Case No: 1993 C 3428
Case No: 1997 G 185

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

BEFORE **MR JUSTICE MOSES**

BETWEEN	**CITY OF GOTHA** (A Body Corporate) **- and -**	**Plaintiff**
	(1) SOTHEBY'S (an unlimited company) **(2) COBERT FINANCE S.A.**	**Defendants**
AND BETWEEN	**THE FEDERAL REPUBLIC OF GERMANY** **-and -**	**Plaintiff**
	(1) SOTHEBY'S (an unlimited company) **(2) COBERT FINANCE S.A.**	**Defendants**

Mr Alexander Layton QC and Miss Monica Carss-Frisk (instructed by Messrs Frere Cholmeley Bischoff) appeared on behalf of the Plaintiffs.

Mr Michael Brindle QC and Mr Bankim Thanki (instructed by Messrs Herbert Smith) appeared on behalf of the second Defendants.

This is the official judgment of the court and I direct that no further note or transcript be made

The Hon Mr Justice Moses **9th September 1998**

Introduction

In 1603 Joachim Wtewael painted The Holy Family with Saints John and Elizabeth; at their side are three angels playing music. A young callipygian St John supports a book read by his mother, St Elizabeth. Flaunting the style of Correggio which, like other Dutch artists before him, the painter had admired during his travels in Italy, he crowds the copper surface of only 21 x 16 cm. with descending putti, fragments of a Corinthian column and classical ruins in the background. The picture is a notable example of Dutch mannerism, a style which Wtewael adopted when he returned to Utrecht in parallel to others in Haarlem who had responded to the Italian influence.

The size of the painting is not merely such as to permit its owner to enjoy its sensuous and spiritual delights by holding it for closer examination. A cabinet painting attracts the thief and smuggler. As in the pillage of Rome, so Gibbon records, "just preference" was given to that which "contained the greatest value in the smallest compass and weight". At the end of the Second World War it disappeared from the collection in the gallery of the Ducal Family of Saxe-Coburg-Gotha in the city of Gotha. It was smuggled from Moscow in the mid 1980s, emerged briefly in West Berlin in 1987, and disappeared, only to reappear when offered for sale by Sotheby's in 1992.

The plaintiffs claim the return of the painting in conversion against a Panamanian Corporation, Cobert Finance S.A. ("Cobert"). An earlier action was brought by the City of Gotha against Sotheby's. The two actions have been consolidated. Sotheby's has taken no further part in the proceedings pending resolution of the dispute between the plaintiffs and

Cobert. The Federal Republic of Germany claims ownership of the painting. The City of Gotha asserts a possessory title to it. The plaintiffs claim declaratory relief, an order for delivery up and/or damages on the grounds that Cobert converted the painting by taking constructive delivery of it in March 1989, by consigning it to Sotheby's for sale at that time, by offering it for sale through Sotheby's to the City of Gotha in October 1991 and/or by demanding its return from Sotheby's in August 1993.

The case is as packed with different characters and issues as the images in the painting. I have been introduced to SMERSH, trophy brigades, the art smugglers of Moscow and "Big Mamma" in order to resolve disputes of fact and to the learning of commentators on the German civil code in order to resolve disputes of German law. The two crucial disputes are:-

(I) Whether the Federal Republic of Germany can establish title to the painting; and

(II) Whether, if it can, its claim is time-barred under the German law of limitation.

Under Section I relating to the Federal Republic of Germany's claims to title, the following issues arise:-

I.1 Whether as a matter of fact it can be established that the painting was in Thüringia in 1945 and 1946;

I.2 Whether title to the painting passed to the Land of Thüringia by virtue of the confiscation police order of 6 July 1945 read with the expropriation Law of 9

October 1945 or, if the painting was still in Thüringia in July 1946, by the operation of the Law of 24 July 1946;

I.3 Whether title to the painting passed to the Land of Thüringia by virtue of the dissolution of the Art Foundation on 14 October 1950;

I.4 Whether an English Court will recognise or enforce the Federal Republic of Germany's title to the painting under German law;

I.5 Whether the arrival of the painting in West Berlin, allegedly via East Germany in 1987 perfects an inchoate expropriation;

I.6 Whether the City of Gotha has a right to possession of the painting.

Under Section II in relation to limitation, the following issues arise:-

II.1 (dealt with in this judgment after the findings of fact in relation to title) Whether as a matter of fact the painting was misappropriated by a subsequent possessor after it had been stolen from Gotha;

II.2 Whether the German limitation period is relevant pursuant to Section 1 of The Foreign Limitation Periods Act 1984;

II.3 Whether, if German law is relevant, the right to recovery is statute barred under German law;

II.4 Whether pursuant to Section 2(1) of the Foreign Limitation Periods Act 1984 I should disapply German law, if it bars the claim, on the grounds that it conflicts with English public policy.

