

THE FINE ART OF FRAUD

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“*Timothy Sammons had lying, scamming and stealing down to a fine art*”, said the Manhattan District Attorney Cyrus Vance Jr after the British art dealer was sentenced in July 2019 to four to twelve years in prison for defrauding his clients of up to \$30 million.¹ A former head of Sotheby’s Chinese art department who had galleries in London and New York and who brokered multimillion-pound deals for wealthy clients, misinformed consignors about the timing of certain sales, used works entrusted to him as personal collateral to secure millions of dollars in loans and redirected proceeds of sales to pay off other victims of his Ponzi-like scheme, between 2010 and 2015.

Following closely on, from 2015 to 2019, Inigo Philbrick, dubbed the ‘Mini-Madoff’² of the art world, also ran a Ponzi-like scheme or rather “a carousel on which the same works were sold or used as collateral for loans more than once”.³ Through his galleries in Mayfair and Miami, Philbrick scammed at least 23 victims, ranging from individual art collectors to well-established gallerists, investors and lenders. Estimated losses from his fraud exceed \$86 million.⁴ This year he was sentenced in the US to seven years in prison.⁵

While worthy of a Netflix mini-series, the adventures of Philbrick, Sammons and others like them⁶ have a real-life cost to their victims. Philbrick’s fraud has “led to an immense financial loss” for Daniel Tümpel, and his family, and has turned “the last two and a half

1 Anna Brady, ‘Timothy Sammons ‘Very Remorseful’ as he is Jailed for Defrauding Clients of up to \$30m’, *Art Newspaper*, 1 Aug. 2019

2 Victoria Bekiempis, ‘The Art World’s ‘Mini Madoff’ Sentenced to 84 Months for His \$86 Million Fraud’, *Rolling Stone*, 23 May 2022.

3 Kenny Schachter, ‘The Art World’s Mini-Madoff and Me Boozy Nights and High-Stakes Art Trades with Inigo Philbrick’, *Vulture*, 16 March 2020.

4 US Attorney Damian Williams in *The Government’s Sentencing Memorandum, United States of America v. Inigo Philbrick*, 4 April 2022, p. 18.

5 Bob Van Voris, ‘Art Dealer Inigo Philbrick Gets 7 Years in Prison for \$86 Million Fraud’, *Bloomberg*, 23 May 2022: <www.bloomberg.com/news/articles/2022-05-23/art-dealer-philbrick-gets-7-years-for-86-million-fraud>.

6 The art world has no shortage of similar, albeit smaller scale, examples. Ezra Chowiaki, a Manhattan art dealer, who sold artwork, purportedly on consignment, without the owners’ authorisation, took money from clients purportedly to purchase artwork, and kept the money but purchased no art, pleaded guilty and was sentenced to 18 months in prison, in 2018. Michael Cohen ran a similar scheme in New York in 2001 and is now a subject of a BBC documentary ‘The \$50m Art Swindle’. Andy Valmorbidia, dealer and promoter of Richard Hambleton’s paintings confessed to forging documents and obtaining loans on art works which he did not own, during civil proceedings in Jersey in 2021.

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years into the most horrendous and difficult years of [their] lives.”⁷ Tümpel is the owner of Fine Art Partners, a former client of Philbrick’s, on whose behalf Philbrick purchased art works only to resell them to other investors without Fine Art Partners’ knowledge, as well as using the art as collateral for loans.

The prospects of recovery are slim. Sammons was declared bankrupt in 2017.⁸ Philbrick, it was said by the prosecution, does not have sufficient assets to pay his victims.⁹ As was summed up by US Attorney Damian Williams during Philbrick’s sentencing submissions:

[...] The defendant has left it up to his victims to fight amongst themselves to unravel his fraudulent art deals and recover their losses. Many civil lawsuits filed by victims in various jurisdictions are pending to resolve disputed ownership claims over multiple artworks. The Government expects that many victims, unfortunately, will never be made whole.¹⁰

This article will examine the civil and criminal remedies available to victims of this type of art fraud. Whilst both Philbrick and Sammons were convicted in the US and the related civil claims span not only England but also multiple other jurisdictions, this article will focus exclusively on the treatment of relevant facts under English law.

The article will first set out some factual scenarios taken from the fraudulent dealings of Philbrick and Sammons. It will proceed to describe the civil remedies available to the victims of such fraud, applying those principles to the factual scenarios. There will then be a short section on criminal law. The conclusion will be that whilst the civil route is more relevant to asset recovery than criminal prosecution, the civil law also fails to give adequate protection to the original owner and fails to shield a *bona fide* purchaser from lengthy litigation. One solution could be for the owners of artworks to ensure prospective buyers have notice of their title by, for example, registering it with an art database.

CASE STUDIES IN FRAUD

Given the length and complexity of the fraudulent schemes perpetrated in both cases, it is not practicable to give a full overview of Philbrick’s and Sammons’s fraudulent dealings, but it is worth describing three transactions here, so that they can serve as illustrations for the application of the legal principles.

THE SIGNAC

Linda Hickox was the owner of an oil painting entitled *Calanque de Canoubier (Pointe de Bamer)* made by the Impressionist painter Paul Signac in 1896 (the ‘Signac’), which she displayed in her apartment in New York. Ms Hickox consigned the Signac to Timothy Sammons to act as her agent for the sale of the painting and signed a Sales Agreement with his US entity, Timothy Sammons Inc (‘TSI’), on 9 March 2012 (the ‘Sales Agreement’). It turned out that TSI had been dissolved since April 2011, but Ms

7 Victim Impact Statement of Daniel Tümpel, as cited in *The Government’s Sentencing Memorandum*, above, note 4, p. 19.

8 John Simpson, ‘Mayfair Art Dealer Timothy Sammons Jailed in US for Fraud’, *The Times*, 1 Aug. 2019: <www.thetimes.co.uk/article/mayfair-art-dealer-timothy-sammons-jailed-in-us-for-fraud-72mng8qck>.

9 *The Government’s Sentencing Memorandum*, above, note 4, p. 17.

10 *Ibid.*

Hickox was unaware of this at the time. The Sales Agreement instructed TSI to act as agent for the sale of the Signac, and incorporated a letter from the gallery which stated:

The purpose of our reporting to you in this way is to provide you with unbiased information to enable you to make an informed decision on how and where to sell [...] Once the decision for sale has been taken and the method determined, we will ensure that you get the best possible result [...]

Sammons sold the Signac without consulting Ms Hickox and pocketed the proceeds. Ms Hickox took various steps to try to recover the price of the painting, but as Sammons was declared bankrupt, she issued proceedings in England in 2020 against Simon C Dickinson Ltd ('SCDL'), a London gallery that acted as agent for the buyer, seeking a Norwich Pharmacal Order to find out the identity of the purchaser.¹¹ The order was granted, thus challenging the custom and practice in the art world not to reveal the identity of private buyers.¹² As will be seen below, this case will provide a useful illustration of the scope of the tort of conversion and applicable limitation periods.

THE BASQUIAT

Starting in approximately 2016, Inigo Philbrick began to obtain loans from Athena Art Finance Corporation ('Athena'), a company based in Manhattan, New York that specialises in providing loans secured by art pledged as collateral. On 31 March 2017, Philbrick, operating through 18 Boxwood Green Limited ('Boxwood') a shell company incorporated in the Bailiwick of Jersey, entered into a loan and security agreement with Athena (the 'Athena Loan Contract') for a \$10 million revolving loan secured by a revolving pool of artworks approved by Athena (the 'Collateral Pool'). The loan amount was later increased to \$13.5 million.

In August 2016, Philbrick entered into an agreement with Alexander Pesko, who was acting on behalf of Satfinance Investment Ltd. ('Satfinance'), to jointly purchase a 1982 painting by Jean-Michel Basquiat titled *Humidity* (the 'Basquiat'). During negotiations with Pesko, Philbrick provided Pesko with a fraudulent contract purporting to show that Philbrick had agreed to purchase the Basquiat from SKH Management Corporation ('SKH')¹³ for \$18.4 million. In fact, the Basquiat had been purchased by Philbrick, acting through Inigo Philbrick Limited ('IPL'), in a private sale through Phillips auction house in New York for \$12.5 million, pursuant to a 'Buyer Agreement' dated 27 July 2016.¹⁴ Satfinance and IPL, entered into a Partnership Agreement (the 'Partnership Agreement') whereby Satfinance paid IPL 50 per cent of the purported \$18.4 million purchase price of the Basquiat and also provided a \$3 million loan to IPL secured by the Basquiat. The Partnership Agreement appears to have been drafted without input from lawyers

11 *Hickox v. Dickinson* [2020] EWHC 2520 (Ch).

