (usufruit) and they are on trust for another after death. In that case no title has been transferred and they cannot be sold free from encumbrances.

When art is being loaned, inadequate ownership history research has led to seizure of artworks at public exhibitions. This can be avoided by only loaning art to countries that have anti-seizure legislation in place. The UK legislation: *Tribunals Courts and Enforcement Act* Part 6 ss134–8 protects from seizure objects from outside the UK owned by non-UK residents brought into the UK for public display in a temporary exhibition in a museum or gallery.

Defective title insurance exists and ought to be considered as an add-on by the trustee when reviewing art insurance requirements. This usually requires reasonable and proper enquiry to have been carried out into ownership.

Attribution and authentication

Attribution of works to certain artists can and does change. Adequate research and regular review ought to iron out any issues in this regard. Old Masters are usually the most problematic area, but contemporary

works are bringing their own challenges even where the artist is still alive! Where there is no published catalogue raisonné, the word of the world-renowned art historian expert can decide attribution. Such opinion needs to be sought out. Conservators are also able to carry out scientific dating of artworks by analysing the age of the paint or the canvas. Prior sales at public auction alone do not, however, determine attribution. In the case of *Drake vs Thos. Agnew and Sons Ltd* [2002] EWHC a painting sold previously at auction described as 'after Van Dyck' was attributed to 'Van Dyck' by the dealer who then successfully sold it as such, basing his view on an honestly held opinion. This case showed the dangers of insufficient checking prior to purchase and also highlights the potential ambiguity of art market language. 'After' or 'in the school of', for example, do not denote a work by the artist. The artist's name alone does.

Authentication bodies exist around the world that confirm (or deny) attribution and authentication of artworks. They are usually set up after an artist has died. They are not without controversy. The Andy Warhol authentication board is currently under attack in the US Courts in two separate actions. In one it is alleged to have wrongly authenticated a work that is not genuine. In the other it is alleged not to have authenticated a genuine work. In both cases the complainants claim there is better evidence from people who were present when the art was created (or not) who have different opinions to the board about the validity of the work.

Fakes and forgeries abound in the art market. Careful checks ought to reveal any problem areas but even the specialists are fooled sometimes. This suggests that it is worth obtaining two opinions where there is any room for doubt. The following examples highlight this.

John Myatt, an English forger, managed to reproduce more than 200 works by modern masters, surrealists, cubists and impressionists. The quality of the works was not that good. He used emulsion instead

of oil paint. He worked with, and was led by, an accomplice, John Drewe who was a master at creating false provenance. Drewe managed to slip the fake details into the card indexes and catalogues at the Tate and the Victoria and Albert Museum and purportedly with the Institute of Contemporary Arts. The pair duped the art world for a long time until they were caught. The paintings had, in the meantime, passed through Sotheby's, Christie's and elsewhere. There are still some unrecovered works.

Condition, storage and insurance

The trustee who does not ensure that artworks are left at a suitable fine art storage house with a proper storage contract, in correct climatic conditions is arguably negligent if something happens to that artwork.

Similarly, if fine art shippers are not used to transport art and damage occurs, the trustee could be left exposed. In a case in which the writer was involved, a fork-lift-truck was driven through an Old Master in a fine art storage warehouse. Fortunately, the work was well insured, which enabled restoration and sale to take place. The auction condition report ought to have referred to the restoration in detail. Sometimes a buyer does not even check the report. Other times it raises alarm bells that are ignored unless analysed by an expert.

Conclusion

It may not be all bad news. The Getty museum trustees in LA only received a telling off from the Californian Attorney General for spending trust money on expensive art for retiring trustees. But trustees pursued for undervaluing or underinsuring works that are damaged or lost, for example, or for acquiring works that are illegally exported cultural artefacts or fakes without adequate checking, would face hefty damages claims and potential personal liability. The key is to limit risk by thorough checks and research into the art in trust. Help is always at hand to limit or avoid liability. ■