Background Facts

The following facts are not in dispute. Duke Ernst the Pious started to buy paintings in 1656. The painting was in the possession of the Ducal Family of Saxe-Coburg-Gotha for many years. It appears in the 1826 catalogue of the paintings in the Ducal gallery in Gotha. In 1855 by a settlement between the reigning Duke and His Royal Highness the Prince Albert, by then married and abroad, and the Ducal State Ministry of Gotha, the art collection was acknowledged as property of the Dynastic House of the Duke. The painting remained in the Ducal picture gallery at Schloss Friedenstein, the history of which was described in a catalogue in 1883. It appears that the painting was available for public view at least from the time when the museum was opened in 1879. In July 1905, pursuant to an Act partitioning state property and a related settlement between the Duke and the Duchy, the art collection was declared part of the entailed estate.

On 9th November 1918 the workers' and soldiers' council of Gotha deposed the Duke of Saxe-Coburg-Gotha. The constitution of the German Reich of 11th August 1919 required the dissolution of entailed estates, the assets of which included the art collection.

Faced with the revolutionary zeal of the socialist Weimar Republic, the entailed estate was voluntarily dissolved. In November 1927 a settlement agreement between the Ducal House and the Land of Thüringia provided for the establishment of:-

"The Duke of Saxe-Coburg-Gotha Foundation for Art and Science".

The Foundation (to which I will refer as the "Art Foundation") was to have its seat in the city of Gotha. Its purpose was to be the perpetual preservation and further enhancement of, amongst other things, the Art Collection. Since subsequent documents may confuse in their references to Ducal Foundations it is important to note that a distinct Foundation was formed known as the Family Foundation. That Foundation was obliged to pay annuities to the Art Foundation. In January 1928, a Thüringian law gave effect to the agreement of November 1927 and in March 1928 the Art Foundation was established.

The charter of the Art Foundation stated that it was located in Gotha (section 1). It was to preserve and enlarge the collections and to further art, science and national education. It was stated that the collections would be made available for public use to the same extent and in the same manner as previously (Section 3). The Ministry for National Education and Justice was responsible for supervision. (Section 4).

On mobilisation the museum was closed and the most valuable and irreplaceable pieces were brought to a place of safety at Reinhardsbrunn, a hunting lodge about fourteen kilometres east of Gotha. Baron Dr. von Schenk zu Schweinsberg, the museum director, reported in the annual report for the Art Foundation (July 1938 to 31st December 1939) that the selection

had to be "considerably restricted". Further paintings were stored and protected from splinters in a ground level room at the home of the museum, Schloss Friedenstein. It is clear from the catalogue that the painting was one of the more distinguished pieces within the Art Collection. It continued to attract interest even during the war and, in 1942, in reply to a correspondent in Holland who wanted a photograph of the painting, it was reported that it was in safe keeping. A reply, in May 1942, to a further inquiry from the editor of the artist lexicon in Leipzig stated that:-

> "The picture by Wtenwael (an alternative spelling) is, as ever, located in the Ducal Museum. ... I believe to have seen the pictures and will keep you informed. Heil Hitler".

Thus the painting was still within the collection during the war although it is not clear whether it had been moved to Reinhardsbrunn.

1.1 The location of the painting in 1945 and 1946 (facts in issue relating to title).

It is not disputed that the painting was taken from Gotha to the Soviet Union in the 1940s. Nor is there now any dispute that the painting was stolen from the art collection which had formerly belonged to the Ducal Family. The issue is: when did it leave Thüringia? This issue is central to the resolution of the question whether the Federal Republic of Germany is the owner of the painting, because, in order to establish its ownership, it must rely upon laws which only had effect within Thüringia or, although there is no relevant difference, in the territory over which the Soviet Military Administration had jurisdiction. It is only if the Federal Republic of Germany can rely upon the dissolution of the Foundation that the location of the painting in the Soviet Union may not matter.

Cobert submits that such was the chaos in Germany both before the arrival of the American army in Gotha in April 1945 and after Thüringia was ceded to Soviet occupation, in consequence of the Allies agreement at the Yalta Conference in July 1945, that the Federal Republic of Germany is unable to prove that the painting was within the Soviet occupied zone even in July 1945, let alone in July 1946. The evidence relevant to this issue consists of documents, vividly illustrating the situation within Thüringia at the time, evidence from Professor Erickson Honorary Fellow in Defence Studies and Professor Emeritus at the University of Edinburgh, an expert in Soviet Military History, called on behalf of the plaintiffs, and historical material produced by a recognised expert on the fate of European art in the Third Reich, a respected academic, Lynn Nicholas. The Federal Republic of Germany contends that the painting did not leave the Soviet occupied zone until after July 1946 and probably not until about 1947 to 1948. The significance of the dates will become apparent when I examine the legislation upon which the Federal German Republic relies to prove its title.