12 Georgina Adam, 'Client Confidentiality Overturned by London High Court, as Dickinson Forced to Reveal Buyer of \$4.85m Signac Painting', *Art Newspaper*, 1 Dec. 2020.

13 This later turned out to be a local grocery and garden centre in Amish country that listed 1875 Lexington Avenue in Manhattan as its address, which was in fact home to a pharmacy. Mr Pesko noticed the address discrepancy (though not, it seems, the nature of SKH's trade) and raised this with Philbrick, who then corrected the address on the bill of sale to Lititz, Pennsylvania.

14 It is not clear when that sale completed and whether Philbrick used his own funds or Satfinance's funds to complete this purchase.

and contains several contradictions.¹⁵ Under the Partnership Agreement: (i) Satfinance would hold ‘full title’ (presumably, meaning ‘legal title’) to the painting; (ii) subject to Satfinance’s full title, Satfinance and IPL would hold jointly the painting and would share equally in any profit or loss; (iii) IPL retained possession of the painting.¹⁶ The stated purpose of the Partnership Agreement was a “quick sale”¹⁷ of the painting at a profit. It appears that the Basquiat was in New York at the time the Partnership Agreement was concluded.

Next, in November 2016, pursuant to an oral agreement Philbrick sold a 12.5 per cent ownership stake in the Basquiat to gallerist Damian Delahunty for a total of \$2.75 million. Philbrick falsely told Delahunty that he was purchasing the Basquiat from SKH for \$22 million and provided Delahunty with an unsigned contract purporting to show the sale from SKH to Philbrick. Philbrick did not tell Delahunty about Satfinance’s ownership interest in the Basquiat, and likewise did not disclose to Pesko the sale to Delahunty. It seems that the painting was still in New York at the time of this transaction.

In March 2017, after Philbrick had sold percentage ownerships of the Basquiat to Satfinance and Delahunty (and encumbered it with a \$3 million loan), he sought to pledge the Basquiat to Athena as part of the Collateral Pool.¹⁸ In the process, Philbrick falsely represented to Athena that he was the sole owner of the Basquiat and did not disclose the interests of Satfinance or Delahunty. In April 2017, Athena approved adding the Basquiat to the Collateral Pool, and provided Philbrick with an additional \$3.25 million in financing as a result. Pursuant to the Athena Loan Contract, Philbrick provided Athena with physical possession of the Basquiat.¹⁹ Satfinance, Delahunty and Athena subsequently became locked in litigation over the ownership of the Basquiat.²⁰

We will use the Basquiat case study to illustrate the passing of title in a sale by a mercantile agent and a seller in possession.

15 For example, it says that Satfinance and IPL intend to ‘jointly purchase’ and ‘jointly own’ the Basquiat, whilst at the same time saying, “For the avoidance of doubt Satfinance shall hold full title to the artwork” in return for 50 per cent of the purchase price. More generally, if one reads ‘full title’ as ‘legal title’, the Partnership Agreement appears to grant legal title to Satfinance making it a trustee of Philbrick; at the same time Philbrick was to retain possession of the painting, arrange storage and insurance, and act as Satfinance’s agent in marketing it. A more conventional structure would have been for the active party who controls, safeguards and markets the painting to hold legal title as trustee, whereas the passive investor would hold the beneficial interest.

16 *Satfinance Investment Ltd v. Athena Art Finance Corp.* [2020] EWHC 3527 (Ch), para. 18.

17 Counsel for Athena in *Athena Art Finance Corp. v. Certain Artwork by Jean-Michel Basquiat Entitled Humidity, 1982, in Rem*, Southern District of New York, Case No. 20-cv-4669 (GBD) (DCF) (proceedings ongoing, pleadings available on PACER), *Memorandum of Law in Opposition to [Satfinance’s] Motion for a Preliminary Injunction*, 8 March 2021, citing the Partnership Agreement at pp. 4-5.

18 This is a simplification, as it appears that in reality, Philbrick first purported to transfer title to Boxwood and Boxwood then pledged it to Athena. This raises questions of whether Boxwood was a bad faith purchaser in acquiring the painting from Philbrick, as it was a company fully controlled by him.

19 Fact summary taken from *The Government’s Sentencing Memorandum*, above, note 4, pp. 4-6.

20 See for example, *Satfinance Investment Ltd v. Philbrick* [2020] EWHC 1261 (Ch) and *Satfinance Investment Ltd v. Athena Art Finance Corp.* [2020] EWHC 3527 (Ch), as well as *Athena Art Finance Corp. v. Certain Artwork by Jean-Michel Basquiat Entitled Humidity, 1982, in Rem*, above, note 17.

THE KUSAMA

In May 2019, Andre Sakhai purchased the artwork *Infinity Nets* by Yayoi Kusama for \$850,000 from the Victoria Miro Gallery (the ‘Kusama’). Mr Sakhai subsequently learned there was some damage to the Kusama during shipping. Sakhai sought Philbrick’s help to restore the painting, as Philbrick had a good relationship with a conservator. On 8 July 2019, Mr Sakhai authorised the transfer of the Kusama to Philbrick’s storage facility for this purpose i.e., so that Philbrick could arrange for the painting to be restored, not sold. On 10 July 2019, Philbrick, without authority, sold the Kusama to another collector and transferred it to that collector’s storage facility in New York without informing Sakhai of the move or sale.²¹

This case is a useful example of the limitations of the mercantile agent exception, as will be explained below.

We now turn to the discussion of civil and criminal remedies available to collectors as against the fraudulent art dealer and any subsequent purchaser or a lending company with a security interest over the object. It is hoped that these three examples will provide meat to the bones of the legal analysis below.

KEEPING IT CIVIL – THE OWNER’S CIVIL REMEDIES

CONVERSION

The most obvious civil remedy available to the original owner of the artwork is to sue the fraudulent art dealer and any subsequent purchaser in conversion. The tort of conversion is encompassed in section 1(a) of the Torts (Interference with Goods) Act 1977 (‘TIGA 1977’) and was defined by Atkin J. in *Lancashire & Yorkshire Ry v. MacNicol*²² as:

[...] dealing with goods in a manner inconsistent with the rights of the true owner [...] provided [...] there is an intention on the part of the defendant in so doing to deny the owner’s right or to assert a right which is inconsistent with the owner’s right.

In order to constitute conversion, the encroachment on the rights of the owner must be such as to exclude him from the use and possession of the goods.²³ Thus, where an art dealer wrongfully sells an object and delivers it to a *bona fide* purchaser, this will amount to a conversion, rendering both the buyer and the seller liable to an action by the true owner²⁴ – though in some circumstances only the seller will be liable because the buyer will have acquired good title.²⁵ If the innocent buyer is sued in conversion, he will have the option of pursuing the art dealer under section 12 of the Sale of Goods Act 1979 (‘SGA 1979’) (on which more later).

Conversion is a tort of strict liability, as a person who commits it may well be ignorant

21 Fact summary taken from *The Government’s Sentencing Memorandum*, above, note 4, p. 12.

22 (1919) 88 L.J.K.B. 601 at 605.

23 *Per* Lord Nicholls, in *Kuwait Airways Corp. v. Iraqi Airways Co. (Nos 4 and 5)* [2002] 2 A.C. 883, at para. 39.

24 Conversion applies only to an interest in chattels and not to choses in action. This means that a buyer not yet in possession and lacking a right to immediate possession of the goods may not sue a purchaser, innocent or not, in conversion for interference with the buyer’s contractual right to acquire the goods: *OBG v. Allan* [2007] UKHL 21.

25 See exceptions to the *nemo dat* rule below.

of the true owner's rights over the object. To receive an art object under an unauthorised pledge is also conversion.²⁶ So, in the Basquiat case, Athena's receipt of the painting as security for the loan to Philbrick could constitute conversion. Co-ownership is no defence – one co-owner can sue another for conversion.²⁷ Again, to take the Basquiat example, the fact that Satfinance and Philbrook were co-owners of the painting would not be a bar to an action in conversion by Satfinance. Contributory negligence by the original owner is also no defence.²⁸

To apply the law to the Signac example, Ms Hickox argued that Sammons stole the Signac and that any sale was done without authority. SCDL argued that there was a valid sale and Sammons merely stole the proceeds.²⁹ This was a crucial distinction, since if Ms Hickox could not identify a wrong that was done by someone other than Sammons, she would not be able to obtain the Norwich Pharmacal Order. In the end, Ambrose J. held that there was a good arguable case of the tort of conversion of the painting rather than theft of the proceeds, as Ms Hickox's position was that Sammons did not have unfettered mandate to sell the Signac and the express terms of the Sales Agreement had indicated that TSI would seek her advice on any sale.

