

Franco-British Lawyers Society
Conference: “Regulation and the Art Market”
Tuesday 6 November 2018

Loaning art-works to institutions

Richard Aikens

Why are there loans of art-works to institutions: what are the challenges?

- In the Museums Association's introduction to its "Principles for Lending and Borrowing from UK Museums", (2012), its President described borrowing and lending by museums as "the life blood of our exhibition and outreach programmes". The aim is to enable more people to see more art-works and cultural objects that are in museums' collections.
- Lending of works of art is a ubiquitous activity. Lenders can range from major world-renowned private or state-owned institutions (which will have formal lending policies) to individual private²

What is the legal nature of a loan of art-work

- A short or long term loan is a temporary change of *possession* of a chattel.
- In all cases the loan is a *bailment* (from old Norman French '*bailler*' – to deliver).
- The essential characteristics of a bailment are: (i) the voluntary taking into possession (by the *bailee*) of (ii) the goods of another (*the bailor*), (iii) with the consent of the bailor; (iv) for an agreed period or until return is demanded by the bailor or to his order.
- The curious facts of a case of bailment: *Yearworth V N Bristol NHS Trust* [2010] 1 QB 1
- A *bailment* is to be contrasted with a *sale*, or a *gift* or the creation of a *trust* over the property concerned or simple *custody* of goods. (An employee may have custody of goods on behalf of his employer; or an agent on behalf of his principal).
- A so-called “permanent loan” is a bailment, because there is no intention to pass property in the art-work from the owner to the exhibiting institution.
- Bailments are either *gratuitous* or *for reward*.
- Most loans of art-works to institutions are *gratuitous* because the lender does not charge a fee for the loan. The National Museum Directors' Conference states that “national museums (in the UK) do not charge administration fees for UK loans”.
- In *Kamadian v Holt* [2008] EWHC 1483 (Comm) Tomlinson J recognised that but hesitated to call these loans “gratuitous loans” because he accepted that there are benefits and obligations on both sides. Thus the borrower may be responsible for many costs of the bailment, eg transport and insurance. The lender has the “achievement of wider publicity....”.

What are the duties of the bailor and the bailee:

common law and terms of bailment

- The bailment of art-work and cultural objects will normally be subject to terms agreed between lender and borrower. These will be enforceable as contracts.
- Those terms will take precedence over common law duties.
- But, in the absence of terms, the duties of the parties are:
 - **Bailor:** If gratuitous, very few duties; main one to take redelivery of the goods at the time agreed. Is there a duty, as bailor not to hand over dangerous goods? (Cf. shipper of goods on board).
 - If for reward, implied terms under the Supply of Goods and Services Act 1982, ss 7-9. (That have the right to transfer possession and that will be quiet possession whilst bailed : s 7; that goods hired by description will match it: s.8 – what if the Constable hired for an exhibition is a fake; s 9 quality or fitness of the goods hired in the course of a business). All can be excluded subject to UCTA 1977 conditions.
 - **Bailee:**

Immunity from Seizure whilst on loan in the UK. Tribunals, Courts and Enforcement Act 2007 Pt 6

- Previously, unless art works were owned by a state, the 1978 State Immunity Act would not protect them from seizure, eg. in attempted satisfaction of debts. (There had been a major case in Switzerland in 2004/5 of Russian pictures being seized by a Swiss company owed money by Russia).
- That resulted in Part 6 of the Tribunals, Courts and Enforcement Act 2007 (sections 134-139) provides important protection to museums and other borrowers (within a class as defined in the Act) of objects that are loaned from outside the UK to “approved” institutions within the UK for the purpose of “public display in a temporary exhibition at a museum or gallery”: section 134(2)(d).
- Pursuant to Regulations passed in 2008 under the 2007 Act, notice has to be given that the items for which protection is sought are to enter into the UK within the next two months.
- Items must fulfil the conditions laid down in s.134(2). (Must be items that normally housed outside UK, are imported for public display in a temporary exhibition; comply with the law on the import of goods, eg. Not caught by sanctions or other protective orders pertaining to cultural property).
- If so, they are immune from seizure or forfeiture under any enactment or rule of law, whilst in the UK for a period of 12 months from the date of entry into the UK, (unless the goods are seized or forfeited under an order of a Court of the UK pursuant to some EU or international treaty obligation: section 135(1). (Eg a request from another EU state to return an object on loan to the UK under the 1993 EU Directive on the Return of Illegally Removed Cultural Property).
- This legislation protects the art work but not the lender, or even the borrower, who eg. may have committed an offence under s1(1) of the Dealing with Cultural Objects Offences Act 2003; or may be liable for damages for conversion.

The terms on which loans of art-works are made to institutions in the UK and in Europe.