Even before Allied Forces crossed the Rhine wandering bands of foreign workers scoured the countryside, looting. But I accept Professor Erickson's evidence that it is pure speculation whether the painting was looted by foreign workers or casually by a local German. Contemporary documents show that some items belonging to the Art Foundation were taken to Coburg by the Americans when they were in occupation in Thüringia. However, there is evidence that, at least the important items from the collection which had been removed to Coburg, were properly recorded. A note from Rentmeister Doetschel in Coburg, dated 27th March 1945, records that three Rubens, one Hals and nine manuscripts were handed to him

for safe keeping. That items taken to Coburg arrived safely was also confirmed in a letter to the Lord Mayor in Gotha dated 4 July 1945. Although American Forces were guilty of looting, (soldiers stole two Dürers from a castle in Thüringia), in relation to the Art Foundation it appears that the Americans acted with a sense of responsibility and concern, all the more remarkable in the light of the military situation. A memorandum of 16 July 1945 recorded that the author had been ordered by the American Military Administration to take an inventory and to note possible damage. He said that an American officer visited the exhibition rooms at the palace shortly before the Russian occupation. By chance, the former Duchess of Saxe-Coburg-Gotha was also there with the Director von Schenk. The Duchess asked that the American Military Administration provide two freight trains to transport some of the collection to Coburg, to save them before the Russians moved in. The American officer refused. The Duchess said she would approach the General. There is no evidence he was more compliant. Further, when a Canadian physician, Morton Shulman, with a particular interest in the museum of the Art Foundation, heard of the painting in 1982 he spoke to Dr von Schenk and asked him what had happened to the contents of the museum. Dr von Schenk replied that when the Russians had arrived nothing was missing. Dr von Schenk is no longer alive but wrote in June 1982 that he had left his books and papers in Gotha saying:-

"We were glad enough to save our souls!"

Much later, on 12th June 1950, it was stated that approximately one hundred and twenty-six large crates of art objects stored at Schloss Reinhardsbrunn were not opened before 1945 and when the Americans opened them they removed nothing from the crates but re-closed them properly.

For these reasons I agree with the conclusion of Heinz Wiegand, museum director until 1986, that the painting did not go missing during the occupation of Thüringia by the American forces. It thus remained, probably in Reinhardsbrunn, until the arrival of Russian forces on 2nd or 3rd July 1945. Moreover, if it had been taken by a member of the American forces it is unlikely to have been taken to Moscow. It is speculation to suggest that a member of the American forces took it to Berlin. By 26th April 1945, as Professor Erickson points out, Germany had been cut in half, after Soviet and American troops had met at Torgau on the Elbe the day before, and it would have been virtually impossible to travel from Gotha to Berlin.

Soviet Military Occupation 3rd July 1945 to 24th July 1946

The most serious losses from the museum occurred when "official" trophy brigades, probably under the control of Professor Major Alexeyev, looted the museum in January 1946. According to Professor Erickson it is unlikely that unofficial looting occured earlier. From the very outset of Soviet occupation in July 1945 members of SMERSH were in Thüringia. SMERSH was the pre-cursor of the KGB; it was formed in 1942/3 by Stalin and represented the most formidable and dangerous element in the Soviet military structure. It had power of life and death over all ranks in what was then the Red Army. The effectiveness of its control was such, says Professor Erickson, that it is unlikely that any Soviet soldier, even if he had been interested in a painting, which is to be doubted, would have risked severe punishment or death by looting an art treasure which would have been regarded as state property. Thus,

Professor Erickson concludes that the painting is likely only to have been taken either as part of an official consignment or by a senior officer with the agreement of SMERSH. The trophy brigades set out from the beginning of their occupation not only to recover Soviet treasures but also to seize paintings and other "cultural artefacts" as trophies of war. Russian historians, Akinsha and Kozlov, record that, under the control of the operational representative of the counter-intelligence department of SMERSH, art valuables were removed from Schloss Friedenstein on 4th March 1946 and that Alexeyev received authorisation from the main trophy department of the Red Army, to confiscate the castle's "museum objects" at the end of January 1946. Professor Erickson thought that the removals had occurred earlier in the year and that the trophy brigade assignment in Thüringia and Saxony was probably completed by January 1946. According to Akinsha and Kozlov, the "rich haul" included fifty-three paintings from Danzig and Reinhardsbrunn. They were taken to Leipzig where they remained for some ten days, during which sixty soldiers filled nineteen carriages with two hundred tons of objects and books. The train left Leipzig on 11th March 1946. Major Alexeyev accompanied the train. This account by those historians is confirmed in contemporary documents referring to the "official" looting in January 1946. On 16th January 1946 the director Dr. von Schenk wrote:-

> "On Monday 7.1.1946, about midday, Major and Professor Alexeyev and 1st Lieutenant Lutscheweit ... appeared at the library, with directives from the Commandant of Gotha, to look over the museum, castle and library premises. On Wednesday, I was called to the museum, where I was informed of the directive of General Kolesnitschenko that all the objects from the museum that were already packed up were to be taken away."

The director complains that receipts he was promised were not given. On 28th January 1946 the Director of Administration requested orders from the Presidential Chancellery at Weimar to prevent the depredation saying that if that was not successful total loss would be

unavoidable. No inventory of the heavy losses was made until 1965 when the "Verlorene Werke der Malerei" identified lost works and paintings including the missing Wtewael Holy Family.

