Investment Art and the Operation of the "Good Faith" Buyer Defence for New Zealand

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Introduction

We often hear the assertion that a buyer of stolen or misappropriated artwork could not have purchased in "good faith". This is sometimes given as an instinctive response, but seldom explained, justified, or explored. This article considers the application of this construct for traded "investment art", within the context of New Zealand law. For this jurisdiction, tangible art is treated as "goods" and therefore subject to the same legal regime as other goods traded in the marketplace. The article concludes that when it comes to the trading of tangible assets (which includes art), the availability of the good faith doctrine as a means of challenging the acquisition is severely curtailed. This is because, for those assets, the law favours transactional efficiency and commercial certainly over existing property rights. The focus of this discussion is on commercial transactions, as the law relating to gifts is subject to a different legal regime, for which different principles operate.

New Zealand law is chosen for two reasons. First, it is the legal jurisdiction the author is familiar with. [1] However, a perhaps Inore interesting justification exists. The New Zealand art market is suggested to operate differently from overseas jurisdictions in significant respects, creating points of difference in terms of the availability of the good faith buyer defence, as it is found to operate in this jurisdiction.

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As will become clear from the analysis that follows, it is in many respects similar to English and Australian law, so this analysis may also have some relevance on {-hoqo

Il The Operation of the New Zealand Investment Art Market

The discussion below sets the scene for the analysis that follows. It is necessarily general in its terms.[2]

We first need to determine what we mean by investment art. The term is intended to refer to art that is collected for investment purposes, as a rneans of investing capital.[3] Within the New Zealand context, investment art would appear to extend artworks sold by gallerists, or at auction, for amounts of NZ$5,000 and upwards, with the weight of much investment art transacted within a band of approximately NZ$5,000 to $60,000. This is a very modest threshold by international standards but, to date, the top price achieved for a work sold at auction in New Zealand :is reported to be only NZ$2.45 million.[4] It is almost unknown for international "blue chip" art to be sold at auction within New Zealand. Such work would invariably be sent to other locations such as Sydney, Hong Kong or Singapore, in order to maximise return. "Settler art" (from the 1830s onwards) and Mäori indigenous art do not, at present, obtain particularly high prices at auction. Furthermore, the preponde:rance of work sold, consists of artists who have been active since, say, the 1950s, so it is the ou tput of either artists still alive, or who have been deceased, but relnain within living n-ternory.

"Gallerists" or dealers, have only been a feature in the art scene since the mid-1980s, with few able to assert anything like the sanne expertise, experience, or (arguably) the same level of sophistication in understanding the operation of the commercial art world as, say, gallerists operating in Sydney, Melbourne, New York, London or Paris. By way of illustration, a recent dispute found the trial judge struggling to establish good industry practice for New Zealand gallerists. [5]

Importantly, only a few collectors of investment art could claim to have particular expertise in the operation of the art market, or a deep awareness of art history. Many are individuals, who fit within the broad category of being seen as middle class consumers. Given the preceding, there is an unthinking assumption alnongst buyers of artwork that the art they are acquiring is original, a good investrnent and by the attributed artist.

Further points of difference exist. The New Zealand tax code does not have a regime giving favourable tax credits or deductions for gifted artworks, resulting in a lack incentive for collectors to gift artworks to

2 .1 am grateful to Dr Penelope Jackson, art historian of Tauranga, for confirming the discussion below accords with my own observations. Email exchange Rod Thomas to Penelope Jackson, regarding NZ art market conditions (25 Oct 2023).

3 True Tamplin "Art investments" (23 May 2023) Finance Strategists <https:/ / www.financestra tegists.com/>.

4 Kate Green "New record set for most expensive artwork sold at auction in New Zealand" (18 September 2022) Stuff <https://www.slu ff.co.nz/ >. 5 See Bmnbury v Jensen [2015] NZHC 2384 at [81-124].

museums, or to set up art museums.[6] With one notable exception,[7] art museums (domestically called art "galleries") are run by local councils, 01' central governnlent for the benefit of taxpayers. Such rnusetums are consequently operational arms of well-funded, statutory-based or[c]anisations, having public accountability in terins of their effectiveness, stewardship, and perfonnance. Thus, the North Alnerican experience of privately owned art nutseums, rich in assets, but poor in terr.ns of accountability, nnanagement, or professional expertise, are rare, if not unknown in the New Zealand experience.

111 The Discussion That Follows

The ensuing discussion is divicled into two parts. In Part A, the origins of the good faith buyer de:fence are examined. The construct is found to be used as a tool to regulate behaviour in the marketplace. It outlines the good faith buyer construct from its origins. Contrary to its operation in terms of real property transactions, for sale of tangible goods, its function is limited. The presumption at cominon law, and by statute, is that a transaction is made in good faith, unless evidence can be asserted to the contrary. [r]rhe exalnination is necessarily technical in nature, and draws on a combination of statute law, common law and equity. The New Zealand law discussed in many respects draws on comparable English and Australian law.

Part B then applies this understanding to three identified categories of buyers of collectable art in terms of the New Zealand art market. These are first "off the street" consumers, then art collectors (including gallerists) and finally, inst:itutional buyers. Recovery by either the "true owner" ,[8] or son-leone having a better competing title right, is shown to be nwre readily available against the second and third categories. Although the focus of the discussion is the New Zealand art scene, overseas :illustrations are provided to best show issues that may arise. Part B concludes with a discussion on whether these property rules are well suited to investmtent art.

PART A

IV The Operation of the Good Faith Buyer Defence

A What Is Title?

An understanding of the legal construct of title is integral to this discussion. As a general legal principle, one cannot pass to a third party a better title than the title enjoyed by the transferor. This is the operation of what is commonly understood as the "nemo dat" principle, which

6 The only tax deductions possible relate to depreciation of artworks from the acquisition price, where acquired for business purposes.

