

Exporting Art from Ireland: The Alfred Beit Foundation and the Protection of Cultural Property

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Abstract: *This article examines the legislative framework in place in Ireland, before and after the events of the Beit sale in 2015. In April 2015, Christies of London announced the sale of several old Masters paintings owned by the Alfred Beit Foundation. There was an immediate hostile public reaction. This attempted sale highlighted weaknesses in the existing Irish art export regime. The sale was challenged in court by An Taisce – the National Trust for Ireland - and the court case began a judicial review of the licensing regime. This initiated a series of changes by the Irish government, e.g. extension of the criteria for the issuing of export licences to the European Union. This is a minor change that does not resolve the greater concerns relating to property rights vs. heritage protection. In addition, it exposed the absence of political will to prioritise and legislate for cultural heritage protection in Ireland, in particular, for non-archaeological artefacts. The purpose of this article is to acknowledge that changes were made to the system, and to highlight continuing weaknesses in the regime.*

Keywords: cultural property, Alfred Beit Foundation, cultural heritage law, corporate governance.

Introduction

On 30 April 2015, Christie's of London announced the sale of nine Old Master paintings from the Alfred Beit Foundation (ABF).¹ It was hoped that the sale would help secure a €15 million endowment fund to ensure the long-term future of Russborough House. News of the sale was met with an immediate and hostile public response. The controversy exposed weaknesses in Ireland's art export regime, and a subsequent challenge in court by An Taisce triggered a judicial review of the licensing system, which initiated a series of changes by the Irish government to export regulation. However, these minor changes do not resolve the greater concerns relating to property rights vs. heritage protection. Neither did these changes, nor the court case, result in the return of all the paintings to Ireland. The controversy exposed the absence of political will to prioritise and legislate for cultural heritage protection in Ireland, and in particular for non-archaeological artefacts. It also laid bare poor standards of corporate governance in the Irish arts sector. This paper will examine the legislative framework for the export of art in place in Ireland, before and after the events surrounding the export of paintings by the ABF.

Origins of the Controversy

Sir Alfred Beit established the ABF in March 1976 out of his home at Russborough House, Co Wicklow. Unfortunately, security at Russborough proved a cause for concern and following a string of violent and high-profile robberies, Sir Alfred donated seventeen of his most famous paintings to the National Gallery of Ireland (NGI) in 1987, where they remain to this day (Mulcahy, 2015). Despite these setbacks, Sir Alfred still hoped that the House, now open to the public, would become, as expressed in Article Two of the ABF's Memorandum and Articles of Association, a centre to 'promote and further the advancement of education in the Fine Arts in Ireland' (Memorandum and Articles of Association, 1976, p. 6). The constant security threat meant many of the paintings were virtually uninsurable and, owing to this, the most famous

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pieces of the remaining collection (which still remained the property of the ABF) were put into storage under the supervision of the NGI (O’Kelly, 2015). As Cooke (2016, p. 199) explains this was a practice that began in 1965, when the Beits would spend the winter months abroad, placing their paintings temporarily in the care of the NGI. Sir Alfred also sold land in 1977 to raise an endowment for the ABF to the amount of £370,770, which, as Cooke (2016, p. 201) comments, seems a large sum, but was in fact insufficient to maintain the property long-term. Over the years finances at Russborough remained a headache for the ABF. In 2002 the ABF applied for, and received, the first in a series of conservation grants totalling €2 million from the Heritage Council (Mulcahy, 2015). Conscious of the financial struggles they faced, Lady Clementine Beit, Sir Alfred’s widow, willed her personal collection of Italian bronzes to the ABF in 2005 with the instruction that it be sold and the resulting monies put towards the maintenance of Russborough House. The sale of these sixty-two bronzes garnered €3.8 million (Gartland, 2006).

However, just as with the sale of land in 1977, these amounts were not sufficient to secure the long-term future of both Russborough and the collection, and the ABF began selling further assets piecemeal to finance the upkeep of the House – a practice which the Beits are on record saying they opposed (Mark-Fitzgerald, 2015). Indeed, though Lady Beit had given her approval for the sale of her Italian bronzes for the upkeep of the House in 2006 (Board of the ABF, 2015), this could not be taken to imply her tacit approval to begin deaccessioning and selling assets for the House, as the ABF appear to have assumed. In November 2013, Sotheby’s auctioned a collection of porcelain, raising €1.2 million and in 2014 a Jacques de Lajoue painting, *The Cabinet of Physical Sciences*, was privately sold raising €500,000. A year later, Christie’s announced the sale of the nine paintings from the ABF collection (Boland, 2015).