The Federal German Republic, however, deny that this painting was part of the rich haul taken from the museum in January 1946. Professor Erickson's view is that it is unlikely that it was taken other than as part of that haul or by a senior officer with the agreement of SMERSH. His reasons are the same as those which applied in relation to the period before the beginning of 1946. Casual theft was unlikely under the watchful eye of SMERSH. If the painting was taken as a trophy of war, it would have left the area of Soviet military occupation and been taken to Russia at the beginning of 1946. I must, therefore, consider whether there is any evidence that it did not form part of the official collection of trophies.

According to Akinsha and Kozlov, the Gotha collections were shared between the Committee on Cultural Education or Institutions of the Council of Peoples Commissars of the Russian Federation and the Arts Committee, which received the best works of art. There is no evidence of this painting forming any part of their collection. Of particular importance is the list of thirty-seven paintings which had been in the Soviet Union and which were returned to the museum at Gotha in December 1958. Although I received no expert evidence from an art historian or curator, I think it is open to me to observe that, whilst amongst the paintings returned were a Jan Brueghel and a Cranach, some of those returned were of no greater distinction than the Wtewael. Yet the Wtewael was not returned on that occasion. Moreover, whatever account of the history of how the painting came to light in the 1980s is accepted, both sides assert that the painting was transferred from the possession of a Russian

officer. If the painting was not part of the official haul, then I accept Professor Erickson's evidence that it is likely it could only have been taken by a senior officer who had made an arrangement with SMERSH or even a senior officer who was a member of SMERSH. Professor Erickson's evidence is that it is unlikely that an officer in the Red Army could have left Thüringia until late 1946 at the earliest. I accept Professor Erickson's evidence on this point. Thüringia was of particular importance to the Soviet Union because of uranium deposits. The Soviet Army was and remained in a state of operational readiness to protect that area from attack. It would only be under special circumstances, on orders, that Soviet officers would have been allowed to leave Thüringia in 1946. Soviet officers remained in that area as the army changed from the Red Army to the Soviet Army in 1946 because they were being prepared for admission to higher military academies. Attestation took place in the area of Soviet military occupation; movement was very restricted and carefully controlled. In those circumstances I conclude that only in rare circumstances would a senior officer have left the area of Soviet military occupation in 1946 and the chance that, among the few officers directed to return to the Soviet Union, there was one who had taken the painting is, in my judgment, remote.

But that, of itself, does not establish that the painting remained in the area of Soviet military occupation during 1946. There is no evidence that the painting was taken by a senior officer other than as part of the official collection of trophies. Nor is there any clear evidence as to what happened to all the paintings taken as part of the official collection in January 1946. I am unable to conclude that because the painting was not returned to Gotha in 1958 that it was not part of the official collection of trophies sent to the Soviet Union from Leipzig at the beginning of 1946. I conclude that the most likely explanation for the loss of the painting is

that it was taken at the time the trophy brigade, under Alexeyev ,was collecting trophies of war from Gotha. By July 1946 the painting had gone.

II.1 Facts relating to Limitation; the arrival of the painting in West Berlin from Moscow, 1987-1989

The following facts are common ground:-

i. The painting was taken from the Soviet Union to West Berlin in the 1980s;

ii. The painting was acquired by Mina Breslav in 1988 and received by Sotheby's in London on 29th November 1988.

iii. It was bought by Cobert from Mina Breslav in March 1989.

There is a substantial difference between the accounts given by the witnesses on behalf of the plaintiffs and those on behalf of Cobert as to when and how the painting arrived in West Berlin and as to who was involved. The important dispute is whether, after it came into the hands of the person who smuggled it out of the Soviet Union, (a Mrs Sunguza or a Mrs Dikeni) she misappropriated the painting or whether it was misappropriated by a subsequent possessor. The issue is of importance because the plaintiffs argue that, if there was a misappropriation, the claim is not barred by effluxion of time under the German law of limitation, if it applies. Cobert contends that even if its account of how the painting came into Mina Breslav's hands is not accepted, the plaintiffs' account is so flawed and inconsistent that I should not be satisfied that any misappropriation took place. There is little of the

Mannerist chiaroscuro to be expected in the world of art contraband, more a prevailing gloom.

Cobert's account of how the painting came to West Berlin

Cobert's account of how the painting came into the hands of Mina Breslav has an unpromising start. Until the first day of this trial it was Cobert's case that a German family had given the painting as a gift in return for food and other assistance to a colonel in the Soviet Army, Adolf Kozlenkov. He had taken it to Latvia. From 1955 it was in the possession of the Nowakowski family, friends of the Kozlenkovs. In March 1982, when Adolf Kozlenkov died, a Mrs Gambourger, a member of the Nowakowski family, gave the painting to Kozlenkov's son Alexander. In March or April 1985, Alexander Kozlenkov sold the painting in Moscow to Itela Sunguza an engineer, who was resident in Berlin in 1989 but who had lived in Moscow with his Soviet wife. In 1985 an African diplomat, Mrs Mukoko, took the painting at Sunguza's request to West Berlin.

In 1987 the painting was given to an acquaintance of Mr Sunguza in West Berlin, Holger Martin, for valuation purposes. Martin, anxious to defend his reputation as a serious arts dealer, made a statement in March 1987 saying he had been asked by Wolosow, who owned an antiques and art shop, to have the painting valued. It is not disputed that Martin took the painting to the Dahlem Museum on 24th March 1987. There it was confiscated whilst the police investigated its ownership. In September 1987 it was released to Martin. Thereafter the account of what happened to the painting is, again, in dispute. Cobert conceded, on the first day of the trial, that neither it nor anyone else acquired the painting in good faith.