Remedies in conversion include the delivery up of the goods.³⁰ Although the order for specific delivery is at the court's discretion,³¹ Woodhead³² points out that the unique nature of a work of art means that this order will be more appropriate for a claimant than monetary compensation.³³ That said, the essential question will be whether an award of damages would adequately compensate the claimant and so the purpose for which the art was acquired or held by the original owner may become relevant. In the Basquiat case, the sole purpose of purchasing the painting was to flip it for profit in a "quick sale". In the English proceedings relating to the Basquiat, the court initially granted Satfinance a preliminary injunction prohibiting Athena from selling the painting pending the resolution of the dispute. Yet, the injunction was later discharged with the court stating that Satfinance was unable to show "[...] that the sale of the painting would necessarily cause it irreparable harm [as] the purpose of acquiring the painting was for it to be sold".³⁴ It will therefore be more difficult to argue for specific delivery (or interim injunction) in a situation where the parties were 'speculators' (as they are sometimes referred to in the trade) as opposed to traditional collectors who were buying an artwork to hang on a wall.³⁵

26 TIGA 1977, s. 11(2).

27 TIGA 1977, s. 10.

28 TIGA 1977, s. 11(1).

29 *Hickox v. Dickinson* [2020] EWHC 2520 (Ch).

30 TIGA 1977, s. 3(2)(a), (b).

31 TIGA 1977, s. 3(3)(b). See also s. 4 and CPR 25.1(1)(e) (interim remedy).

32 Charlotte Woodhead, 'Recovery of Stolen Art', Commentary for Diploma in Art Law course (2015).

33 In *de Preval v. Adrian Alan Ltd* (1997) unreported 24 Jan., Arden J. awarded the delivery up of two French gilt-bronze champlevé enamel candelabra under s. 3(2)(a) because of their unique character (see Ruth Redmond-Cooper, 'Good Faith Acquisition of Stolen Art' (1997) *II Art Antiquity and Law* 55-62).

34 Chief Master Marsh, as cited in the *Memorandum in Opposition to [Satfinance's] Motion for a Preliminary Injunction*, above, note 17, at p. 1.

35 See also Janet Ulph, 'Tracing and Recovering Stolen Art or the Proceeds of Sale', Ch. 3 in *The Recovery of Stolen Art* (Kluwer, 1998), p. 75; *Cohen v. Roche* [1927] 1 K.B. 169.

The owner can also sue for damages.³⁶ The measure of damages for conversion “is generally the value of the chattel at the date of the conversion together with any consequential damage flowing from the conversion and not too remote to be recoverable in law”.³⁷ Calculating the measure of damages in the case of an art work will be a complex exercise, likely involving analysis of previous (legitimate) sales and expert evidence.³⁸ Damages are available even if the original owner has subsequently lost his title³⁹ – he can still bring an action in conversion against any person who converted the goods before his title was extinguished, provided that at the time of conversion he had an immediate right of possession of the goods.⁴⁰ The effect of receiving damages in conversion is to extinguish the claimant’s title,⁴¹ meaning that the defendant becomes the owner of the object.

As an aside, a mere equitable interest will not found an action in conversion. This is because equity follows the law and, where equities are equal, the law prevails and legal ownership of the good faith purchaser is given pre-eminence. The usual example given in this context is that of a beneficiary under a trust who will not be able to make any claim to a painting which has wrongfully been sold by a trustee to a good faith purchaser.⁴²

LIMITATION

As to time limits, the usual six-year limitation period from the time of the accrual of the cause of action (that is, the date of conversion) applies.⁴³ However, this rule is modified for conversions constituting, or relating to (i.e. following), theft – the true owner never loses the right to pursue the thief or any subsequent bad faith purchaser.⁴⁴ No limitation period applies until the stolen property passes into the hands of a purchaser acting in good faith.⁴⁵ The limitation period then runs for six years from that date even against subsequent conversions.⁴⁶ Thus, the combination of good faith purchase and the passage

36 TIGA 1977, s. 3.(2)(c).

37 *General and Finance Facilities Ltd v. Cooks Cars (Romford) Ltd* [1963] 1 W.L.R. 644, 649 per Diplock L.J.

38 But note that in the circumstances where the artwork is returned undamaged before the claimant suffered any loss or inconvenience, only nominal damages are likely to be awarded. This is because the aim of an award of damages in conversion is to compensate the claimant for his actual loss, not to punish the defendant (*BBMM Finance (Hong Kong) Ltd v. Eda Holdings Ltd* [1990] 1 W.L.R. 409).

39 By operation of one of the exceptions to the *nemo dat* rule (see below).

40 Michael G. Bridge, ‘Transfer of Title by Non-Owners’ Ch. 7 in *Benjamin’s Sale of Goods* (Sweet & Maxwell, 11th edn and First Supplement, 2021), at 7-003; *Willis (RH) & Son v. British Car Auctions Ltd* [1978] W.L.R. 438.

41 TIGA 1977, s. 5(1).

42 Janet Ulph, ‘Exercising Due Diligence in Art Transactions’ (1998) III *Art Antiquity and Law*, 323-344, at p. 324.

43 Limitation Act 1980, s. 2. In the case of successive conversions, the limitation period does not restart on each conversion, but runs from the date of the first conversion only: Limitation Act 1980, s. 3(1).

44 Limitation Act 1980, s. 4(1).

45 *Ibid.*

46 Limitation Act, s. 4(4) states that the claimant bears the burden of proving that the goods were stolen from him or anyone through whom he claims, but the defendant bears the burden of proving that he is or claims through a *bona fide* purchaser: see *Kuwait Airways Corp. v. Iraqi Airways Co. (Nos 4 and 5)* [2002] UKHL 19.

of six years can cure a defect in title arising from theft.⁴⁷ The same applies to actions in conversion where the goods are obtained by fraud.⁴⁸

A good faith purchaser who subsequently discovers within the limitation period that the goods have been stolen or obtained by fraud, may be under a duty to take reasonable steps to acquaint the true owner with his possession and the whereabouts of the goods.⁴⁹ Bridge⁵⁰ suggests that it is arguable that a conscious failure to take such steps amounts to a deliberate concealment of a fact relevant to the true owner's right of action, which would start time running again. The extension of time, however, may be of little consolation to the original owner of the work where the *bona fide* purchaser had acquired good title (through one of the exceptions to the *nemo dat* rule discussed below) – the only recourse then would be against the rogue art dealer, who may be insolvent.

Notably, and as an exception to the general rule that the limitation rules bar remedies rather than extinguish title, section 3(2) of the Limitation Act 1980 (the 'Limitation Act') expressly provides that the owner's title shall be extinguished on the expiration of the six-year period.

In the Signac case, SCDL attempted to argue that Ms Hickox's cause of action in conversion had expired and her title extinguished, since the Signac was allegedly sold in 2013 or 2012. Ms Hickox contended that section 3(2) of the Limitation Act did not apply but instead the applicable section was section 4, which provides for the aforementioned special time limit in cases of conversions related to theft. Ambrose J. was satisfied that Ms Hickox had a good arguable case that the conversion related to a theft of the painting (rather than its proceeds) and that an extended limitation period described above would apply.

PURSuing THE *BONA FIDE* PURCHASER

A claim in conversion against the fraudulent art dealer is therefore relatively straightforward, but it may be of limited utility if, as was the case with Philbrick and Sammons, the defendant is insolvent. To succeed in an action for conversion against subsequent purchasers the owner must be able to demonstrate that his original title survived those transactions.

At first glance, English law appears to give strong protection to the original owner, via the maxim *nemo dat quod non habet* ("no one gives what he does not have"), which means in practice that an individual who does not have title to the goods in question and does not have the authority or consent of the owner, cannot pass on any title to the purchaser. The *nemo dat* rule is true at common law in respect of all proprietary interests;⁵¹ it has also been explicitly preserved by statute in the form of section 21(1) of

47 Birgit Kurtz, Friederike von Brühl and Gregor Kleinknecht, 'Standards of Care in the Art Market: A Comparative Study on What Is Expected of Buyers, Sellers, and Consignors on the United States, Germany and England' (2016) XXI *Art Antiquity and Law* pp. 1-30, at p. 18.

48 Limitation Act 1980, s. 4(5)(b).

49 In the same way as a finder of lost property, unless he takes the chattels into his care and control with dishonest intentions, acquires a right to keep the chattel against all except the true owner or except one who can claim a superior title to him (*Parker v. British Airways Board* [1982] Q.B. 1004 at 1007).