- Although loans are made without a fee, loans to institutions are bound to be made the subject of contractual terms: there are mutual obligations involved.
- There appears to be no UK national recommended set of terms and conditions for lending art-works to museums within the UK. Some national museums, eg the British Museum and the Imperial War Museum have standard terms and conditions for loans TO or FROM the institution concerned.
- **The British Museum** has a standard form of agreement for Loans of works TO it by others. (revised 20 January 2015). Will look at some of its terms.
- **The Imperial War Museum** has conditions for loans FROM it. Look at those below.
- The **National Museum Directors' Conference** has issued a document “New Standards and Practical Guidelines” for “Loans between National and Non-National Museums” in September 2003: see nationalmuseums.org.uk
- In contrast, the Network of European Museum Organisations (NEMO –consisting of 40 member states from Albania to Ukraine) has issued a Standard Loan Agreement for Temporary Exhibitions with suggested standard conditions. See the website: <http://www.ne-mo.org/index.php?id=110>
- And also see below.

National Museum Directors' Conference

Guidelines on loans: some key points

- The onus is on the lender to provide information about loans, policies and conditions.
- It is usually ONLY the Trustees of a museum who have the authority to agree to a loan of a museum's art-works etc. Not curators or registrars. (If not authorised then no bailment, as that requires the bailor's consent).
- It is normal to have a "loan application" submitted to the proposed lender by the potential borrower, which will give details of the proposed exhibition for which the loaned

Standard terms of loan: the British Museum's conditions

- The key aspects of the loan that are dealt with in the conditions are:
 - **Packing and transportation.** The Lender to the BM is responsible for packing and transport of the objects to the BM. And the BM for the reverse process. The arrangements have to be in accordance with “the GIS Guidelines on transporting works of art”. Transportation has to be accompanied by a courier provided by the Lender.
 - **Storage and display:** the BM's responsibility. But the terms on which it is to be displayed (openly or in a case etc) are to be agreed.
 - **BM's duty whilst on display:** The BM agrees to take “all reasonable steps whilst the Objects are being shown at the Museum to keep the objects in the same state of repair and condition as they are at the Delivery Date” and that it will not “sell, assign, let, pledge, charge or otherwise encumber the Objects...”.
 - **Insurance and risk:** the BM will arrange for the Objects to be covered “nail to nail” ie during the whole term of the loan, by a “Government indemnity to the value agreed with the lender” during the term of the loan. And “the Lender accepts and agrees that the Museum shall have no liability for the objects other than as provided by the Government Indemnity during the [term of the loan]” – So that the BM will not be held liable for any loss or

Imperial War Museum conditions.

- These conditions are for lending of objects by the IWM to borrowers.
- Important terms:
 - The items loaned are at the borrower's risk “nail to nail”: viz. From the moment taken off the wall or case or stand in the IWM to the time it gets back there.
 - The borrower undertakes not to deal with the item (eg remove, transfer or divest itself of it) without the prior written permission of the IWM.
 - The borrower gives extensive warranties about the provenance of items with which the loaned item is

NEMO Standard Loan Agreement for Temporary

Exhibitions

- The standard form is divided into two parts: the agreement and the conditions.
- The agreement sets out obvious things: lender and borrower institution's names, name of exhibition for the loan, duration of loan, value for insurance and who is to be responsible for it and who is to be insurer (state/commercial).
- There are different versions of the loan conditions, in an attempt to cover all possible lending situations.
- For example: 7 different versions on “liability” depending on whether borrower is to indemnify,¹⁰

Unfair Contract Terms Act 1977 and standard conditions of loan

In principle the UCTA 1977 must apply to contracts of loan of art works to institutions.

Even though loans of art to institutions do not involve a “fee” for loaning, they involve mutual obligations so are contracts. Thus section 3 must apply.

Section 3 – Liability arising in contract

(1) This section applies as between contracting parties **where one of them deals on the other’s written standard terms of business.**

(2) As against that party, the other cannot by reference to any contract term—

) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

) claim to be entitled—

. to render a contractual performance substantially different from that which was reasonably expected of him, or

What if there was a breach of some term by the borrower?

- As the relationship is essentially contractual, the usual contractual remedies are, in principle, available, unless modified by the contractual terms.
- So:
 - Right to terminate
 - Right to specific performance?
 - Injunction”
 - Right to damages; normal rules of causation, remoteness and need to mitigate loss.

A loan that went wrong: the story of the Ambum Stone

- The Ambum stone, a pre-historic sculpture from Papua New Guinea, was in the collection of the National Gallery of Australia, and was long considered its “jewel in the crown”.
- In 2000 it was loaned to the Musee D’Arts Africains, Oceanien et Amerindiens in Marseille, France. It broke into 4 pieces, ALLEGEDLY when knocked off its stand by an employee of the French museum.
- The French museum, without asking the NGA, tried to repair the work using glue (!!). It also remained on display despite a request by the NGA to remove it so it could be collected by an NGA courier.
- It transpired that two of the three breaks had occurred earlier, possibly even before the work was in the hands of the NGA. The other break may have occurred when the stone was temporarily placed on a cushion when the display was being set up. Unclear whether there was litigation (the piece was

THE END

- Thank you! •