It is important to record that Cobert's concession was limited. Its concession was made, so I was told by Mr Brindle QC, on the basis that it would accept that it and its predecessors knew or suspected that the painting might be stolen but made no inquiries to allay such suspicion. However, Cobert persisted in relying upon the evidence in witness statements and of the witnesses whom it called to give oral evidence to demonstrate that the account given by the plaintiffs' witnesses was incorrect. In those circumstances it is necessary to make findings about the evidence called on behalf of Cobert before I turn to consider the evidence upon which the plaintiffs rely.

The story that the painting was a gift was not only implausible for reasons I have given in relating the facts concerning the whereabouts of the painting in 1945 and 1946 but the witnesses' statements recounting the story were inconsistent. I do not rely upon the absence of any reference to a Colonel or General Adolf Kozlenkov in central archives, but it is of note that the statements of Mrs Gambourger nee Nowakowski and Alexander Kozlenkov as to what was sold are inconsistent with the receipt and the statement of Itela Sunguza. Moreover there is no explanation as to why the painting was not valued until March 1987 if it had been brought to Berlin as Cobert alleges in the summer of 1985. Sunguza's statement and that of Mrs Breslav are inconsistent as to how much was paid for the painting. Sunguza says he was paid in cash the sum of DM300,000, Mina Breslav says she agreed an initial payment of DM20,000 and was to pay further sums after she had disposed of the painting. There is a receipt dated 23rd November 1988, signed by a Mohammed Gerard, showing the receipt of cash of DM20,000 saying that the painting was sold by him on behalf of a female African owner to Mina Breslav. There is a second receipt signed by Mohammed Gerard, dated 28th

November 1988, showing the figure of DM20,000 crossed out and a purchase price of DM200,000. Mina Breslav does not explain why the first receipt is not signed by Itela Sunguza and says she cannot recall the significance of the second.

There is no explanation of the part played by a Larissa Leontiew who was to receive a proportion of the purchase price of the painting pursuant to the purchase agreement between Mina Breslav and Cobert, nor any explanation of a payment to a Lola Minchin of DM25,000. Mina Breslav's son was called to give evidence; I shall deal with his evidence when I consider the plaintiffs' account but Mina Breslav was not available to give evidence. Not even her son knew where she was. Some light may have been thrown upon the purchase of the painting by Cobert by a Mr Douglas Montgomery who has some involvement in the activities of Cobert. He was present during part of the hearing but left, not to return, after evidence was given as to his presence at a time when money was offered to one of the plaintiffs' witnesses.

I accept that Itela Sunguza existed. Ülo Salm, a German lawyer and notary public, took an affirmation from him. Apart from confirming the existence of Mr Sunguza, Mina Breslav, Alexander Kozlenkov and Mrs Gambourguer, Mr Salm's evidence was not of further assistance. I also accept that Sugunza worked for a Peter Rohde, a dealer in Russian icons. But on the evidence before me I do not accept that he bought the painting in the Soviet Union or arranged for it to be smuggled into West Berlin in 1985. If he played some part in the transactions thereafter, that part was of no significance to the question I have to decide.

The Plaintiffs' Evidence as to how the Painting came to West Berlin

The plaintiffs' account depends on the evidence of witnesses involved in smuggling art from the Soviet Union. They were Makhin, Greshnikov and a German national, Helmut Fürst. Makhin and Greshnikov were convicted by the Leningrad Criminal Court for smuggling works of art, including the painting, and sentenced to five years imprisonment. The milieu of their trade was so murky that their evidence should not be relied upon unless it withstands the closest scrutiny.

Makhin gave oral evidence through an interpreter. He described seeing the painting at the flat of Bishkinsky where he learnt that Bishkinsky and his partner Bezuevsky were selling the painting on behalf of a Russian owner. He does not say he ever met that owner but he did say he knew his name but did not want to risk his own life by revealing it. He says he can confirm that the owner was an officer in the Soviet army. Makhin asked Greshnikov to make enquiries because Makhin did not know whether the painting was an original. Greshnikov contacted Fürst who was able to smuggle works of art under the cloak of his tourist business, taking groups to St Petersburg. According to Makhin, Fürst telephoned to confirm that the painting was authentic. He said that it was a war loss and would, as a result, be difficult to sell in the West. According to Makhin, Fürst said that he was not sure whether he wanted to buy it. Several days later he agreed to do so. Makhin then contacted a Mrs Mariouena Dikeni, the wife of the Togo ambassador in Moscow, who had in the past smuggled works of art including icons on behalf of Makhin. He persuaded her to meet Fürst. A meeting took place, according to Makhin, in an embassy car. He says that, afterwards, Fürst explained that

he had proposed to Mrs Dikeni that she should pay DM50,000 and that Fürst would repay her with a commission of DM30,000. Alternatively, if she was not willing to invest DM50,000, her commission would be DM10,000. Apparently Fürst had already given Greshnikov DM50,000. Mrs Dikeni, having taken time to think about the proposal, later agreed to act as a courier but would not invest any money.

