

KEY POINTS

What is the issue?

For anyone looking to invest in art, it is paramount to ensure an artwork's intrinsic value and that the investment is secure. However, ensuring artwork has good provenance (a record of ownership used as a guide to authenticity or quality) may not be clear cut.

What does it mean for me?

Disputes are common and may be complex, with the potential to trigger costly and lengthy litigation.

What can I take away?

This article considers lessons learned from recent cases for those looking to invest in art and protect themselves from risk.



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Know your risks

HELEN CONYBEARE WILLIAMS OFFERS
ADVICE ON AVOIDING AND MANAGING
DISPUTES FOR PRACTITIONERS INVOLVED
IN ART-RELATED TRANSACTIONS

GOOD TITLE

Undertaking due diligence before purchase to verify that an artwork has demonstrable provenance (accompanied by reliable documentation charting previous ownership) is essential to ensure that the investor receives full and marketable title to the piece. However, tracing good title can be challenging, as the past of older artworks may have been eventful, lost or obscured by time, and such artworks may have moved across borders many times. There are different approaches as to what constitutes transfer of title, depending on the applicable jurisdiction.

There are also many infamous cases of stolen art, and even if the investor is a 'good-faith purchaser' and unaware that the artwork was stolen at the time of purchase, the common-law tradition, by way of example embodied in the law of England and Wales, is that the purchaser of goods acquires no better title than the seller, subject to some exceptions.¹ By contrast, civil law, such as French and Italian law, tends to view a good-faith purchaser's claim more favourably over the

original owner's title based on possession of the artwork, as well as other reasons.

In *Winkworth v Christie, Manson & Woods Ltd*,² a decision of the English High Court, Japanese artworks were stolen from the original owner in England and taken to Italy, where they were acquired by a good-faith purchaser. The Italian purchaser subsequently brought the works back to England for sale. The judge held that the good-faith purchaser had acquired good title under Italian law, being the law in the jurisdiction where the property was located at the time the title was created, so did not have to return the stolen artworks. A different outcome would have resulted had the events occurred exclusively within the English jurisdiction, as the original owner would have been entitled to recover the stolen pieces.

ATTRIBUTION AND AUTHENTICITY

Ascribing a work to a named artist can be fraught with difficulties. The art world uses a range of terms to attribute artworks, describing by different degrees the certainty that a work is by the artist, which go hand-in-hand with the artwork's value.

These terms include:

- painted by;
- by the hand of;
- studio of;
- circle of;
- style of; and
- copy of.

It is therefore wise for a purchaser to understand the industry's language before purchasing, and check if the term given matches the price.

New techniques have become available that may assist in unravelling a piece's true origins or uncovering sophisticated forgeries. Following extensive investigations, cleaning and restoration, the purchaser of a painting sold by Sotheby's³ announced, with the support of an Italian scholar, that the painting was an autograph replica of the Kimbell *Cardsharps* by Caravaggio.⁴ After originally selling for GBP42,000, the painting was then valued at GBP10 million. The original seller brought an action against Sotheby's in negligence and for breach of contract, claiming that if Sotheby's had performed its duties towards him properly, the painting would have realised its 'Caravaggio potential' and much greater value.

This case is authority in the law of England and Wales, showing that a distinction will be made between a regional and leading auction house when considering the standard of skill and care owed to those that consign artworks to them. However, the nature of the task of attribution, the need to avoid hindsight, the prevalence of copies of *The Cardsharps* and the absence of bidders prepared to pay above GBP42,000 at auction meant that the claim was unsuccessful.

STOLEN CULTURAL HERITAGE AND HOLOCAUST-LOOTED ART

There are many cases of looted art and artefacts trafficked from war zones that are offered for sale on the art markets. Special protections cover stolen or

illegally exported cultural objects under international conventions, which set out conditions for their return and compensation to an innocent purchaser, if applicable. There are many claims by the heirs of those dispossessed during 1933–1945 for the return of Holocaust-looted art that circulated on the international art markets before ending up in national and private collections. In some jurisdictions, such as the US, there have been a number of high-profile litigations, while in others, such as England and Wales, these claims are typically resolved through mediated solutions.