The Document and Pictures (Regulation of Export) Act (1945) and EU Regulation 116/2009

On 16 June 2015, An Taisce brought a legal challenge in the High Court claiming that the export licences issued on 16 March 2015 by the NGI to Christie’s Ireland (acting on behalf of the ABF) had been made *ultra vires*. An Taisce’s legal counsel made it clear that they were not trying to stop the sale, but putting the respondents on notice of flaws in the export licences issued. The case primarily concerned the weaknesses of the Documents and Pictures (Regulation of Export) Act 1945. Since 1985, the NGI had been issuing export licences under the 1945 Act, but despite repeated attempts, An Taisce could find no legal basis for the NGI’s delegated licencing authority (Carolan, 2015) as the 1945 Act did not allow for a delegation of authority from the Minister. It later transpired that this function had been delegated in 1985, by way of a letter, to the NGI by the then Minister for State with responsibility for Arts and Culture, Ted Nealon (Leydon, 2015).

As Conlon (2014 p. 206) notes, the 1945 Act was recognised as inadequate and out-dated, even before the Beit controversy. For instance, Section 3 of the Act prohibited the export of any paintings covered by the Act without a proper licence, which had to be delivered to an export officer when leaving the State. This was not practicable owing to Ireland’s membership of the EU and the free market. Despite the fact that the 1945 Act predated Ireland’s EU membership by thirty years, it was never amended to reflect Ireland’s changed international legal obligations. Furthermore, under the 1945 Act definitions were vague. While the Act gave the Minister wide-ranging powers to extend its coverage or exclude items from it, as Conlon (2014, p. 209) notes, there was uncertainty as to the precise coverage of the Act at any particular time. Additionally, the NGI, which acted as the licencing authority, had no power

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to refuse the issuing of a licence, that power resting solely with the Minister (NGI Registrar, 2016). As Cooke (2016, p. 207) observes, the Act can be seen to reflect the State's tendency to favour private property rights over heritage protection, a subject which shall be discussed in more detail below.

As a member state of the European Union, Ireland has transferred competence in the movement of goods (as well as persons, services and capital) to the EU, and EU law is decisive in this area. While the Treaty on European Union prohibits fiscal and non-fiscal barriers to the movement of goods, it makes exceptions for national treasures of artistic, historic or archaeological importance (Conlon, 2014 p. 195-196). In this instance, Ireland must abide by Commission Regulation 116/2009 on the export of cultural goods, which supersedes Irish legislation in this field (Patterson et al, 2014 p.581). Regulation 116/2009 has clear descriptions and stipulates the various categories of cultural object (depending on financial value, type of object/painting, age threshold) which require a licence. The basis for refusal of a license is through Article Two, whereby the goods in question are covered by national legislation protecting national treasures of artistic, historical or archaeological value to a Member State. In practice, there are few refusals (Peters, 2015 p. 143). Most licences are issued through the cultural ministries of respective Member States. In Ireland, these licences for non-EU bound cultural goods are issued by the Cultural Institutions Unit, Department of Arts, Heritage and the Gaeltacht (DAHG) (Conlon, 2014, p. 220).

Although the court case brought by An Taisce primarily concerned perceived infirmities of the export licences issued under the 1945 Act, it also highlighted the complexities of the Irish export regime. While the Cultural Institutions Unit, DAHG issues licences for non-EU bound paintings, certain paintings (provided they were valued at under €150,000, or if a watercolour, under €30,000 – basically, those not covered by Regulation 116/2009) could have their licenses issued by the NGI under the 1945 Act (NGI Registrar, 2016). For paintings in excess of these values leaving the EU, licences were (and still are) issued by the Cultural Institutions Unit, under Regulation 116/2009 (Conlon, 2014, p. 220). Three of the nine paintings originally scheduled for sale (a selection of the highlights, as described by Christie's) were affected by the latter, but were granted licences under the 1945 Act along with all the others. Christie's moved these three paintings from London to Christie's New York and Hong Kong offices to go on view in a pre-sale exhibition. An Taisce alleged that licenses would have been required under Regulation 116/2009 for export out of the EU, but the licences issued for these three paintings did not allow them to leave the Union (Carolan, 2015 and Stanley-Smith, 2015).