According to Makhin, in early February 1987 he handed 130,000 roubles to Bezuevsky in Bishkinsky's flat and agreed to pay 20,000 roubles commission, after Fürst had disposed of the painting. He says he handed over the painting to Mrs Dikeni late one night in Moscow, and returned to St Petersburg. He says Greshnikov told Fürst that Fürst would receive the painting in a week. A week later Fürst rang to say he had not received the painting. Makhin was unable to contact Mrs Dikeni. In March 1987, two or three weeks later, she telephoned him, saying she had been unwell and unable to take the painting to Berlin. Three days later she said that she was well again and ready to take it to Berlin. Makhin says he left a message on Fürst's telephone answering machine and later learnt that Fürst was in the USA. Mrs Dikeni, on her return to Moscow, said that she had left the painting with a relative in Berlin. He learnt that Fürst never recovered the painting. Greshnikov, who also gave oral evidence before me but without a translator, supports Makhin's account.

Fürst, who gave oral evidence, says that he had given DM50,000 to Greshnikov in anticipation of making a purchase. But he was clearly a part of the organisation which smuggled works of art from the Soviet Union. He accepted that he was not doing this in order to earn a medal. He says Greshnikov offered to sell the painting which he identified from the signature as being an Wtewael. He instructed Greshnikov to secure the painting for

him using the DM50,000 towards the purchase. The offer price was 150,000 roubles (approximately DM100,00 at black market rates). He confirms meeting Mrs Dikeni who was referred to as "Big Mamma". According to him she said she needed to discuss the matter with her husband. He says that the arrangement was to pay her DM80,000 when he took possession of the painting in Berlin.

Fürst says that he returned to Germany and learnt that the painting had been taken from the Schlossmuseum Gotha when he saw a copy of the Verlorene Werke der Malerei in Munich. He telephoned Greshnikov in Leningrad asking him to cancel the transaction because he did not want to be involved with art works looted from East Germany. He says that Greshnikov told him the painting had already been handed over by Makhin to "Big Mamma". In March and April 1987 he telephoned Greshnikov on several occasions to find out about "Big Mamma's" visit to Berlin. Greshnikov told him that "Big Mamma" had said to Makhin that her children were ill and her trip to Berlin was delayed. Fürst says he heard nothing throughout the summer of 1987 and then learnt that Makhin and Greshnikov had been arrested by the KGB for their black market activities. In March 1993, shortly after Greshnikov's release from prison, he learnt that "Big Mamma" had only paid half the agreed amount namely DM25,000 and that they had never seen her again.

By means of a somewhat labyrinthine route which it is unnecessary to detail, Fürst met Peter Rohde in November 1988 in Berlin. As I have recorded, Rohde dealt in Russian icons. According to Fürst Rohde eventually agreed that he had the painting in his possession and offered him the opportunity to recoup the money he had lost in marketing the painting. He says he saw the painting at Rohde's shop in December 1988. Negotiations with Rohde broke

down. He says that he visited the museum in Gotha, and spoke to the director in January 1990. The museum was unable to pay the price Rohde was asking of DM400,000. He says that in autumn 1989 Rohde had told him that he had given the painting away against a down payment but would be able to retrieve it. In June or July 1990, when the painting had not been retrieved, Fürst says he told Rohde that he could no longer accept his excuses and required payment of some money. He says he eventually received DM25,000. Dr Hebecker, the specialist director of the Schlossmuseum, confirmed that he was approached by Fürst but was unable to raise the DM400,000.

In a written statement made to the cultural attaché to the German Embassy in Togo on 23rd June 1993 Mrs Dikeni says that she did take the painting to Berlin at the request of Fürst. There she contacted Rohde who advised her to have the painting examined. She says Rohde gave the painting to Martin and that it was never returned to her. She says that she lost the possession of the painting against her will.

Findings of Fact as to Misappropriation

The crucial issue is whether either Mrs Dikeni or Rohde, once they had acquired possession of the painting, misappropriated the painting; in other words whether they kept it or dealt with it contrary to the wishes of the person by whom the painting was transferred to them. But, since the story of the misappropriation depends upon the credibility of particularly Fürst and, in part, Makhin and Greshnikov, it has been necessary to set out their account and I must make findings as to their credibility.