7 A noted exception is the Art House Trust. For general background, see Wikipedia "James Wallace (businessman)" (18 December 2()23) <https:// 8 [r]rhis meaning of this term will be discussed further in Part A of this article.

literally means "no one can give what they do not have". [9] By way of

example, in a dispute as to ownership of an artwork, a may assert to be the "true owner" by virtue of being able to produce a recei pt of purchase of that work from (say) an artist, or an auctioneer. However, the expression "true owner" has an uncertain. application due to the operation of nunnerous legal exceptions. Despite that documentary proof, the law may not recognise the ti tle of the documentary owner. Instead, a third party claimant be able to successfully contest ownership (and therefore be the true owner) by operation of competing, or relative title claims.This result may occur by operation of estoppel issues, or due to provisions contained in a Limitation Act, that prohibit the doculnentary owner from asserting best title after the passage of a suitable period of time that the legislature determines is reasonable, where these earlier title claimants (that will include the documentary owner) have not commenced court action to get the goods back. Thus a fresh legal title arises that trumps that of the other claimants.

A colourful example of how such relativity of title principles .nuy operate is starkly illustrated by the English case of Costello v Chief Constable ofDerbysh'ire Constabulary[10] which, admittedly, was not a contest between the documentary owner and a new claimant, but still shows the sensitivity of the court in dealing with relativity of title claims. The issue before the court was possession of a car that the police had seized from Costello, as the apparent fruits of critne. When the police could not find the true owner, Costello successfully sued for return of the car. Even though it was apparent to the court that the car had been stolen, in relation to the parties before the court (being Costello and the police), Costello was able to assert that he had the better possessory title.

Against this understanding, we better comprehend the reasoning behind provisions such as the Contract and Con-nnercial Law Act 2017 (CCLA), s 152, as an illustration of the irnportance the law places on relativity of title principles trtllnping the application of the nemo dat rule. This provision provides as follows:

> 152 Revesting of property in stolen goods on conviction of offender
> The property in stolen goods revests in the person who was the owner of the goods (or that person's personal representative) if the offender is convicted, despite any intermediate dealing with the goods...

Thus, in the absence of a criminal conviction, as shown by s 152, a claimant to goods (which. Inay be an artwork) defeats prior title claims, including a claim that may be made by the prior documentary owner.

9 Nen10 dat quod non habet. See the acceptance of this principle for the sale of "goods" in the Contract and Commercial Law Act 2()17 (CCLA), s 149. See further, discussion in Gault on Connnercial Law (online ed, Thomson Reuters, accessed 23 Aug 2023) at "Introduction to the sale of Goods", S14 "Passing Property".

10 Costello v Chief Constable of Derbyshire Constabulary 120011 3 All ER 150 (EWCA).

In the absence of a conviction, the later owner's title rights will therefore trump those of the documentary owner.

By this analysis, we comprehend the importance of understanding the „good faith" construct, as its operation in validating acquisition of art (and other consumables) is an inlportant exception to the nemo dat rule. A good faith buyer could be a party who has purchased artwork that is subsequently shown to have been stolen, but who is still able to assert, by operation of the good faith doctrine, a better title claim.

B Public PO licy Considerations

There is a sense of history in the application of the good faith principle to the acquisition of const-unables, including art. Its development and present operation reflect what are, frankly, important public policy considerations. We need to appreciate that, historically, where the law has favoured the protection of property rights, it is for the recipient of the goods to have to prove to the court that they are a good faith buyer. In other words, that party has the evidential burden of showing they took title to the goods, in good faith, so as to defeat the title of the prior owner or clailnant, Where, however, the law instead promotes transactional efficiencies over property rights, the law assumes a buyer has acquired the goods in good faith. [E]l'hus, under this latter application, unless the prior owner can displace this this presu:nption, by showing that the recipient did not take in good faith, good title will pass. Consequently, under this second construct, the documentary owner or other third party (and not the buyer) faces the evidential burden of showing that the purchase was not made in good faith.

C Origins

'I'he good faith doctrine has been with us since Roman law. [11] Since preJustinian times, its application has been suggested to apply as follows:

> ,'[b]ona fides . is perhaps best regarded as the belief of the possessor that, in holding the res, he was not infringing the rights of another: in a word, bona fides manifested the subjective honesty of the acquirer.' '[12] Thereference to "subjective honesty" from the preceding quote is important. It implies that a recipient rnay assert good ti tie notwithstanding they have been negligent in failing to make proper enquiries concerning existing title rights in the goods. '"This is a shorthand expression to indicate when a buyer can claim to have a good title (that can be passed on) even though the acquired goods were sold with defective ownership rights. Thus, under Ronnan law, a buyer's bona fides was assunaed, unless proven otherwise. Consequently, the evidential onus of proof of establishing

11 See Sanutel Martin '"Phe Evolution of Good Faith in Western Contract Law/' (112 May 2018) MS, SSRN, at 1-3.

12 See discussion by JAC Fl"homas in Law (North-I-lolland Publishing Conlpany New York, 1976), at 171-172.

lack of good faith was placed on the party seeking to displace that presumption. [13]

D Development of the Const:ruct

Historically, the common law favoured protection of existing property rights. This is still the situation regarding common law conveyancing. A buyer is deemed to not be a good faith buyer unless they have carried out all diligent inquiries that a court of law deems to be necessary.[14] For real estate transactions we have therefore developed what has become known as the caveat emptor principle. [15] Thus, a prior owner can recover, unless the buyer can discharge the evidential burden of establishing that they acquired in good faith, or sonne other applicable legal defence applies. Indeed, for the purpose of protecting existing property rights, the law has created a distinction between "knowledge" and "notice".

E Knowledge and Notice

Notice has been called a "subtle and difficult doctrine". [17] It applies where a court finds that the party under consideration was under a duty to make further inquiry and, if they had done so, they would have found out about the earlier interest.[18] Thus in James v Litchfield., Lord Romilly MR opined as follows.[19]

> The purchaser bound himself by contract. He must be taken to have had present in his mind all those things of which he had notice, and those things which necessarily flowed from, and were incidental to, that notice.

In such circumstances, a court will find that the buyer has "constructive notice" of the information that they would have discovered. This may sometimes be explained as "constructed" knowledge. 'I'hus, the notice

13 At 173.

14 The application of this principle for land transactions is particularly onerous. The test is whether the defendant as properly advised by a competent conveyancer would have had any suspicions at all of an irregularity. See AH Chaytor and WJ Whitaker (ed) (revised by J Brunyate), Equity: A Course of Lectures by FW Maitland (Cambridge, CUP, 1936). At 119, reference is made to a trained adviser' .