Reformed Regime – National Cultural Institutions Act (1997)

Another piece of legislation that came under scrutiny was the National Cultural Institutions Act 1997. When first introduced, the Law Reform Commission commented that the 1997 Act represented a significant extension of the existing export regime in Ireland (for instance, it classified objects for the first time) (Conlon, 2014, p. 207). However, Sections 6 and 49 of the Act, regulating the trade of paintings, were not brought fully into force until 2015, following the eruption of the controversy (DAHG, 2015). As Conlon (2014, p. 219) commented, almost prophetically with regards to the ABF paintings, this 'piecemeal commencement [of the 1997 Act] is not helpful as regards the transparency ... of the relevant regime applicable to the movement, and control, of cultural goods'.

However, on 28 July the High Court recommenced and the State conceded without reservation that the export licences issued by the NGI on 16 March 2015 to Christie's were unlawful and the NGI had no authority to issue licences: that power still remained with the Minister for

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Arts (Stanley-Smith, 2015). That day the Minister, Heather Humphreys, signed the statutory instrument to commence Sections 6 and 49 of the National Cultural Institutions Act 1997 (DAHG, 2015). Section 6 fully repealed the 1945 Act and certain provisions of Section 49 set out stricter categories for export. Any paintings over 25 years, painted by hand and which originated, or had been in Ireland for 25 years, would require an export licence. Although the changes were generally welcomed, observers including the Chair of the Irish Museums Association noted that if not enforced, the new export regime would suffer from similar issues as the 1945 regime (Crowley, qtd. in McGrath, 2015).

Concerns remain. Sculptures are excluded from the scope of the 1997 Act, so in theory sculptures could be exported without record. The role of the NCI in issuing export licenses still remains largely perfunctory, the priority being to maintain a record of all artworks leaving the State rather than scrutinising the export requests (NCI Registrar, 2016). Just as they had no power to refuse the issuing of a licence under the 1945 regime, they similarly have no power under the 1997 system. Of greater concern is the legal loophole identified by Conlon (2014, p. 214), which has yet to be addressed. This concerns the temporary movement of a cultural item to the EU, and onto a third country (in a travelling exhibit, for example). In this instance, the Irish authorities could issue a licence for movement of an object to an EU state, and a subsequent license for the final non-EU destination country, yet there is no provision to issue a licence for movement of the object from the interim host EU state to its final destination. In this instance the Irish authorities could, theoretically, lose control of the licensing regime.

Private Property Rights vs. Heritage Protection during Export – A Fair Balance?

The controversy highlighted the challenges that exist in finding a balance between heritage protection and private property rights. This was alluded to by Minister Humphreys in a statement to the Dáil: 'These issues [the provision to refuse export licences] were examined in the 1980s and the 1990s and the view has always been that there are other issues around property rights. It is not quite as simple as some might suggest' (Humphreys, 2015). Indeed, while the new 1997 Act allows the Minister to require an object to be entered into a register of cultural objects, including paintings 'whose export from the State would constitute a serious loss to the heritage of Ireland' (National Cultural Institutions Act, 1997), these listed objects are not automatically protected from export. Section 50 of the Act only allows for the Minister to refuse a licence for objects on the register; to refuse a license for a registered object in the care of an institution funded in whole, or in part, by the State; or to issue a stay on any object on the register for a period of one year (National Cultural Institutions Act, 1997). These limited refusal mechanisms and the stay, in particular, can be seen to respect property rights, which are guaranteed under the Irish Constitution (1937).

Owing to similar concerns on the impact on private property rights, the Waverley Criteria in the United Kingdom allows for a stay to be issued on the export of an object, provided it is deemed to be immensely important to national cultural heritage. The stay is to allow time to identify potential buyers and thus keep the object in the UK (Nafziger et al. 2014, p. 3).² At the height of the ABF controversy, the NCI, in criticizing the inadequacy of the Irish export regime, made reference to the British and Commonwealth systems of export control. It suggested that the implementation of a Waverley-like system would go a long way towards protecting cultural patrimony in Ireland (NCI Board of Governors, 2015). Despite British efforts to strike a balance between the various interested parties, there has been criticism of poor funding for public institutions, which has resulted in the loss of many valuable cultural items, with national museums unable to afford them (Chamberlain et al, 2014, p. 484). This British effort to

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balance the various interests is not unique and the registering or listing of culturally important material is a common mechanism in many Western European states that are wary of the legal implications for property rights of blanket designation of culturally important material (Nafziger et al. 2014, p. 2-3).