I did not think that Makhin was a witness upon whose evidence I could rely. Stephanie Burras, who was at the time employed by the plaintiffs' solicitors, stated that at a meeting in February 1993 Makhin had asked what he would be offered in return for making a statement. She also recalls that Fürst raised the question as to whether he might be entitled to a finder's fee. Makhin denied that he asked for money but said he asked for political asylum in return for assistance. He also admitted that he had accepted $10,000 from Solomon Breslav, Mina's son. Solomon Breslav was called, mainly to provide a basis for an attack on the credibility of Makhin. He said that Makhin had asked for money and that he had given $10,000 to Makhin in the foyer of the Savoy Hotel in February 1998. He denied that that was with the agreement of Montgomery although apparently Montgomery had been present in the building shortly before he handed the money over. At the same time he passed him a list of questions. Those questions came from Montgomery and were headed "Queries Breslav should put to Makhin". They were questions designed to test Makhin's evidence and, coupled with the payment, were calculated to try to use Makhin to bolster Cobert's account. There was no reference to payment of money in Solomon Breslav's written statement. Nor was there any reference to the questions. Indeed, in my judgment paragraph 20 of Breslav's written statement was designed to conceal the fact that Montgomery had been present on the occasion that money was paid to Makhin. I did not believe Breslav's attempts to distance Montgomery from the payment of what I regard as a bribe to Makhin. Montgomery did not remain in court for long enough to give his explanation for the questions. Whilst that, quite apart from my observations of Breslav, destroyed Breslav's credibility, it provides no support for the plaintiffs' account let alone for the credibility of Makhin. At the end of his evidence when asked whether he was prepared to sell his evidence to the highest bidder he replied:-

> "What else would you expect from a person who has spent five years in prison, became an invalid while behind bars in the camp and invested 150,000 Roubles?"

I have sympathy for anyone serving a sentence at that time in the Soviet Union. But I cannot reflect that sympathy in any finding as to credibility. His own evidence contained unexplained inconsistencies. I do not believe him when he said he discovered the identity of the painting from the "Verlorene" when, as he accepted, he does not speak German. His attempts to persuade me that he was acting merely to ensure that the painting returned to its rightful owner were unsuccessful. Like the others, he was not engaged in this venture "to earn a medal".

Greshnikov's evidence was more convincing. I accept his evidence as to how Fürst came by the painting from Bishkinsky and Bezuevsky and as to the introduction to Mrs Dikeni. His evidence is of importance in assessing the evidence of Fürst because he says that Fürst exhibited no reluctance in buying the painting although he did say that it would be difficult to sell. Moreover, he says that after the painting had been given to Mrs Dikeni, Fürst telephoned to say that he had not received the painting. Those two pieces of evidence were inconsistent with the account of Fürst. Greshnikov denied that he was ever given a deposit of DM50,000 to show the painting.

It is Fürst's evidence which is central to the plaintiffs' contention that there was a misappropriation once the painting came into Mrs Dikeni's hands. There are ample grounds for suspecting his credibility. He was heavily involved in smuggling works of art from the

Soviet Union. In 1993 Fürst was claiming that the courier was called Mrs Sunguza (according to an affidavit sworn in September 1993 by Dr Carl a partner in the plaintiffs' solicitors). His evidence that he was reluctant to sell the painting finds no support in the evidence of Greshnikov. Importantly, Fürst accepted that he expected a fee for assisting the plaintiffs in the litigation. Notwithstanding these considerations which taint his evidence, having seen and heard Fürst, I believe him when he says that he gave the painting to Mrs Dikeni and, contrary to his instructions, that it was never returned to him. It was argued on behalf of Cobert that his familiarity with Rohde's business, and the facts that he was paid DM25,000 and that Mrs Dikeni was a courier who acted on behalf of Rohde show that Fürst expected Rohde to be involved in the sale of the painting all along and that the subsequent sale to Mina Breslav was with Fürst's connivance. Thus, there was no misappropriation.

I do not think that Fürst's evidence that he accepted DM25,000 from Rohde supports the conclusion that Rohde's possession was with the permission or connivance of Fürst. On the contrary it seems to me that Fürst's admission that he did receive DM25,000 from Rohde provides an indication that he was telling the truth. I see no reason why it was necessary for Fürst to reveal that he had received any payment from Rohde. I accept that Fürst would have a motive for concealing any part which he played in transferring the painting to Rohde and any responsibility he might bear for the painting coming into the hands of Cobert. By distancing himself from those transactions he might expect to be viewed more favourably by the plaintiffs and increase his chances of a fee. But if that was a motive underlying his evidence, I do not see why he should have revealed as much as he did about his negotiations

with Rohde and the acceptance of DM25,000. Although I have viewed his evidence with suspicion, I do believe him in relation to his dealings with Mrs Dikeni.

Accordingly I find that the painting was handed to Mrs Dikeni in 1987 and misappropriated by her. If she herself had been the victim of a misappropriation, I would have expected her to tell Fürst at the time. In any event, for the purposes of the limitation issue, it matters not whether she, or a succeeding possessor, misappropriated the painting.

1.2 Approach to Foreign Law

In resolving the disputes as to foreign law, I must be guided by the following principles:-

(1) When faced with conflicting evidence about foreign law I must resolve differences in the same way as in the case of other conflicting evidence as to facts. (**Bumper Corporation v. Commissioner of Police of the Metropolis [1991] 1WLR 1362, 1368G**).

(2) Where the evidence conflicts I am bound to look at the effect of the foreign sources on which the experts rely as part of their evidence in order to evaluate and interpret that evidence and decide between the conflicting testimony (**Bumper Corporation at 1369H**)

(3) I should not consider passages contained within foreign sources of law produced by the experts to which those experts have not themselves referred. (**Bumper Corporation 1369D-G**)

(4) It is not permissible to reject uncontradicted expert evidence unless it is patently absurd (**Bumper Corporation 1371B**).