15 Essentially, "buyer beware", the principle that the buyer alone is responsible for checking the quality and suitability of property, before a purchase is made.

16 For the purpose of this discussion, in discussing the construct of common law conveyancing, reliance is placed on conveyancing practices which emanated from the England. New Zealand has a codified title registration system where the equitable notion of constructive notice is made irrelevant. See generally, the Land Transfer Act 2017.

17 Kettlewell v Watson (1882) 21 Ch D 685, per Fry J.

18 Reziya Harrison Good Faith in Sales (Sweet and Maxwell, London, 1997)
at

19 Jmnes v Litchfield (1869) LIR 9 EQ 51.

principle operates in a penal sense,[20] as a party is "deemed" to have knowledge of the earlier interest that they did not actually possess.

By way of contrast, knowledge is just that. It encapsulates what has become known as "Nelsonian" knowledge, which is where a party deliberately turns away from the truth, as a form of wilful blindness.[21]

F Commercial Applications

By way of contrast to the sale of real estate at connmon law, New Zealand sale of goods legislation places a premium on transactional certainty. The applicable regitne favours the seller being able to give good title, unless the buyer is shown to be aware of title deficiencies. Further, standard consumer protection legislation backs up this assu mption. This movenlent towards transactional security over protection of existing property rights is explained for the England and Wales jurisdiction by Denning IJ in the 1949 reported case of Bishopsgate Motor Finances v Transport Brakes:[22]

> . in the development of our law, two principles have striven for mastery. The first is for the protection of property: no person can give better title than he or she possesses. The second is the protection of commercial transactions: the person who takes in good fai th, and for value without notice should get a good title. 'The first principle has held sway for a long time, but it has been modified by the common law itself and by statute, so as to meet the needs of our own times.

G For Sale of Goods

For New Zealand, a number of statutes apply in this regard. They also apply to the sale of artworks. [23] The provisions are technical, but relevant.

The first is the CCLA, which codifies the law for sale of goods. Then we have two other enactments, being the Fair Trading Act 1996 (FPA) and the Consumer Guarantees Act 1993 (CGA). These last two pieces of legislation are consumer protection Ineasures which cannot be contracted out of.24

20 Harrison, above n 18, at [8.04].

21 Harrison, above n 18, at [8.22].

22 Bishopsgate Motor Finances v Transport Brakes [1949] 1 KB 322 (EWCA), at 336-337:

23 See Rod Thomas "Misdescription and misrepresentation liability arising out of art auctions in New Zealand" (202.1) Vol. XXVI, Art Antiquity and the Law 40 and Rod "I[t]homas "Recovery of art by vindication of property rights" (2020) •.1 9 Journal of Art Crime 17. If there are public policy considerations for a different regime applying for artworks, this impulse has yet to get traction in New Zealand or comparable jurisdictions such as in Australia or the United Kingdom. [r]his subject will be discussed furthel' at the conclusion of Part B.

24 Fair Trading Act 1986 (FCA), s 5C; Consumer Guarantees Act 1993 (CGA), s 43.

Good title is passed under the CCLA, when the goods are left in the possession of either the seller or the buyer (or a niercantile with the consent of the prior owner.[26] The expression "owner" encapsulates someone who has a better title to the goods. Thus, it extends to relative title claims.[27] Also, good title can be passed where the sale is made under a "voidable" transaction,[28] where the buyer completes the transaction before the seller avoids.[29] The mercantile agent defence is particularly important for art transactions, as most gallerists will fit within the statutory definition of a mercantile agent. Thus, they are able to give good title to artworks they do not own, when selling thenÄ, in the norm al course of their business.[30]

H How then Does the Good Faith Doctrine Apply?

The good faith expression is given a precise legislative definition by the CCLA, in a way that mirrors our understanding of its application from Roman law. That provision provides as follows:[31]

> A thing must be treated as having been done in good faith within the meaning of this Part when it is in fact done honestly, whether or not it is done negligently.

Thus, honesty trumps competence. From this, we understand that "notice" principles have no application. An action is protected if honestly undertaken, even if done negligently.

I Confused Drafting

However, other provisions in the CCLA confuse this issue, and appear to be the result of bad drafting.[32] In this regard, the CCLA provides that a buyer is protected when purchasing in good faith (the nÄeaning of which we already understand) and yet "without notice" .[33] By way of example, the defence is expressed in the following Inanner in s 151 (2):

25 CCLA, s 297.

26 CCLA, 153 and 154.

27 See discussion in Nicholas Woocl Sale of Goods in Nezv Zealand (Thomson Reuters New Zealand Ltd, Wellington, 2018) at [6.3.31(4).

28 A voidable title is commonly understood to arise where the goods are taken by duress, mistake, misrepresentation, fraud or deceit. Also, where undue influence and unconscionability can be proved.

29 CCLA, s 151.

30 A mercantile agent can give good title, even if the transaction is voidable, so long as the agent is given possession by the "true owner" and sells in clue course, acting as a mercantile agent. See CCLA, Part 5, Subpart 2; CCLA, s 296, which contains a definition of mercantile agent. See also, discussion by Harrison, above n 18, at [8.341. The issue of purchase off a
mercantile a ent is not further considered in this article.

31 CCLA, s 119b), definition of "good faith".

32 See CCLA, ss 151, 153 and 154. Then for mercantile agents, s 297.

33 Also an estoppel binding the seller. See CCLA, s 149(2). This additional ground _is not further considered in this article.