50 Bridge, above, note 40, at 7-116.

51 *Paterson v. Tash* (1742) 2 Strange 1179 (pledge); *Buxton v. Baughan* (1834) 6 C. & P. 674 (lien); *Reeves v. Capper* (1838) 5 Bing. N.C. 136 (competition between pledges).

the Sale of Goods Act 1979 ('SGA 1979'), when it comes to an outright sale:⁵²

Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Thus, the starting point under the *nemo dat* rule is that a fraudulent art dealer who sells an object without the consignor's authority or consent will not be able to pass good title to the purchaser. This, however, is not the end of the enquiry and one needs to look at the exceptions to this rule and other circumstances (such as the location of the sale or the expiration of the limitation period described above), as in certain circumstances a *bona fide* purchaser may obtain good title.

At one time, the only effective exception to the *nemo dat* rule was that of a sale in market overt. Tettenborn⁵³ describes how the unlamented disappearance of this exception was precipitated by yet another art scandal. In 1993, a person presented for valuation at Sotheby's a Gainsborough and a Reynolds, both stolen from Lincoln's Inn and bought by him in Bermondsey Market for £145. He was accepted to have impeccable title under the then rule of market overt. Following an outrage from the art community, the market overt exception was abolished.⁵⁴

Further exceptions have evolved in response to commercial and social demands,⁵⁵ resulting in a state of the law which some commentators are calling "an arbitrary and unpredictable mess".⁵⁶

Firstly, both art trade and art fraud are international. Certain jurisdictions allow title to pass to a *bona fide* purchaser⁵⁷ and the English court will apply the *lex situs* of the goods at the time of sale to determine whether title has passed.⁵⁸ The position has been aptly formulated by Pollock C.B. in *Cammell v. Sewell*,⁵⁹ "If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere". Thus, if an object stolen in England was taken and sold abroad in a jurisdiction which allows title to pass to a *bona fide* purchaser, the original owner's title is extinguished. This is so even if the object is subsequently returned to England.⁶⁰ Applying the *lex situs* rule to the Basquiat case study, even if the Partnership Agreement with Satfinance and the oral agreement with Delahunty were both governed by English

52 Tettenborn points out that in so far as provisions in the 1979 Act protect non-buyers such as pledgees (e.g., ss. 24 and 25 of the SGA 1979) they are strictly speaking exceptions not to s. 21 but to the common law rules: Andrew Tettenborn, 'Transfer of Chattels by Non-Owners: Still an Open Problem', (2018) 77(1) *Cambridge Law Journal* 151-178, fn. 13.

53 *Ibid.*, fn. 5.

54 By the Sale of Goods (Amendment) Act 1994.

55 Bridge, above, note 40, at 7-001.

56 Tettenborn, above, note 52, at p. 156.

57 For example, Italy.

58 *Winkworth v. Christie Manson & Woods Ltd* [1980] 2 W.L.R. 937; *Iran v. Berend* [2007] EWHC 132.

59 (1858) 3 H & N 617, at p. 638.

60 *Winkworth v. Christie Manson & Woods Ltd* [1980] 2 W.L.R. 937.

law, the title to the painting would pass under New York law, because the Basquiat appears to have been stored in New York at the time.⁶¹

In addition, numerous exceptions to the *nemo dat* rule exist even where the object never leaves the country.

MERCANTILE AGENTS

The most obvious exception in the context of the recent art market scandals is the mercantile agent exception. This is contained in section 2(1) of the Factors Act 1889 (the 'FA 1889'):⁶²

Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

A mercantile agent is defined in section 1(1) of the FA 1889⁶³ as:

[...] a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

The likes of Sammons and Philbrick certainly fall within these provisions. The rationale for the rule appears to be that where a consignor entrusts his painting to a dealer with instructions to sell or otherwise dispose of it for value, having clothed the dealer with the appearance of ownership, the consignor should bear the risk that innocent third parties may be misled into thinking that the dealer has authority to sell the item.⁶⁴ If the art dealer sells contrary to consignor's instructions, or dishonestly on his own behalf, the innocent buyer gets good title and the owner must seek his remedies against the dealer.⁶⁵

The terms of the dealer's engagement are central to the enquiry. The object must have been entrusted to the mercantile agent in his capacity as, and for purposes connected with his character as, a mercantile agent.⁶⁶ Section 2(1) of the FA 1889 would not apply

61 New York law is, in many respects, similar to English law and also recognises the *nemo dat* rule, but the authors do not intend to comment on it in this article.

62 Which is specifically preserved by s. 21(2)(a) SGA 1979.

63 This definition is repeated in the SGA 1979, s. 26.

64 Another way to view this is simply as a consequence of the law of agency which views the acts of the agent as those of the principal if that agent was acting within the scope of his 'ostensible' authority.

65 The provisions of the FA 1889 do not authorise an agent to exceed his authority, nor do they exempt him from any liability, civil or criminal, for so doing (FA 1889 s.12(1)); see also Norman Palmer, 'Conversion, Trespass and Title to Art Works' Ch. 2 in *The Recovery of Stolen Art* (Kluwer, 1998), at p. 51.

66 The capacity in which the mercantile agent has possession of the goods is, of course, something of which a prospective buyer can have no knowledge. Merrett explains that the mercantile exception to the *nemo dat* rule does not protect the *bona fide* purchaser *simply* because he believed that the mercantile agent had authority to sell – this exception is based on the conduct of the original owner rather than solely on the expectations of the buyer (Louise

if the collector merely consented to the mercantile agent holding the goods as bailee for other purposes (for example, repair).⁶⁷ Thus, in the Kusama example, the mercantile agent exception would not apply because the painting was given to Philbrick for the sole purpose of organising its repair and not for sale in his capacity as an art dealer.

For the mercantile agent to pass good title, he must have possession⁶⁸ of the goods, or of the documents of title to the goods, at the material time. The entrustment of the object to the dealer must be with the owner's⁶⁹ consent.⁷⁰ Such consent will be presumed in the absence of evidence to the contrary.⁷¹ It appears that consent will be found to exist even if the dealer gained possession by deception⁷² (though it bears more detailed consideration as to what exactly the deception related – mere future intent or the fact of possession or identity). There is no reference to delivery in section 2(1), hence good title may be obtained prior to delivery under a sale or other disposition⁷³ (other than a pledge, which under English law is necessarily possessory) entered into by the mercantile agent.⁷⁴

In the Signac case, SCDL tried to argue that the mercantile agent exception applied and that Ms Hickox bore the burden of showing that any person taking from Sammons did not take in good faith. Ambrose J. disagreed and ruled that although Sammons was very probably a mercantile agent and was involved in the sale, it was not clear that he was the person who made the sale or had possession of the Signac with Ms Hickox's consent at that date.⁷⁵ It was further held that it was the buyer who bore the burden of proving that they acted in good faith and had no notice of Sammons's lack of authority.⁷⁶

The Signac case concerned the disposition of 100 per cent of the painting and the standard of proof was good arguable case. Applying the mercantile agent exception to the Basquiat case is infinitely harder. With Philbrick having sold more than 100 per cent of shares in the work and then having pledged it, it is difficult to determine who now holds the rights to the Basquiat – Satfinance, Philbrick, Delahunty or Athena.

The wording of the documents underlying each disposition would be key in determining

Merrett, 'The Importance of Delivery and Possession in the Passing of Title', (2008) 67(2) *Cambridge Law Journal*, p. 380.

67 *Astley Industrial Trust Ltd v. Miller* [1968] 2 All E.R. 36; *Forristal v. McDonald* (1883) 9 S.C.R. 12 at 17; Bridge, above, note 40, at 7-038.

68 A person is deemed to be in possession where the goods or documents are in his actual custody or are held by any other person subject to his control of for him or on his behalf: Bridge, above, note 40, para. 7-035; *Capital and Counties Bank v. Warriner* (1896) 12 T.L.R. 216; *City Fur Manufacturing Co v. Fureenbond* [1937] 1 All E.R. 799.

69 The 'owner' is the person who could have given express authority with regards to dealing with the goods, and a mercantile agent can be in possession with the consent of the owner even if he (the agent) has an interest in the property shared with the owner: *Lloyds Bank Ltd v. Bank of America National Trust and Savings Association* [1938] 2 K.B. 147 at 161-162; Bridge, above, note 40, fn. 268.

70 FA 1889, s. 2(1).

71 FA 1889, s. 2(4).

72 *Cole v. North Western Bank* (1875) L.R. 10 CP 354 at 373; *Pearson v. Rose and Young* [1950] 2 All E.R. 1027; *Du Jardin v. Beadman* [1952] 1 All E.R. 160.