The Irish Constitution's (1937) strong provisions on property rights can be seen to follow the European constitutional tradition of protecting the right to property, with these rights further entrenched under the Charter of Fundamental Rights of the European Union. Article 17 of the Charter provides for the right to private property, including the right not to be deprived of one's property except in public interest, and subject to fair compensation (Conlon, 2014, p. 201). Ireland is also a founding member of the Council of Europe and a signatory of the European Convention of Human Rights (ECHR), of which Article 1 of Protocol 1 provides for peaceful enjoyment of one's possessions (including cultural property) with a provision for deprivation of this right only where there is public interest (Chamberlain and Vrdoljak, 2014, p. 539). The Convention has force in Ireland through the European Convention on Human Rights Act 2003 and Irish Courts must consider the decision of the European Court of Human Rights in Strasbourg in their own rulings. The Strasbourg Court has never held against public interest in protecting cultural property in favour of private property rights, but has sought to strike a 'fair balance' between the two. Regarding the deprivation of one's property, the Court has deemed that public interest requires (a) that a deprivation of property must be for a legitimate purpose and (b) that the achievement of that purpose must strike a 'fair balance' between the demands of the public interest and the need to protect individual rights (Chamberlain and Vrdoljak, 2014, p. 539 - 540). Regarding moveable cultural heritage, the court considers that 'the control by the state of the market in works of art is a legitimate aim for the purposes of protecting a country's cultural and artistic heritage' (de Clippele and Lambrecht 2015, p. 272).³ On this topic Conlon (2014, p. 201) writes that 'public interest in the [conservation of cultural patrimony] remains outside the actual application of the law, while at the same time a potential applicable legal measure exists'. In other words, although several relevant cases have been brought before the Strasbourg Court, regarding public interest in heritage protection, there has been no definitive comment on the balance struck between the accommodation of individual rights and the public interest in member-states of the Council of Europe, Ireland included.

Certainly the challenges to introducing stronger protective legislation raised by Minister Humphreys are substantive, and Irish constitutional protections of property rights are indeed strong. Taking into consideration other trends at national levels to increase heritage protection and recent developments judicially at a European level to strike a fair balance between the rights of the owners and the public interest, the Irish constitutional protections offered to private property rights could be accommodated with heritage protection, where export is concerned, provided there is political will to do so (de Clippele and Lambrecht, 2015, p. 275-6). However, it may take a test case in the Irish Supreme Court, or Strasbourg, to test the boundaries of what might be possible.

Ongoing Controversy

Despite the publicity generated by the case, it was not the judgement from the High Court on 28 July 2015 that resulted in the sale of the paintings being postponed. The remaining paintings (the two Grimshaws sold below expectations on 15 June 2015 for a combined £112,500 [Parsons, 2015]) were withdrawn from auction on 25 June 2015 only when the ABF received proposals from private Irish donors about a possible purchase under Section 1003 of the Taxes Consolidation Act 1997 (Parsons, 2015). The Act allows for individuals to buy cultural property, donate it to the State and receive tax relief, though this did not concern all the

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paintings. Through this mechanism the Teniers painting and Rubens' *Head of a Bearded Man* were subsequently purchased and donated to the NGI, with the donors recouping 80% of the value in tax credits.⁴ This turn of events allowed breathing space for the ABF to consider its options and demonstrated the ability of the ABF to find buyers for the paintings in the Irish market (Stanley-Smith, 2016). But as Judith Woodworth, Chair of the ABF made clear, if an adequate, long-term solution was not found to the ABFs financial predicament then 'the Foundation may have no option but to resume the proposed sales so as to avoid a financial crisis' (Cullen, 2015).

Unfortunately the financial headaches for the ABF only increased after July 2015. The sale of the remaining paintings was announced in June 2016 on foot of the same export licences that had been issued *ultra vires* in March 2015, an action itself which was heavily criticised (Stanley-Smith, 2016). Despite renewed protestation from art historians and professionals alike, the *Venus and Jupiter* by Rubens was sold to an unnamed bidder for £1.3 million on 7 July, along with the two Guardis for £135,000 each, which was below expectations, and the Boucher was also sold for €87,500 (Parsons, 2016). However, this still left the ABF well off their target of €15 million and critics feared the sale of assets could continue, unchecked, until the Foundation reached, or failed to reach, its goal (RTÉ News, 2016). Further doubt was cast on the ABF's overall competency when it emerged that the sale of the paintings would prompt the British Government to trigger a long-standing inheritance tax bill for on Sir Alfred's estate. In July 2016 there were reports that the ABF was disposing of more assets, this time donating another painting from its collection to the Ulster Museum to offset the tax bill for British Revenue and Customs (Burns, 2016, p. 26). In all, by December 2016, the ABF had disposed of eight of the nine paintings originally put up for sale in April 2015, with the fate of the Van Ostade still under negotiation.