'I[t]he buyer acquires a good ti tle to the goods if the buyer buys the goods in goodfaith and without notice of the seller's defect of title. (emphasis added)

To a critical reader, this is unhelpful. How can the "notice" construct be relevant, if the Act otherwise expressly provides that an acquisition may be "done honestly, whether or not it is done negligently"? Fortunately, courts have dealt with this imprecision. [V]l[t]his has been achieved by negating the suggestion that "notice" has key relevance in establishing the bona fides of the transaction. The courts have instead accepted that for sale of goods, the buyer is not obligated to inquire into the seller's authority to sell.[34] [E]l"hus, in the (then) English equivalent of s 151(2), the English Court of Appeal in Greer v. Downs Supply C0[35] depreciated the role of constructive notice in ordinary commercial transactions. Similarly, in Feur Leather Corp v Frank Johnstone & Sons,[36] Neil J expressly negated any obligation for a buyer of goods to make further inquiries, He is reported to have opined as follows:[37]

> The court will not expect the recipient of goods to scrutinise commercial documents such as deliver notes with great care there is no general duty on a buyer of goods in an ordinary commercial transaction to make inquiry as to the right of the seller to dispose of the goods.[38]

However, there are limits. A disponee does not act honestly if he or she suspected that the transaction was "not altogether right" or consciously refrained from making inquiry.[40] This form of suspicion may be treated as the equivalent of knowledge.[41] However, this probably fits within the categorisation of "Nelsonian" knowledge, which has already been discussed as a subset of knowledge.

Further, under the CCLA, the FTA, and the CGA, assurances are provided to the buyer on associated issues such as quiet possession, description, and fitness for purpose. As discussed, these are consumer protection measures, which cannot be contracted out of. The application

of these provisions to the sale of artwork has been discussed in more detail elsewhere by the author.[42]

34 Worcester Works Finance Ltd v Cooden Engineering Co Ltd [1972] 1 QB 21() (EWCA) at 218. See also v 13nrnard [19041 2 KB TO (EWCA).

35 Greer v. Downs supply co Il 9271 2 KB 28 (EWCA).

36 Feur Leather Cow v Frank Jo/lnsl•one & Sons [19811 Com LR 25L

37 The report is not available to the author, but the analysis carried out by Neil J is discussed by Jack J in Marcq v Christie Manson & Woods Ltd 4 All ER 1005, at [611.

38 See also Harrison, above n 18, at [8.231.

39 Oppenhehner v Frazer & Wyatt [19071 1 KB 519 (E'WHC), at 530, per Channell

Associated Midland Corp v Sanderson Motors Pty Ltd [19831 3 NSVVLR 395, at 4()2, per Clarke J.

See Harrison, above n 18, at 18.221.

4-2 Thomas "Misclescl"iption and misrepresentation liability", above n 23.

V For Breaches of Equitable Obligations

What remains to be examined is the application of the good faith buyer defence where an equitable relationship can be found. This Inay apply where a gallerist steals or commits fraud against a client, or as an employee against an art museum. Equitable principles are likely to apply in such circumstances, as the relationship of agent and principal gives rise to equitable duties of loyalty (and indeed fiduciary obligations). In such circumstances, the right of recovery arises as a consequence of a breach of obligation recognised in equity, rather than pursuant to common law principles. Thus (being in equity) different recovery principles operate.[43] Here the good faith principle may defeat a prior title, where the recipient is a "bona fide purchaser in good faith without notice of the prior equitable interest" Thus, liability is imposed by use of constructive notice principles. However, even here, the good faith principle is sumnlarily curtailed for what are considered to be commercial transactions.

A How Does Constructive Notice then Operate?

In Halsbury's Laws ofEngland the point is add ressed as follows: "In general the equitable doctrines of constructive notice are not to be extended to purely commercial transactions." Various authorities are then provided.[45] In essence, for commercial transactions, again, commercial certainty trumps a bias in favour of prior title rights. This result therefore has sorne rough parallel with the statutory good faith buyer defence under the CCLA which protects a buyer who is honest, but negligent. An illustration is given by Macmillan Inc v Bishopsgate Investntent Trust Plc. [d6] This was a money claim.[47] Here, the court opined that "[u]nless and until the recipient is put on inquiry as to wrongdoing, he is entitled to assumte that he is dealing with honest people". Equally, in Goodyear Tyre and Rubber Co (Great Britain) Ltd v Lancashire Batteries Ltd, Lord Evershed MR followed a similar theme. I-le stated that: "[tlhe word notice means something

43 There is no equivalent at common law to a trust, which is a creature of equity only. This would require a juclge to determine that the common law duties an agent owes his or her principal are different from the ones owed in equity. Further, the Limitation Act restrictions on prohibition of proceedings only apply by analogy to breaches of equitable obligation. See 13mnbury v Jensen, above .n 5, at [991.

44 As stated, the good faith buyer principle is expressed as a "bona Jidc purchaser for value without notice of the prior equitable interest". For an explanation of its application, see J McGhee and S Elliott (eds) Snell's Equity (34th ed, Sweet and Maxwell, London, 2()2()), at

45 flalsbury's Laws of England, "Sale of Goods and Supply of Services", 3. Effect of Contracts, 2. Defects in contracts, (ii) Sale and Effect under a Voidable Contract, at [1551, fn 7. See also 11591, at fn 15.

46 Macmillan Inc v Bishopsgate Invcshnent Trust Plc (No. 3) [1995] I WLR 978 (EWHC).

47 McGhee and Elliott (eds), above n 44, at [4-035]. This is a reference to above n 46, at 1014.

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less 'than full knowledge. It Ineans, no doubt, that the thing of which a Inan must have notice must be brought clearly to his attention" .[48] The evidential burden of proving a third party had notice is therefore again on the plaintiff. Absent such proof, the judicial assumption will be made that the transaction was bona fide.[d9]

However, the parallel with the common law application of the good faith principle is not exact. The court may wish to give paramountcy to the consequences of breach of the relationship of trust, over any com merci al considerations. By way of example, a person experienced in the foibles and dangers of the art world would be expected by a court to be aware of the uncertainties in proving ownership. Where such a

of a continuum, with members of the public buying with little concern about the good faith buyer doctrine, and with the least protection being available to buyers in the third category, being institutional collectors. By way of contrast, this can be compared with the North American experience where, arguably those most knowledgeable about the art world (and therefore less likely to be able to claim to be a good faith

person acquires the artwork, a court may find a heightened expectation regarding the need to prove provenance. Thus, the application of equitable remedies depends on a factual analysis of the matter at hand.