73 Consideration, however, appears to be key in any disposition by a mercantile agent and so a mere gift by the agent would not bind the owner: Bridge, above, note 40, at 7-042.

74 Bridge, above, note 40, at 7-041.

75 *Hickox v. Dickinson* [2020] EWHC 2520 (Ch), para. 64.

76 *Ibid.*

whether or not title, in fact, passed. The Partnership Agreement is not well drafted and it is hard to predict how a court would interpret it. Assuming the painting was in England throughout⁷⁷ and ignoring the fact that the Athena Loan Contract is governed by New York law,⁷⁸ one possible analysis under English law could be as follows:

1. If Philbrick's purchase of the Basquiat from Phillips auction house completed in July 2016, as per the date of the 'Buyer Agreement' between Philbrick and Phillips, Philbrick would have acquired 100 per cent title to the Basquiat.
2. Assuming that Philbrick acquired 100 per cent title from Phillips, subsequent disposition under the Partnership Agreement would have transferred 50 per cent of that title to Satfinance. There are, of course, several issues with the Satfinance/Philbrick transaction:
 - a. The Partnership Agreement is voidable for fraud due to Philbrick's misrepresentation as to price. As an aside, voidable title can still be transferred to a good faith purchaser before the contract has been avoided.⁷⁹ However, in this case, this exception does not seem engaged, since we assume Philbrick acquired titled under the Buyer Agreement, and only attempted to dispose of it under the – voidable – Partnership Agreement. So, Philbrick could still pass title to Delahunty from his own 50 per cent later on.⁸⁰
 - b. Separately, there is a breach of fiduciary duties which Philbrick owed to Satfinance, as well as self-dealing (i.e., Philbrick represented to act as an agent in the purchase, where in fact he was selling what he already owned and was on both sides of the transaction). If Satfinance wanted to keep its interest in the painting and *not* avoid the contract, it could argue that the Partnership Agreement gave it 50 per cent title to the Basquiat, and that the excess cash that Satfinance was fraudulently induced to pay should be seen as held by Philbrick on constructive trust for Satfinance's benefit: one could then seek to trace⁸¹ those excess funds in equity⁸² and, if that money was used to pay for the Basquiat, then Satfinance would argue it is the 100 per cent beneficial owner of the painting (owning 50 per cent under the Partnership Agreement and 50 per cent as a result of the constructive trust).⁸³ However,

77 So that title would pass under English law.

78 As presumably are any accompanying security documents for the pledge.

79 SGA 1979, s. 23.

80 In fact, there is a further complication as the Partnership Agreement contained a provision stating that Satfinance and IPL agreed that their share in the Basquiat would not be diluted, transferred or otherwise encumbered. However, a breach of this provision simply means that Satfinance has a personal claim against IPL – Delahunty's title would remain unaffected.

81 Tracing will be discussed further below.

82 At common law tracing is available only where the proceeds of sale have not been mixed with other moneys. However, equity will trace into a mixed fund and will follow the money into the hands of anyone other than a *bona fide* purchaser, giving the owner a charge over the fund in question. In the circumstances where payment has been made into a bank account it is therefore advisable to trace in equity. Tracing in equity requires a fiduciary relationship, which is present here, as Philbrick was an agent of Satfinance.

83 This is a simplified analysis, as it appears that in reality Philbrick may have contributed at least £300,000 of his own funds to the purchase.

even if the constructive trust argument succeeds, in doing this, Satfinance will be asserting mere equitable proprietary rights. As mentioned above, an equitable interest will not found an action in conversion and so even if the second 50 per cent is indeed held on constructive trust for Satfinance, that would be defeated by a good faith purchaser, such as Delahunty.

3. Assuming Philbrick was disposing of his own share in the Basquiat, he could simply sell 12.5 per cent to Delahunty. Even if that is wrong and he was disposing of Satfinance's share, Philbrick would still likely be able to pass title to Delahunty under the mercantile agent exception, as delivery of the painting is not required to pass title under this rule.
4. Athena's pledge would likely be valid as well either under the mercantile exception or the seller in possession rule (on which see below).⁸⁴ Athena would likely have the right to sell the Basquiat; Satfinance and Delahunty would likely have the right to redeem the painting at any time before any such sale on satisfying the claim for which the painting was pledged.⁸⁵ Satfinance and Delahunty would then have recourse against Philbrick, which is cold comfort given his financial situation.

This deeply unsatisfactory outcome for Satfinance and Delahunty is strengthened by two further exceptions to the *nemo dat* rule, which also favour the *bona fide* purchaser: the seller in possession and the estoppel rules.

SALE BY A SELLER IN POSSESSION

The seller in possession exception is enshrined in section 24 SGA 1979,⁸⁶ as follows:

Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

Under this exception if the seller has parted with the property in the goods⁸⁷, yet retained possession of them, or of the documents of title to the goods, he can pass good title upon delivery of the goods (or documents of title) to a third party.

In the case of the Basquiat, it appears that Philbrick remained in possession of the painting after the sale to Delahunty, because Philbrick was able to subsequently grant possession to Athena. In these circumstances Philbrick, who represented himself to Athena as the sole owner of the Basquiat, is a seller in possession in relation to the pledge and, under English law, Athena would acquire its security interest, upon delivery of the Basquiat, pursuant to section 24 SGA 1979. Thus, to the extent that Philbrick had title to any share in the painting prior to the sale to Delahunty, the seller in possession rule would likely apply to Athena's pledge; to the extent that Philbrick dealt with Satfinance's share in the painting as its agent,

84 For simplicity we ignore the purported transfer to Boxwood (see note 18 above).

85 FA 1889, s. 12(2).

86 This substantially duplicates s. 8 of the FA 1889, which remains in force.

87 Under SGA 1979, s. 18 Rule 1 there is a presumption that property in specific goods passes when the contract is made even if payment or delivery is postponed.

the mercantile agent exception would likely apply. The result, however, will be the same in both cases – Athena as a *bona fide* actor would likely obtain a valid security interest.

ESTOPPEL

The estoppel exception is acknowledged in the wording of section 21(1) of the SGA 1979, “[...] unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell”. The rationale is the same as that underlying the mercantile exception – having provided the dealer with the appearance of ownership, the consignor should bear the risk of the dealer misleading third parties.

For the estoppel exception to apply, the original owner must have so acted as to mislead the buyer into the belief that the seller was entitled to sell the goods⁸⁸ (for example, if the original owner acts in a way that leads the buyer to believe that the seller (and not he) is the true owner of the work or that the seller is fully authorised to sell the work as the true owner’s agent). Given the traditional secrecy in the art market as to the identity of the true owner, with sales sometimes being done through third parties to deliberately conceal ownership of a work of art, it may well be that this exception is engaged more frequently in the art world than in other trades.

GOOD FAITH AND NOTICE

Good faith and notice are key. They are central to the operation of the exceptions to the *nemo dat* rule and provide the most effective means of protecting the title of the original owner.

The buyer will acquire good title to goods, provided that he buys them in good faith and without notice of any lack of authority or other misconduct. By section 61(3) of the SGA 1979 a thing is deemed to be done in good faith within the meaning of the Act when it is in fact done honestly, whether it is done negligently or not.⁸⁹ Yet, some commentators⁹⁰ suggest that the common law meaning of ‘good faith’ has evolved and honesty is no longer a complete defence. Kurtz *et al*⁹¹ argue that, certainly in circumstances involving experienced art dealers, failure to perform a search against a public register (such as the Art Loss Register (‘ALR’)) may prevent a trade buyer from claiming that an item was purchased in good faith.⁹² The burden of proof for establishing good faith in the context of most⁹³ of the exceptions to the *nemo dat* rule lies on the purchaser.⁹⁴

As to notice, on the one hand there is no general duty on the buyer in an ordinary commercial transaction to make enquiries as to the right of the seller to dispose of the goods⁹⁵ and in the context of the FA 1889 and the SGA 1979, ‘notice’ of a fact

88 *People’s Bank of Halifax v. Estey* (1904) 34 S.C.R. 429; Bridge, above, note 40, at 7-010.

89 ‘Good faith’ is not defined in the FA 1889, but Bridge suggests that it would appear to mean ‘honestly’, that is, not fraudulently or dishonestly: Bridge, above, note 40, at 7-046.

90 Kurtz, *et al.*, above, note 47, at p. 18.

91 *Ibid.*, pp. 18-19.