PROTECTING YOURSELF

Gaps in collecting history can be a red flag that the piece may not be what it seems. It is also essential to ensure that all paperwork is in order. If there is uncertainty over the ownership of a valuable piece, it can undermine resistance to claims if a third party later makes a competing ownership claim; but if documentation is complete, such claims may be less likely and more readily resolved.

The art world has a legacy of oral agreements in private sales, but resolving disputes down the line without adequate documentation can give rise to unexpected results. In *Jeddi v Sotheby's and Others*,⁵ a valuable and rare carved rock-crystal jar from the medieval Islamic period was the subject of an ownership dispute between two Iranian dealers in the England and Wales High Court. The dealers' competing accounts as to ownership of the jar and its provenance were totally irreconcilable, with a striking absence of reliable documentary evidence. Ultimately, a simple agreement written out after a meeting on hotel notepaper, stating that the jar was consigned by one dealer to the other for sale in London, was deemed the only reliable document.

It is safest to have a purchase agreement or a bill of sale with provisions for warranties and representations and sufficient guarantees to obtain a refund if a piece is subsequently proved to be a forgery or there is a title dispute. If a seller is not prepared to stand behind the sale by providing adequate warranties, this again can be a red flag. However, a purchaser's recourse may be limited if the work is wrongly attributed, as this generally comes down to an expression of opinion, and authenticated works may be subject to later reappraisal if the scholarship regarding an artist changes over time.

RESOLVING DISPUTES

Once an art dispute arises, it may be resolved in a number of ways: through litigation in national courts or alternative private and confidential processes (such

as negotiated settlement, arbitration, mediation or expert determination). Private processes may be preferred to protect investor identities and details of their private affairs, avoid damage to reputations or long-term relationships and address moral claims, as needed. These processes can be more flexible and less disruptive, as well as time- and cost-efficient.

The safest course is always to document negotiated settlements. In *Simantob v Shaveleyan*,⁶ a 'kiss and handshake' deal between two Iranian dealers in Islamic antiquities related to the sale of antique Islamic art ended up being litigated up to the England and Wales Court of Appeal. At issue was whether an oral agreement to discharge an outstanding debt under an existing settlement agreement was supported by good consideration, specifically the debtor's forbearance to raise a defence later rejected as without merit. The judgment distinguished between:

- threats of a claim or defence in which a person has no confidence; and
- a claim or defence that a person believes in and intends to pursue in court, while recognising that it raises a doubtful or undecided point.

The latter was held to be good consideration. The case was distinguished from the long-established rule, under the law of England and Wales, that part payment of an existing debt is not good consideration for a promise to accept less than the full amount. As this case demonstrated, the safest course for parties seeking to agree or vary contractual promises subject to English law will be to document these (including nominal consideration) to avoid later challenges.

CONCLUSION

There is a good reason why the simple adage 'let the buyer beware' has stood the test of time. These cases serve as a warning to prospective buyers of high-value artwork. Unresolved questions or the existence of claims can spoil the marketability and diminish the value of an artwork and, in this scenario, it quickly becomes very difficult to dispose of a prized artwork in any of the art markets around the world. However, with solid provenance and attribution, the prized artwork and associated investment may exceed all expectations.

#ALTERNATIVE AND LUXURY ASSETS

#CONTENTIOUS TRUSTS AND ESTATES

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¹Notably, if the dispossessed owner's title has expired due to the statute of limitations. ²[1980] 1 Ch 496 ³Sotheby's is one of the world's largest brokers of fine and decorative art, jewellery, real estate and collectibles. ⁴*Thwaytes v Sotheby's* [2015] EWHC 36 (Ch) ⁵[2018] EWHC 1491 (Comm) ⁶[2019] EWCA Civ 1105