VI Analysis so Far

We understand that the good faith buyer defence is carefully circumscribed in terms of commercial transactions to promote the certainty of transactions, rather than to protect existing title rights. This is clear from examination of its application under the CCLA, the FTA, and the CGA. Where the transaction results from the breach of equi table obligations, constructive notice principles do apply. However, where the goods are placed in the hands of third parties, as a result of a normal commercial transaction, the notice principle is minimised unless there is reason for the recipient to be "put on notice" as to wrongdoing regarding breach of a prior equitable relationship.

PART B

VII Three Different Classes of Application

We now move on to consider the application of these principles in terms of the operation of the New Zealand art market, dealing with the acquisition of investment art. For the purpose of illustrating the operation of the good faith construct, buyers are separated into three separate, perhaps arbitrary, categories. Argument is :made that this cal-egorigation, although a generalisation, has value for discussion purposes in determining different applications of the good faith defence.

On one end of the spectrum, we have, perhaps, uncritical consutners. On the other end of the spectrum, we have institu tional collectors. The rnicldle orouncl consists of collectors and art dealers. Thus there is something

48 Goodyear Tyre and Rubber Co (Great Britain) Lld v Lancashire Batteries Ltd [19581 3 Ail ER 7, [1958] 1 WLR 857 (EVVCA). Admittedly this was not strictly a sale of goods issue, but Halsbnrv's Laws of England (above n 45) suggests it to be helpful.

49 See Dexter Motors Ltd v Mitcalfe [19381 NZLR 804 (SC and CA); [19381 GLR 411 (NZSC); [1938] CLR 461 (NZCA). see also, The Laws ofNew Zealand, "Protection of 13uyers of Goocls", at 111 601.

buyer) may be the grouping in the middle, that is gallerists and collectors.

VIll Consumers Who Purchase Artworks on the Secondary Market As stated, for approximately the last 50 years at least, in New Zealand members of the general public have increasingly purchased what the

perceive to be investment art, on the open market, in an untutored way: In many ways such buyers represent a new sector of the art investment market. Such buyers are more likely to see artworks sold as another form of consumable. They are argued to have a reasonable expectation that the seller will be giving good title, and therefore the law will not overturn the purchase on a lack of good faith basis, unless the buyer's suspicions were raised. From observation, they purchase investment art as a commodity in reliance of the usual consumer protection measures.[51] They may even be one of an increasing number of consumers who buy art online, with li ttle understanding of the difficulties of attribution and believable provenance.[52]

In this regard, we must recall that the provisions of the FIA and CGA cannot be contracted out of. Given these apply to consumers, why would such a buyer make further enquiries, so long as no "alarm bells" ring that would suggest to an ordinary consumer, untutored in the operation of the Inarketplace, that good title cannot be made out, and that the work is not authentic.[53] We must remember in this regard, that most of the work traded in New Zealand is attributed to contemporary artists, or those who have died within living memory. However, by way of contrast, a consumer who employs an expert to advise on the acquisition, tnay have less protection, as the agent's expertise and Iknowledge will be attributed to them.[54]

50 See generally, Rod Thomas "Buying investment art, authenticity, risk, and a four proof framework" (2()22) Vol. XXVII, Art Antiquity and the Law 133.

51 In such a jurisdiction there is little market avvareness of the clifficulties with attribution of authenticity and good title. See Thomas, above n

52 See Artwork Archive "Collector Concerns: Buying Art Online" (22 .March 2()17) <https://www.artworkarchive.c011Ä/>.

53 See Harrison, above n 18, at [8.241-18.251.

54 See CGA, s 2. FTA, s 2. An exception to both is when the supply or sale is made to somebody who is not a "consumer" within the confines of each set of legislation. See also, Harrison, above n 18, at This may have the result of removing the protection a buyer would otherwise be entitled to under some of ihe statutory warranties. Thus an agent may have a greater awareness of the unsatisfactory nature of the seller's title. See Harrison, above n 18, at: [8.4()].

IX Private Collectors and Dealers

Who fits within this group? Collectors and dealers are reasonably expected to have some greater experience of the workings of the art Inarket, but that is very fact dependant. We must recall that under the division made by the author, investment art is seen to apply to acquisitions of artworks for NZ$5,000 or more. Given the enthusiasms of this group, it is not a "given" that private collectors will have knowledge regarding the credibility or authenticity of the art they acquire. However, where such collectors acquired art for the purpose of further trade, they do not fit into the statutory definition of "consumers" under either the CGA or the FTA.[55]

Further, due to the increased knowledge of those buyers, their acquisition of the artwork may not have been by "description", as with consumers in the first category. In this regard, as it is possible such buyers niay have more knowledge of the artwork being acquired than the seller. If so, the standard seller representations and warranties in the CCLA may not apply. [56]

Liability would therefore be determined for this middle group on a case-by-case basis, and as an issue of fact. Two examples follow that illustrate how i t may be di fficult to show reliance. Both relate to gallerists in overseas markets.

A Two Illustrations

In Harlingdon,[57] no liability was found. Here, there was no sale by "description", as the work was bought by a dealer gallery, and the gallery's experts had examined the painting and satisfied themselves as to its authenticity. Thus, there could be no reliance on the statutory warranties that the artwork complied with a given "description", to then trigger the associated undertakings as to merchantability. [58]

Secondly, the facts of De Preval v. Adrian Alan,[59] where the England and Wales High Court dealt with the right to recover rare candelabra, created by the nineteenth century French sculptor, Barye.[6]() The defendant, a dealer, bought the candelabra from a "reputable" New York gallery, but failecl to undertake any enquires regarding their provenance. It •was subsequently asserted that the candelabra had been stolen. Arden

55 Such dealers vvould not fit into the statutory definition of being 'consumers". See the CGA, s 2. FTA, s 2 definition of "consumer".

56 This is because there is no reliance on those representations. See by way of example, CCLA, s 139(2).

57 Harlingdon & Leinster v. Christopher Hull Fine Art Ltd [1991] 1 QB 564 (EWCA).

58 The legislation was the (then) England and Wales equivalent of the applicable CCLA provisions which are referred to in this article.

59 De Preval v. Adrian Alan (1997), unreported, Jan 24, Arden J. Q.B.D.

60 See Ruth Redmond-Cooper "Good Faith Acquisition of Stolen Art: De Preval v. Aclrian Alan Ltcl" (1997) Vol. Il, Art Antiquity and Law 55.