92 See also Redmond-Cooper, above, note 33, discussing *de Preval v. Adrian Alan Ltd.*

93 In cases of sale under a voidable title the burden lies on the original owner to demonstrate that the buyer bought otherwise than in good faith and with notice of wrongdoing (*Whitehorn Bros v. Davison* [1911] K.B. 463). Bridge argues that this position deserves reconsideration, as the buyer is in a better position to prove the circumstances of his acquisition (Bridge above, note 40, at 7-029).

94 *Oppenheimer v. Frazer and Wyatt* [1907] 2 K.B. 50 at 62; Bridge, above, note 40, at 7-045.

95 *Hambro v. Burnand* [1904] 2 K.B. 10 at 20; *Dobell, Beckett & Co. v. Nelson* (1904) 7 F. 281

appears to mean actual knowledge of that fact.⁹⁶ On the other hand, the test may not be entirely subjective and Bridge⁹⁷ suggests that the court may apply an objective test to ask whether a reasonable man must have known of the agent's want of authority or must have suspected that authority and wilfully shut his eyes to the means of knowledge available to him.

So, what due diligence must a purchaser perform to satisfy the good faith / no notice requirement?

The level of due diligence needed will vary depending on the circumstances of the sale and on whether there were any 'red flags' at the time of purchase (for example a sale at gross undervalue or absence of any documentation relating to the artwork). Further, art market professionals are likely to be held to a higher standard of due diligence requirements.⁹⁸ In the cases of Philbrick and Sammons, several factors advocated for good faith – both were highly reputable dealers, the purchase price was (in most cases)⁹⁹ reasonable and there was accompanying (albeit forged) paperwork.¹⁰⁰

However, whilst conducting due diligence will assist the buyer in establishing good faith in subsequent proceedings it does not guarantee spotting a fraudulent deal at the time of transaction. The level of sophistication of this type of fraud operation often means that no red flags are raised even where a buyer or lender engages in extensive due diligence. For example, here is the description of the due diligence Athena claims to have conducted on the Basquiat pledge:

Athena conducted extensive diligence of the artwork collateral. With respect to the Painting, Athena not only verified that IPL had acquired the Painting from Phillips through a July 27, 2016 Bill of Sale and proof of payments by IPL to Phillips as evidenced in IPL's bank statements [...] but it also independently confirmed with the Chief Financial Officer of Phillips that it had received wire payments from IPL's bank account for the purchase of the Painting and that title had thereby passed to IPL. [...] Athena also performed provenance research at the Metropolitan Museum of Art and MOMA libraries on April 3, 2017 and confirmed the exhibition history of the Painting. [...] Further, Athena searched the Art Loss Register ("ALR") Database to ensure that none of the artwork collateral in the pool were reported lost, stolen or had been claimed in any way by an unknown third-party. [...] Through an Art Loss Register search on April 7, 2017, Athena verified that the Painting had not been reported lost

at 288; Bridge, above, note 40, at 7-047.

96 The doctrine of constructive notice does not normally apply to commercial transactions: Bridge, *Ibid.*

97 Bridge, *Ibid.*

98 *de Preval v. Adrian Alan Ltd* (1997) above, note 33, where it was held that a professional art dealer could not rely solely on the reputation of a gallery from which he bought the work, as the dealer of his experience ought to have recognised the unique character of the work and made further enquiries.

99 Though not always. For example, in a separate court action in the US Viscountess Hambleden alleged that Timothy Sammons sold her \$6 million Dutch master painting, which she consigned to him, for \$650,000 (Will Worley, 'Art Dealer Timothy Sammons Faces Extradition to US', *The Times*, 9 Aug. 2017: <www.thetimes.co.uk/article/art-dealer-timothy-sammons-faces-extradition-to-us-sxsxjwrltd>).

100 For example, the forged SKH contract which Philbrick presented to Pesko and Delahunty.

or stolen and subsequently registered the Painting with the ALR, such that if any third party registered an interest in the Painting, Athena would have been notified of such.¹⁰¹

This shows that, in practice, even extensive due diligence may come up short in the circumstances where the original owner had not taken any steps to notify his interest to prospective buyers (for example, by registering the artwork with the ALR). Whilst there is no legal obligation to do so, there is a clear commercial incentive for the owner to register his title to the work and for the buyer to investigate the seller's title – it is in everyone's interest to avoid lengthy litigation of title that usually follows these types of fraud. Marketability of a work of art is bound to be impaired whilst a dispute about ownership continues, as a prospective buyer will feel that they are “buying a lawsuit as well as a painting”,¹⁰² and the uncertainty will affect the value and onward sale prospects.¹⁰³

The ALR provides an option to register one's interest in a work of art before any theft has occurred under what is called ‘Positive Registration’ service.¹⁰⁴ Had Satfinance registered its 50 per cent interest in the Basquiat via ‘Positive Registration’ with the ALR at the time of concluding the Partnership Agreement, Athena's subsequent search of the database would have been notified to Satfinance and the fraud would have been discovered. Similarly, had the painting been registered and had Delahunty searched the ALR the fraud would have unravelled even sooner.

OTHER POTENTIAL CLAIMS AGAINST THE ROGUE DEALER

It is worth mentioning briefly some of the other civil remedies available to the original owner against the fraudulent art dealer, in addition to conversion.

FRAUDULENT MISREPRESENTATION

The original owner can sue the dealer for monetary damages for fraudulent misrepresentation. Further, if an artwork is stolen or obtained by fraud, equity imposes a constructive trust on the fraudulent recipient.¹⁰⁵

Section 32 of the Limitation Act 1980 postpones the commencement of the limitation period in an action for fraud, mistake or where “any fact relevant to the claimant's cause of action has been deliberately concealed from him by the defendant”¹⁰⁶ – the limitation period does not start to run until the claimant discovers, or could with reasonable

101 *Memorandum of Law in Opposition to [Satfinance's] Motion for a Preliminary Injunction*, above, note 17, p. 8.

102 Robert Ham K.C., at para. 31, *Spencer-Churchill v. Faggionato Fine Arts Ltd* [2012] EWHC 2318 (Ch), noted by Elizabeth Emerson in (2012) XVII *Art Antiquity and Law* 359.

103 Robert Ham K.C., *ibid.*, suggests that one possible way to resolve this would be for the parties to agree to market the work together and argue about the proceeds of sale afterwards, but the surrounding publicity of a legal action will likely also affect the price.

104 <www.artloss.com/registering-interests-in-artworks/>.

105 *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] A.C. 669 at 716.

106 Limitation Act 1980, s. 32(1)(b). It is worth noting that deliberate commission of a breach of duty in circumstances where it is unlikely to be discovered for some time is to be treated as deliberate concealment of the facts involved in that breach of duty: Limitation Act 1980, s. 32.(2).

diligence¹⁰⁷ have discovered, the fraud, mistake or concealment.¹⁰⁸

Note that, where the existence of an action for *conversion* is concealed by the fraud of the defendant, sections 32(3) and (4) of the 1980 Act stop section 32(1) from extending the time limit in the circumstances where an innocent third party¹⁰⁹ has acquired the property for valuable consideration. As discussed above, there is no time limit for an action in conversion against the rogue dealer himself and any bad faith purchasers.

UNJUST ENRICHMENT

The claim in unjust enrichment is concerned with the recovery of the benefit received by the defendant rather than with compensating the claimant for the loss suffered. The claimant is entitled to restitution in the form of a personal remedy,¹¹⁰ whereby the defendant must pay to the claimant the value of the enrichment. Ulph¹¹¹ suggests that a thief who has sold the claimant's painting and invested the proceeds of sale in a lucrative investment will have to hand over both the value of the original proceeds of sale and the enhanced value of this investment.¹¹²

TRACING

Tracing is neither a remedy nor a cause of action in itself – it serves an evidentiary function in identifying substitute property which represents the claimant's original property. Bridge¹¹³ explains that the owner's proprietary right is recognised both at law and in equity, allowing him to 'trace' his property into the proceeds of sale¹¹⁴ or into other identified assets which have been purchased with those proceeds. Tracing in equity (as opposed to at common law) is preferable because equity will trace into a mixed fund and so will assist where money was paid into the defendant's bank account and was mixed with his own funds. To trace in equity the owner must establish that the defendant was in a fiduciary relationship with him.¹¹⁵ This should be possible in relation to a dealer acting as an agent – Philbrick and Sammons will have owed fiduciary duties to their clients.

107 In demonstrating 'reasonable diligence' the claimant is not required to do everything possible, but only to do what an ordinary prudent person would do having regard to all the circumstances (see *Peco Arts Inc v. Hazlitt Gallery Ltd* [1983] 1 W.L.R. 1315, where it was held that the claimant, who was not an art professional, was entitled to rely on the recommendation of a well-known and highly reputable gallery.)