Operations of the Board of Directors

The secretive nature of the ABF Board of Directors throughout the controversy also came in for public scrutiny. By the time the sale had been announced, the paintings had been moved out of Ireland and it was only the Christie's statement that brought the matter to public attention (Boland, 2015). The Board (which voted to approve the sale) includes representatives from the NGI, Royal Dublin Society, Trinity College Dublin, University College Dublin, the Irish Georgian Society and An Taisce, as stipulated by the Foundation's Articles of Association (1976, p. 7). However, not all of these bodies and representatives supported the sale. While it can be argued that the directors felt bound by confidentiality, the failure, for instance, of Director Consuelo O'Connor to inform her nominating body, An Taisce (which was fiercely opposed to the sale) subsequently led to its withdrawing her as its nominee. Observers noted that this would have been an ideal opportunity for the Board to appoint a cultural professional to the vacancy to strengthen their position. However O'Connor's subsequent re-nomination as an independent director dismayed these observers and only seemed to confirm the secretive workings of the Board (Mulcahy, 2015).

The presence of the Director of the NGI, Sean Rainbird, on the ABF Board attracted some of the strongest criticism. Under the Documents and Pictures Act 1945, it was the Director of the NGI who signed the export licences (albeit, *ultra vires*, as it emerged). While the 1945 Act did not allow the Director to refuse the issuing of a licence, Rainbird's vote in support of the sale of the paintings and, with it, the export of valuable historical art from the State was perceived by some to be an example of a conflict of interests, a claim the NGI was quick to deny (NGI Board of Governors, 2015).

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Conclusion

The events surrounding the sale of the Beit paintings in 2015 and 2016 exposed several inadequacies in legislative protection afforded to historically important art works in Ireland. Firstly, it is clear that the licencing regime and legislative framework were outdated. While the full entry into force of the 1997 Act is welcome, it is also clear that anomalies remain in the export regime which need to be addressed. Although the weak legislative framework was not directly responsible for the Beit controversy, successive governments' failures to enact the sections that would strengthen the art export regime in Ireland exacerbated the problem. The episode also laid bare the complexities that exist with respect to property rights and heritage protection. Keeping in mind the constitutional rights to private property, in cases where the export of art is identified as detrimental to the public interest, an appropriate accommodation must be met where public interest in heritage protection conflicts with private property rights. However, without a definitive judgement, either by the Irish Supreme Court or Strasbourg, it will be difficult to determine the extent of the protection that could be offered. Thirdly, the controversy demonstrated that the standards of corporate governance in the ABF were below what should be considered acceptable. A more open and constructive dialogue between the ABF and the public prior to the sale, would have gone a long way towards mitigating criticism aimed at the Foundation in the weeks following the announcement of the sale.

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NOTES

1. The paintings included two works by Peter Paul Rubens *Head of a Bearded Man* and *Venus and Jupiter*, one by David Teniers the Younger, *Kermesse*, a religious piece by Adriaen van Ostade, *Adoration of the Shepherds*, and two Venetian views by Francesco Guardi. Three further paintings belonging to the ABF were also selected for sale and listed separately, a pair by John Atkinson Grimshaw, *Two views of Yew Court, Scalby, Scarborough* and one by François Boucher *Aurore et Amour tenant une torche* (Christie's Press Release, 2015). A license was obtained for a third Rubens, *Portrait of a Monk* though this was subsequently withdrawn by the ABF, with speculation that its attribution to Rubens could not be verified (Boland, 2015).

2. As Blake (2015, p. 31) notes, the art market in the UK is a large and profitable sector for the UK economy, therefore, private property rights aside, there is a financial incentive for the UK Government to maintain the freedom of movement for cultural property, mainly for art and antiques.

3. Although not concerning export law, these comments made during *Beyeler v Italy* (2002) ECHR, which concerned the transfer of ownership of a Van Gogh, can be applied more generally to measures designed to regulate the movement of cultural property, including export controls (Chamberlain and Vrdoljak, 2014, p. 544)

4. Negotiations were also ongoing to buy and donate the Van Ostede on a similar scheme (Parsons, 2016)

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