J. (as she then was) found the dealer could not claim to be a good faith purchaser.[61] In giving judgment, Her Honour opined:[62]

> it has not been shown on a balance of probabilities that [the defendant] had no doubt that the [selling gallery] had title to the candelabra to sell to him. Accordingly I find that the defendant has not discharged the onus of showing that its acquisition was a purchase in good faith .

Thus, again, there was no reliance on the seller assurances of title. However, if instead, the buyer had purchased as a consumer, then it was possible that the comparable provisions under England and Wales equivalents of the CGA and the FTA could have applied.[63] In such a situation, the buyer could have claimed to have purchased in good faith*

B Equity

Likewise, for equitable claims, the CGA and the Fl[t]A will apply if the purchasers have bought as consumers.[64] Thus col lectors who reasonably placed reliance on the seller representations of title might be able to assert they purchased without notice of a prior equitable interest. However, if the buyer had knowledge of some form of irregularity or should have made further inquiry in the eyes of equity, it is conceivable they might still have liability imposed on constructive notice principles.

X The Institutional Buyer

For an institutional buyer, the good faith buyer defence is suggested to be less available. In the New Zealand context, institutional buyers are organisations such as museums and government bodies, and public and civic collectors. They tend to be either or quasi-govern_ment organisations. Such institutions would not therefore fit within the definition of "consumer" [65] in the CGA, nor the definition of the same expression under the FTA, so the statutory protections in those two measures would not apply.

Further, it is argued that the law would have a reasonable expectation that such bodies would be professionally advised, or have access to specialised knowledge, which includes access to available online databases. It is therefore increasingly unlikely that such a buyer would have purchased in reliance of any given description. The Art Loss IRegist:er (ALR)[66] comes to mind, as do other databases of a more specialised nature

61 Admittedly, this was in the context of whether the defence for good faith buyers in the Limitation Act 1980 (UK), s 41 a plied.

62 De Preval u Adrian Alan, above n 59, at [29% The issue related to the applicable good faith defence in the Limitation Act 1980 (UK), s 4.

63 This issue becomes key, as if they buy for the purpose of resale, they cannot meet the definition of "consumer" under these two Acts. Thus, art dealers have no protection under the legislation.

64 See discussion in Wood, above n 27, at [5.6.91.

65 CGA, s 2, definition of "consumer." FTA, s 2, clefinition of "consumer' .

66 See The Art Loss Register (2()21) <https:/ /www.artloss.com / >.

which would be known, or which advisers would know of.[67] Invariably, some of these registers charge users access fees, which n•tay make access untenable for members of the public and indeed New Zealand based collectors.[68] However, the existence of such registers is known to exist in terms of the level of expertise that institutional collectors would have ready access to. Given this, it is no longer acceptable that information found on those registers is not accessed. [69] Publicly available checklists for fine art purchases are also available and published online, and these invariably make provenance and ownership standard issues to be checkedY[0] An institutional buyer should be expected to know of all of this, and in general, to have access to a higher level of competent performance through exchanges with other national and international contacts![i]

An example may be where a museum purchases worl< of the sort that is commonly looted from a war zone, or an area that is known to be the subject of looting, or theft. Because the market is so flooded with such works,[72] an institutional buyer is unlikely to be able to argue that there is

67 A sampling of such internationally available registers, apart from the Art Loss Register, is suggested to include the following: Interpol's Stolen Works of Art database, Interpol "Stolen Works of Art Database" (2024) <https://www.interpol.int/en>; the Carabinieri's PHYSCE, Protection System for Cultural Heritage: Arma dei Carabinieri '"I'he Carabinieri Command for the Protection of Cultural Heritage (ITC)" (2023) <htlps:/ / tpcweb.carabinieri.it/SitoPubblico/home>; the FBI's National Stolen Art Federal Bureau of Investigation, "National stolen art file" <httpg:// artcrimes.fbi.gov / the British Museum's CircArt, [r]l'he British Museum "Circulating Artefacts (CircArt)" (2024) <https://www.britishmuseum. org/>.

68 It could be argued that gallerist and auctioneers should also have an obligation to search these registers on the basis that any cost could then be passed on as a business overhead, to be recovered through sales. However, no known New Zealand dealer or auctioneer accesses these databases. This could be because they invariably deal wit:h contemporary New Zealand art.

69 Penelope Jackson refers to the Dunedin Public Art Gallery acquisition of Italian works which were listed on the ALR. It appears the gallery did not search that register before acquiring those works. This will be discussed further.

70 See the template promoted for use by galleries for a sound acquisitioning process — Collections trust "Acquisition and

accessioning suggested procedure" (2()22) <https://collectionstrust.org.uk/>. This is provided by the "Collections Trust" which helps museums work with the information that connects collections and audiences. The promoted standards and advice are used around the world.

71 T.hey may be assumed to belong to national or international gallery organisations which constantly exchange information and offer to each other supportive training programmes in terms of gallery "best practice" and good operating procedures.

72 The extent to which such arguments can be macle of New Zealand institutional buyers is less certain, if only because they are often not funded to acquire vvorks with such freedom.

no reasonable suspicion that the work has not been illegally acquired.[73] Such an entity should surely have (at least) a positive duty to enquire into the provenance of any art acquired on the secondary market. "l"he san-le may be argued for certain well-funded art :museunns in North America.[74] Indeed, an. institutional buyer would also be well aware of the pressure internationally imposed on museunns to repatriate artworks held in public collections. In this regard, British and Ann erica.n n[n]tuseunns in particular have been shown to have acquired looted or stolen artefacts in the past 150 or so years with sonne degree of i:tnpunity.

This all creates a market expectation that son-te degree of clue enquiry needs to be made and should be an. industry expected no.rnn. .lndeed, in many situations, the good faith buyer defence may sitnply not apply if the works have been gifted to the institution. by third party donors, or by government.[76] In this regard, the good faith buyer defence has no relevance regarding gifts. Instead, Limi tation Acts or estoppels may apply ilnpeding legal recovery. I-lowever, consideration of those issues is beyond the scope of this work.