108 Limitation Act 1980, s. 32(1).

109 Defined as someone not a party to the fraud (or the fraudulent concealment) and who at the time of the purchase had neither actual nor constructive knowledge of the fraud or the concealment: Limitation Act 1980, s. 32(4)(a).

110 However, there is debate as to whether a claim in unjust enrichment could also give rise to proprietary relief (see Paul McGrath, *Commercial Fraud in Civil Practice* (2nd edn, Oxford University Press, 2014), 3.103 – 3.131).

111 Ulph, above, note 35, p. 70.

112 See also the Court of Appeal decision in *Trustee of the Property of FC Jones & Sons (A firm) v. Jones* [1997] Ch. 159: a claim by the trustee based on its having retained legal title to recover the exchange product of the money wrongly taken from the trust. That money had been given to the wife of one of the partners who invested it well. The Court of Appeal allowed a personal claim against the wife inclusive of profits.

113 Bridge, above, note 40, at 7-003.

114 *Re Diplock* [1948] Ch. 465 at 521, 546.

115 Bridge, above, note 40, at 7-003; *Re Diplock* [1948] Ch. 465 at 532; *Buhr v. Barclays Bank Plc* [2001] EWCA Civ 1223.

On successful completion of an equitable tracing exercise, the claimant could pursue a proprietary remedy to enforce his rights in the property or a personal remedy for breach of trust or fiduciary duty. The former may be of more use in the circumstances where, like Sammons, the defendant is insolvent – if the claimant can establish a proprietary or security interest in assets in the hands of an insolvent defendant, he will have priority over other creditors, depending on the type of proprietary remedy awarded. If the claimant successfully asserts an equitable proprietary interest, he will take free of the insolvency.¹¹⁶

BAILMENT

There would also be breaches of bailee's duties by the rogue dealer who had possession of the artwork. Part of Ms Hickox's case in arguing for the Norwich Pharmacal order, was that there could be claims in bailment against any person taking possession of the Signac with sufficient notice of her ownership interest. Ambrose J. was not convinced. There was no evidence that anyone taking possession, whether on the instructions of Sammons or following the sale, had notice that they were acting contrary to Ms Hickox's rights.¹¹⁷ It seems, therefore that, a claim in bailment would be likely to succeed only as against the rogue art dealer and not the subsequent purchasers.

THE BUYER'S RIGHTS

In all of this, we must not forget the buyer. The buyer's position is remedied only if the seller that sold to him is solvent. A *bona fide* purchaser will have an action against the seller under section 12 of the SGA 1979, which implies several terms into every contract of sale.¹¹⁸

1. An implied condition that the seller has the right to sell the goods.¹¹⁹
2. An implied warranty that the goods are free from undisclosed charges and encumbrances.¹²⁰
3. An implied warranty that the buyer will enjoy quiet possession of the goods.¹²¹

The implied term that the seller has the right to sell the goods is a condition of the contract and so the usual remedy will be for the buyer to reject the chattel and reclaim the price.¹²² Each person in the chain of title can sue their predecessor in title for return of the purchase price.¹²³ The price that the buyer recovers under section 12(1) is not subject to any deduction to take account of the buyer's enjoyment of the chattel or its loss in value. Thus, in a failing market for a particular artist, this cause of action may be more advantageous to the buyer (assuming, of course, that the seller is still solvent).

116 *FHR European Ventures LLP and others v. Cedar Capital Partners LLC* [2014] UKSC 45, para. 43.

117 *Hickox v Dickinson* [2020] EWHC 2520 (Ch), para. 71.

118 Palmer, above, note 65, at p. 61.

119 SGA 1979, s. 12(1).

120 SGA 1979, s. 12(2)(a).

121 SGA 1979, s. 12(2)(b).

122 Palmer points out that the buyer can always elect to waive the condition or treat it as a warranty, thereby limiting himself to a claim for damages (SGA 1979 s. 11(2)): Palmer, above, note 65, at p. 62.

123 This, of course, is subject to limitation periods.

With regard to the warranty of no encumbrances, it seems the buyer will need to demonstrate that the object is subject to some proprietary (or, possibly possessory) interest before he can complain of a charge or encumbrance.¹²⁴

Finally, the added value of the warranty of quiet possession under section 12(2)(b), in addition to the condition of a right to sell the object under section 12(1), is that in the case of section 12(1) the limitation period begins to run from the time of the sale, whereas under 12(2)(b) it does not begin to run until the buyer's quiet possession is disturbed.¹²⁵

As mentioned above, these remedies are useful only if the seller who sold to the buyer is solvent, which is not the case with Philbrick and Sammons, but could be the case for subsequent sellers in the chain, where the artwork has been sold on. Ultimately, it would have been better for the buyer to have conducted due diligence and walked away from a suspect transaction, but that would require a registration of the true owner's title as discussed above.

DOES CRIME PAY?

High profile art theft, the type we read about in the newspapers has historically been the movie scene-esque middle of the night smash and grab 'heist', that is the robbery and / or theft of the art itself usually from a public building such as a gallery. BBC iPlayer has recently created a series documenting events such as these which historically hit the front pages: *Stolen: Catching the Art Thieves*. It is a three-part documentary series focusing on high profile art robberies. Episode one covers the events surrounding the theft of two Turner paintings which were stolen whilst on loan from the Tate Gallery in 1994. It details the "high stakes game of cat and mouse across Europe from London to Belgrade and deep into the world of Serbian war lords".¹²⁶ Those familiar with the documentary, or either involved in or on the periphery of this multi-jurisdictional investigation will appreciate the substantial time, money and police resource which goes into trying to retrieve the artwork.

As for the perpetrators, artwork has become less lucrative as a prize for a high-risk, high-reward heist. It is notoriously difficult to move on / sell / rid oneself of world-famous headline grabbing artwork. This brings two further problems – getting paid a sum anywhere near the real value (insured value) of the artwork, and ultimately having to potentially sell it to very dangerous groups of organised crime.

As a result, it is not unusual for the police or FBI to receive a tip off as to the artwork's location and ultimately either be blackmailed into paying for its return, or to negotiate a payment to have it back. In those types of cases the victim, however, is generally the gallery, or the insurers – whilst the loss of the painting itself may feel personal to the family of the artist, or employees of the gallery, the loss seems easier for the general public to digest.

Turning to criminal law, in theft cases, where a person is convicted of any offence where goods have been stolen or obtained by blackmail or fraud, the Court has various powers in relation to restitution and restoration. In particular Chapter 3 of the Sentencing Act

124 *The Barenbels* [1985] 1 Lloyd's Rep. 528.

125 Palmer, above, note 65, at p. 63.

126 <www.bbc.co.uk/iplayer/episode/m001e5tv/stolen-catching-the-art-thieves-series-1-1-frankfurt>.

2020 gives the court the power to require anyone having possession or control of the stolen goods to restore them to any person entitled to recover them from him.¹²⁷ It also deals with “removed money” which is money in the offender’s possession when he was arrested. A sum of this money may be paid to any person entitled to recover the stolen goods from the offender, if they were in the offender’s possession.¹²⁸ Furthermore, where an order is made, it requires payment of a sum of any removed money to any person to whom the offender has sold the stolen goods, or any person from whom the offender has borrowed money on the security of the stolen goods.¹²⁹

What of the Philbrick and Sammons cases? In Philbrick’s case much of the art has been located – it is held by Athena which is claiming it has a pledge over it. Sammons had his London home repossessed (worth £4 million) but otherwise appeared to spend his criminal profits on “funding his own lavish lifestyle”.¹³⁰ It therefore seems he was not in possession of “removed money” which might be distributed to assist here. Ms Hickox has obtained a Norwich Pharmacal order (a civil order) in an attempt to locate her Signac. In England, the police may assist with locating the painting, but, where the painting was sold and there are multiple claims to title, the criminal courts would take a step back.

Bridge¹³¹ is of the view that although a restitution order can be made in favour of a person “entitled to recover” the goods, and that person may or may not be the owner, it is submitted that the court could not deprive a *bona fide* disponee of a good title which he had obtained under one of the exceptions to the *nemo dat* rule. The previous owner has no claim against the disponee. Moreover, it has been stated that the court should exercise this power only in “the plainest cases”¹³² and that it should not be exercised when difficult questions of law affecting title to goods arise, since such matters are more suitable for the civil courts.¹³³ So it seems that a criminal court will be reluctant to deploy the sledge hammer of criminal law to try to resolve the intricate maze of civil legal disputes left in the aftermath of Philbrick’s and Sammons’ fraud operations.