A Equity

Where breaches of trust are found, equity generally acts in. a prophylactic manner, to ensure no breaches go unpunished. Where the claim arises as a consequence of a breach of an equitable relationsh:ip, the argument that constructive notice has no application regarding acquisitions by institutional collectors is unattractive. Tt niay even be possible for a court to conclude that where no enquiries were Inade, this was clue to an. institutional collector, with all its access and knowledge of Inarket

73 Acquired works are then seldom de-accessioned and thus held by the institutional collector for a significant period. [r]rhe issue therefore enn.erges about when reparation claims are possible for institutional collectors.

74 Recently, both the Metropolitan Museurn ofArt (Met) in New York, and the J Paul Getty Museum in California have been subjected to investigations regarding their respective antiquities collections, undertaken on the basis that those acquisitions consisted of stolen artefacts. See Angela Gui.ffrida "Getty Museum to send stolen terracotta sta tues back to Italy" The Guardian (12 August 2022) <www.theguardi.an.cotü>; Angelica Villa "New York Officials Seized Antiquities Worth $11 M. fronn the Met" (2 September 2022) Art News <www.artnews.c()tn>.

75 One may think of the incredibly generous gifting by Josie and Julian. Robertson to the Auckland Art Gallery, with the works due to arrive post 2023. The gifted works consist of Picasso, Cézanne, Gauguin, Bonnard, and so on, at a value of over NZ$200 Inillion. See Jane Phare "Billionaire Julian Robertson leaves art worth $200m to Auckland" NZ Herald (27 August 2022) <www.nzherald.co.nz>.

76 One .may think of the unclaimed artworks at the conclusion of World War Il that were split up and taken home by various allied forces and then distributed to local galleries in each jurisdiction. See exaniples given in Arthur Tompkins Plundering Beauty: A History of Art Crilne during War (Lund Humphries, London, 2018), at ch 7.

irregularities, having chosen not to Inake inquiry, through a fear of finding ownership irregularities. Thus, where the artwork was originally held under "trust like" obligations, there are e:nhanced opportunities for recovery.

Again, this discussion applies to purchases only. 'l'here is no defence of a good faith buyer defence where a work has been gifted to the museum. [r]rhis is because equity does not protect what are termed as "volunteers" .[77] "Chat is, a recipien.t who has not paid fair value for the acquisition.

B Three New Zealand Illustrations

I-low such principles .may play out in the equitable context nnay be illustrated by three New Zealand examples. [r]rhey are all relatively recent, and also serve to provide illustrations of the rather cavalier attitude institutional buyers can. appear to adopt in making acquisitions.

First, the acquisition in 2003 of Edward Bullmore's "Creation" by Te Papa. The original transfer arose as a result of a breach of an agency, which arguably gave rise to a right to trace the property in equity.[78] At the ti111e the work was acquired by Te Papa,[79] it was known within the New Zealand art sector that Bullmore's work had been misappropriated by nnennbers of the extended fainily, who had distributed his works without the consent of his widow, as the true owner. Thus, arguably, it would have been difficult for Papa to claitn to be a bonafide purchaser, wi thout notice of this prior equitable interest.[8]() As at the date of writing, the work is still owned by [e]re Papa. [81]

Secondly, another incident, also involving Te Papa. [t was reported that in 2009, the nutsetll.n agreed to buy from a Wellington based seller, seven works by the New Zealand artist, Ralph Hotere. Hotere, still alive, contested that the seller owned the works, claiming that they remained his property. The sale did not proceed. Although settled between the parties, the issue arose as to whether Te Papa had properly checked the provenance before initially agreeing to the sale. [82]

77 [E]l"his is solnetimes expressed as an equitable maxim "Equity does not assist volunteers". See Oxford Reference "Maxims of Equity" Oxford University Press (2024) <www.oxfordreference.com/>.

78 An agent owes a principal fiduciary obligations, actionable on breach, in equity.

79 [r].l'h.is is the national n.museunl of New Zealand, located in Wellington. The Mäori expression is translated as "our place".

80 See New Zealancl Herald "Brother in court as feud over artist's legacy flares" (21 June 2006) <www.nzherald.co.nz>; Tony Wall "Te Papa caught up in major art scandal" Stu.ff (19 March 2012) <www.stuff.co.nz>.

81 Te Papa "Creation" Museum of New Zealand Te Papa Tongarewa <collecti ons. tepapa -govt.nz>.

82 See [r]l."e Papa, above n 81. '['he "stuff" account at above n 80, refers to th.is occurrence.

Finally, in 1994, the Dunedin Public Art Gallery acquired a number of Italian impressionist paintings. The circumstances of the original purchase during the Second World War, and the subsequent acquisition by the gallery, do not need to be repeated here. They have been recounted in full by Penelope Jackson in her book, Art: Thieves, Fakers & Fraudsters: The New Zealand Story. Tellingly, Jackson makes the remark that the gallery did not search international art loss registers at the time, to establish whether the works were regarded as missing.[b3]

C Additional Exposure qf Employees

Equally, equity may also impose personal liability on employees of institutions and, arguably, gallerists, where they are found to have assisted with a breach of trust. The point is colourfully illustrated with regard to the New York Metropolitan Museum of Art (Met) acquisition of a Romanesque ivory carved cross known as the Bury St Edmunds Cross. The example is taken from Watson and Todeschini's The Medici Conspi.racy. The account concerns the circuunstances of the acquisition:

> The British Museum asked [the seller] to warrant that he had full title to the cross he was offering to sell, but this was something he steadfastly refused to do. In fact, he always refused to say where he had gotten [sic] the cross and for this reason the British Museum deal fell through. One evening, Hoving [subsequently the director of the Met] satu drinking coffee with [the seller] until, as midnight passed, the deadline for selling to the British Museum] passed. Thereon Hovingl paid over the $500,000 plus that was the equivalent of the E200,000, and the cross went to the Met.