The police have powers under the Police (Property) Act 1897,¹³⁴ which applies to property which has come into possession of the police in connection with their investigation of any suspected offence. This power is discretionary but does not depend upon the apprehension or conviction of the offender. However, it has been stated that this procedure should not be used in cases involving “tricky questions of title”.¹³⁵ The police also have powers to seize and retain property under the Police and Criminal Evidence

127 Sentencing Act 2020, s.147(1)(a).

128 Sentencing Act 2020, s.147(1)(b).

129 Sentencing Act 2020, s.147(d)(i) and (ii).

130 Lanre Bakare, ‘UK Art Dealer Jailed in US for Defrauding Clients of up to \$30m’ *Guardian*, 31 July 2019: <www.theguardian.com/artanddesign/2019/jul/31/uk-art-dealer-jailed-us-defrauding-clients-timothy-sammons>

131 Bridge, above, note 40, at 7-006.

132 *R v. Ferguson* [1970] 1 W.L.R. 1246 at 1249.

133 *Stamp v. United Dominions Trust Ltd* [1967] 1 Q.B. 418; *R v. Church* (1970) 53 Cr. App. R. 65.

134 Police (Property) Act 1897 s. 1(1), as amended by the Criminal Justice Act 1972 s. 58 and the Powers of the Criminal Courts (Sentencing) Act 2000 s. 144. See also s. 2 (as amended by the Police Reform and Social Responsibility Act 2011 Sch. 16(3) para. 62) and s. 2A (inserted by the Police Reform Act 2002 s. 77 and amended by the Serious Organised Crime and Police Act 2005 and by the Crime and Courts Act 2013).

135 *Reymond Lyons & Co. Ltd v. Metropolitan Police Commissioner* [1975] Q.B. 321 at 326.

Act 1984 ('PACE'),¹³⁶ but the exercise of this power does not transfer title and the person from whom the property is seized can normally rely on his previous possession of the property as conferring sufficient title to recover the property from the police once the statutory authority of the police to retain possession has expired.¹³⁷ In reality, items seized by the police are retained as evidence pending the outcome of the criminal trial – on conviction they are likely to be subject to the issue of the Proceeds of Crime Act 2002 ('POCA') confiscation orders (discussed below), or held subject to the outcome of a battle through the civil courts. This legislation does not envisage the police handing over a million-pound artwork to its rightful owner, but instead enables them to seize, review and ultimately return a mobile phone to a suspect.

So, the chances of recovery of physical artwork are low generally, where a straightforward theft has taken place. Ponzi scheme frauds have become particularly prominent in the last decade – especially those using pensions schemes, vague offers of investments in certain 'eco' projects in faraway countries. Criminals are always a step ahead, so why would they not turn their attention to fine art? A much easier way to 'sell on' the artwork without all the problems of being front-page news, or taking the risk, effort and expense of burgling the gallery in the first place would be to use Ponzi schemes, which are typically charged under English criminal law as fraud. The legislation is wide and Philbrick's and Sammons' crimes sit squarely in the offence under section 2 of the Fraud Act 2006, 'fraud by false representation'.

As in most fraud cases, the items, investments and opportunities which have been offered to the victim are rarely received by them, or are received in part before their investment is used to (partially) pay others. The remedy in criminal law (other than conviction of the defendant and any satisfaction a lengthy prison sentence might bring) is to try to retrieve the funds, known as 'the proceeds of crime' under the relevant legislation.¹³⁸ This remedy requires the defendant to have been charged and convicted of the offence before monies can be pursued.

In the English criminal courts, Crown Court cases are hitting an all-time backlog and it can be several years before they are brought to trial. High-profile cases may skip parts of the queue, but the reality for victims who want their cash back, is that the criminal route of recovery is not quick and it is not easy. Obtaining a POCA confiscation order, unlike a criminal conviction itself, requires what the defendant says of his assets to be proved on a 'balance of probability'. If Philbrick had been convicted in England of this offence (which is a 'qualifying offence' for POCA purposes) the authors have no doubt that a POCA confiscation order would have been issued, with a timetable being set requiring the defendant to complete a series of detailed disclosures in relation to his personal finances. Philbrick according to US reports was said "not [...] to have assets sufficient to pay forfeiture or restitution".¹³⁹ Under English law, he would have been required to prove this and list information relating to his entire finances dating back to six years before the offence.

136 PACE ss. 19, 22; supplemented by the Police Reform Act 2002 Sch. 4, para. 19 and the Criminal Justice Act 2003 Sch. 1, para. 4.

137 *Webb v. Chief Constable of Merseyside Police* [2000] Q.B. 427; *Costello v. Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381.

138 Proceeds of Crime Act 2002.

139 *The Government's Sentencing Memorandum*, above, note 4, p. 17.

In England, POCA proceedings are typically most effective against prolific criminals who are high up the chain in their organised crime. Criminals who work alone or are at the bottom of the chain typically do not have personal wealth. If all substantive investigations under POCA indicate the person does not have assets or money which can be seized, then there is very little that can be done to recompense the victim. Victims of these types of financial crime are understandably frustrated by this, particularly after such a long period of time waiting for an arrest, investigation and trial has elapsed by this point. This then means victims are back to trying to claim best title over the artwork itself. Arguments which relate to title are, as mentioned, something criminal courts prefer to steer clear of claiming ‘tricky questions of title’ belong in the civil courts.

So where does the merry-go-round of insufficient recovery end for the victims? Andre Sakhai for example might well argue personal attachment to his Kusama – he never intended for it to be sold only repaired by Philbrick, so mere monetary damages may be inadequate, but where other claims of title are brewing, the criminal courts are not going to help.

CONCLUSION

As the above analysis demonstrates, the current legal framework simply does not provide sufficient protection to the original owner of a work of art in the circumstances of fraud by a respected dealer, as exemplified by the cases of Philbrick and Sammons. Nor does the law provide comfort to a good faith purchaser of such artwork, as regardless of whether such purchaser is (eventually) found to have good title to the work he will likely spend years in litigation before the outcome is determined. In the meantime, whilst the dispute is ongoing, no purchaser will pay fair market price for an artwork with a cloud over its title.

The English criminal justice system as a vehicle for recovering victims’ stolen funds or providing compensation has proved similarly ineffective. Lengthy backlogs and delays in bringing cases to trial have further exacerbated these failings, including a lack of police resourcing. None of this is helped by the complex nature of these types of fraud, where monies have often been transferred through shell companies to and from a number of different jurisdictions through various different means, making funds almost impossible to track, trace and identify (in particular to link them to their original ‘owner’). It can be said that wire transactions and diminishing investments in cash mean that at least there is a trail to follow, but ultimately when advising clients on the best chance of asset recovery, we would advise them to remain civil – pursuing the perpetrators through civil courts. On 15 September 2022, the District Court of the Southern District of New York ordered Philbrick to pay restitution in the total amount of \$82,592,367 to his victims. The Restitution Order states that Philbrick “shall make monthly instalment payments in the amount of 15% of [his] gross income toward the payment of restitution”¹⁴⁰ and that the Bureau of Prisons may establish a payment plan to facilitate this. In reality, this is just lip service to a payment which will not ever be made. Maybe after all, crime does pay?

140 Order of Restitution as to Inigo Philbrick dated 15 Sept. 2022; Amended Judgment in a Criminal Case as to Inigo Philbrick, dated 27 Sept. 2022. Philbrick was also ordered to forfeit his interest in two paintings, as well as his interest in “\$86,672,790 in US currency”, which appears to be a standard order to sever the defendant’s interest in property he obtained as a result of his offence (even if the defendant no longer has this property).

One practical solution to resolve this problem appears to be notifying potential purchasers of one's title to or security interest in the work. Had Satfinance and Delahunty registered their respective interests with the ALR, the fraud would have unravelled sooner or could potentially have been prevented altogether. 'Positive Registration' therefore seems to be the best means of protection against this type of fraud.

Given the lack of legal protection of the original owner's interest in the circumstances of fraud such as that perpetrated by Philbrick and Sammons, it is perhaps unsurprising that some victims choose to avoid the courts altogether. Kenny Schachter, a columnist for Artnet and a personal friend of Philbrick, whom he defrauded out of USD 1.75 million in an alleged joint purchase of a Stingel copper cast,¹⁴¹ said in an interview to the *New York Times* that he did not intend to sue but was planning to write a screenplay instead, quipping: "It'll make a great movie".¹⁴²

141 Schachter, above, note 3.

142 Jacob Bernstein, 'The Talented Mr. Philbrick', *New York Times*, 13 March 2020.