In such circulnstances, a New Zealand court rnay well have found Hoving personally liable, having knowledge that the issue of ownership was contestable, even though he was not himself the purchaser. [85] By the manner in which the above transaction is described, it has the aura of a backhand deal carried out by parties keen to avoid the legal consequences of their actions. In the absence of the seller being able to make out good

83 Penelope Jackson Art Hlieves, Fakers & Fraudsters: The New Zealand Story (Awa Press, Wellington, 2016), at 48-49. It remains interesting to note however, that as the original sale was made in Italy during World War Il, title to the works probably validly passed, under the bona fide purchaser test discussed in the earlier part of this article, emanafing from Roman law. Further, if the gallery had searched the ALR, this would have been to little avail. Jackson recounts that the works were only added to that register the following year.

84 Peter Watson and Califia Todeschini The Medici Conspiracy (Public Affairs, New York, 2006), at 1.01-102. "l"he book goes on to repeatedly assert that the Met had also been unscrupulous in acquiring antique Greek pottery, deliberately turning a blind eye to issues such as ownership and lack of provenance.

85 In this illustration, Hoving may have been found liable to the trust fund for assisüng in breach of trust, if the funds used to acquire the work were classified by a court as being trust funds.

title, what was the sum of "US$500,000 plus" being paid for? From the description above, I-loving would have been (or should have been) well aware of such concerns.

XI Are These Legal Principles Well Suited to Protect Investment Art?

In the preceding discussions, investment art has been discussed as a tangible asset, and part of the law as it relates to dispositions of choses in possession. Given the uniqueness of art, the question Inay be asked whether such principles are best sui ted to fine art dispos:itions. After all, fine art lilay be considered unique, serving as a monitor and recorder of the creative efforts of hunÄankind. In other words, should principles of commercial certainty applicable to the disposition of tangible assets which (conventionally) are consumables, reducing in value over time, apply to investment art? Should instead, policy dictate that for

investment art, as :for real estate transactions at com,mon law, a buyer should have the burden of proving any acquisition is made in good faith, in order to replace the title of the documentary owner? One may reflect that art, as with real estate, is unique and irreplaceable, as opposed to being a consumable.

A full discussion is beyond the focus of this article, but one may speculate how such a change could work. Should all investment art be protected? How then, should we define investment art, for such purposes? Equally, should not other tangible assets, equally considered irreplaceable, also be protected?[86] Or do we assert that :investment art serves a purpose that places it above other items of unique heritage value? There is no easy answer. If such a regime was to be recognised, perhaps bespoke legislation should be legislated to protect set categories of art, considered to be of value to humanity, similar to export controls related to specified art or historic artifacts.[87] After all, generalised classifications regarding "art", "fine art", or "investment art", are inherently vague expressions, and value laden.

Xll Conclusion

We are used to hearing assertions that buyers of artwork cannot claim to have purchased in good faith. The issue is an important one that needs discussion and analysis. ʳrhis article attempts to carry out such an analysis, in tenns of the New Zealand art market for acquisition of investment art. Indeed, it is curious that this important topic is not better discussed in any depth elsewhere. Perhaps it is due to the topic being necessarily technical, and jurisdiction focused — as this discussion shows.

86 Say, the original Magna Carta, or the American Declaration of Independence.

87 In practice, we Inay reflect on the outdated and limited protections available to prohibit exports from New Zealand, provided by the Protected Objects Act 1975.

The discussion helps us that a buyer, who is a consumer and has no expertise in the art market, has significant protection against a restitution claim under New Zealand law. For collectors and dealers, the outcome will depend on the background and circumstances of acquisition. However, for institutional buyers, in the New Zealand context, the argument is made that such parties should not easily be able to assert they are a good faith buyer, unless credible provenance and ownership checks have first been undertaken. Equally, employees and advisers of institutional buyers may also be exposed to damages claims when they are found to have knowingly abetted in questionable acquisitions.

Wai 262 Response: Government Strategy for Mäori Engagement

Jayden Houghton*

1 Introduction

In 1991, the Wai 262 cla:im was lodged in the Waitangi Tribunal[l] and sought redress for the Crown's breaches of its guarantee under te Tiriti o Waitangi 1840[2] to allow Mäori to exercise tino rangatiratanga (the unqualified exercise of our chieftainship) over our mätauranga Mäori (the body of knowledge originating from Mäori ancestors, including the Mäori worldview and cultural practices) and taonga (tangible and intangible treasures).[3] The Tribunal investigated and released its report on Wai 262/[4] and the New Zealand Government responded by proposing Pae Tawhiti: a work programme to address Wai 262.[5] In 2019, the Labour-led minority coalition Government proposed the work programme as an Overlapping Spheres Model, con-tprising a space in which Mäori exercise authority (tino rangatiratanga), a space in which the Crown exercises authority (käwanatanga) and, where they overlap, a space where the authorities interact.[6] In 2022, the Labour majority

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The Waitangi Tribunal is a New Zealand permanent commission of inquiry charged with investigating and making recommendations on claims brought by Mäori relating to the Crown's breaches of the Treaty of Waitangi. See Th'eaty of Waitangi Act 1975. See also Treaty of Waitangi Amendment Act 1985.

2 The '*freaty of Wai tangi was signed between the British Crown and some Mäori in 1840. It is considered a founding document of New Zealand. 'There is an English language version and a Mäori. language version. The Mäori language version is titled te Tiriti o Waitangi.

3 See Statenzent of Clainz (Wai 262, 9 October 1991). See also First Ainended Stafenzent of Clailll (Wai 262, 10 September 1997).

4 Waitangi ʳribunal Ko Aotearoa Tenei: A Report into Claitns Concerning New Zealand Law and Policy Affecting Mäori Culture and Identity (Wai 262, 2011) vols 1 and 2.

5 "Wai 262: Te Pae 'l'awhiti" (20 October 2()22) Puni Kökiri. <www.tpk.govt.nz>.

6 Jayden Houghton "The New Zealand government's response to the Wai 262 report: the first ten years" (2021) 25 The International Journal of Human Rights 870 at 881. Compare He Whakaaro Here Whakaurnu MO Aotearoa: The Report ofMatike Mai Aotearoa — The Illdependent Working Group on Constitutional Transfonnation (January 2016) at 108; and He Puapua: Report of the Working Group on a Plan to Realise the LIN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand (November 2019) at 11.