(5) In considering foreign sources of law I should adopt those foreign rules of construction of which the experts have given evidence (this principle underlies the principle that an English court must not conduct its own researches into foreign law).

(6) Whilst an expert witness may give evidence as to his interpretation of the meaning of a statute it is not for the expert to interpret the meaning of a foreign document. His evidence will be limited to giving evidence as to the proper approach, according to the relevant foreign rules of construction, to that document.

There is no dispute as to the approach the German Court would take to issues in respect of which there is no judicial precedent. It would have regard to commentaries on the German Civil Code ("BGB"). It would not feel bound by the mere fact that the majority of commentators took a particular view or by the most recent statement of opinion. It would take into account the

quality of arguments, the consistency of the statements and the reputation of the authors. German Courts adopt a teleological approach, interpreting a statute according to its purpose.

Law Applicable to the Transfer of Title to the Painting.

There is no dispute between the parties but that I must apply German domestic law in order to trace the title to the painting. Both sides agree that:-

> "the validity of a transfer of a tangible, movable and its effect on the proprietary rights of the parties thereto and of those claiming under them in respect thereof, are governed by the law of the country where the movable is at the time of the transfer. (Lex Situs). (See Rule 118 Dicey and Morris Conflict of Laws 1993 Edn. Page 965 and Winkworth -v- Christie Manson and Woods Limited and anr. [1981] Ch. 496 at 513). "

No-one has suggested that any of the five exceptions to which Slade J. referred at pages 501 and 514 A-B. apply. Accordingly, the Federal Republic of Germany must establish that it has title to the painting under German law. There was no argument before me as to the effect of Soviet law on proprietary rights whilst the painting was within Soviet territory. Under Soviet law if the transfer of possession occurred without lawful consent of the owner, no subsequent possessor could acquire title. No-one has suggested that Soviet law is relevant to the issue of title.

Title to the Painting under German Law

The question whether the Federal Republic of Germany can prove title to the painting turns on the effect of legislative provisions passed between 6 July 1945 and 24 July 1946 and the location of the painting during that period. Whilst not admitted in the pleadings, Cobert was prepared to assume The Art Foundation acquired ownership of the painting in 1928.

The Orders and Laws passed in the period July 1945 to July 1946 concerned confiscation, sequestration and expropriation of property within the area covered by the Soviet Military Administration in Germany. It is important, therefore, to distinguish between confiscation, sequestration and expropriation. It is accepted by both Professor Werner and Professor Brunner, the experts in German Law, that:-

(i) Confiscation merely had the effect of placing the property under the control of the state. It did not have the effect of altering ownership.

(ii) Sequestration was concerned with the administration of the confiscated property; to secure confiscation by preventing interference by the owner whose rights were restricted by confiscation. Sequestration did not, therefore, alter ownership in the property

(iii) It is only expropriation which has the effect of depriving a former owner of his title to the asset.

Confiscation and sequestration may therefore be regarded as measures preliminary to expropriation, designed to prevent subsequent expropriation from being frustrated by the former owner.

Confiscation of the painting on 6th July 1945

In order to determine whether the painting was expropriated in October 1945 it is necessary to determine whether the painting was confiscated in July 1945. Three or four days after Russian troops arrived in Thüringia, the President of the Government of Thüringia passed a Polizeiverfügung (called in these proceedings a police order) and a Polizeiverordnung (called in these proceedings a police regulation) concerning confiscation of certain assets. It is accepted by both Professor Werner and Professor Brunner that, as a matter of general law, the legal validity of a Verfügung depends upon a Verordnung. The Verfügung of 6 July, 1945 purports to confiscate assets of the former reigning royal house of Saxe-Coburg-Gotha.

> "Based on paragraph 1ff of the Polizeiverordnung (regulation) concerning the confiscation of assets of former members of the national socialist German workers' party, the assets of the Duke of Saxe-Coburg-Gotha and of his house ... are confiscated"
>
> "In particular also in so far as assets have been transferred to the "Foundation of the Duke of Saxe-Coburg-Gotha's Family" and the "Foundation for the Arts and Sciences" (see para 2 of Polizeiverordnung (police regulation) dated 6th July 1945)"

The Polizeiverordnung appears on its face, to be inconsistent with the Verfügung which purported to confiscate all the assets which had formally belonged to the Duke of Saxe-Coburg-Gotha. The Verordnung provided in paragraph 1 for the confiscation of assets of

former members of the national socialist German workers' party, its organisations and affiliated bodies. The Foundation for Art and Science was not such a body. But by paragraph 2 of the Verordnung:-

> "Such confiscation of assets also applies to third persons to whom individuals named in paragraph 1, have transferred, after 30th January 1933, ownership, possession or other entitlements in relation to such items."

Although the Duke fell within paragraph 1, the assets of the Art Foundation and in particular the painting were not transferred after 30th January 1933. There is no evidence that any assets were transferred by the Duke to the Art Foundation after that date. Thus, the problem arises as to whether the Verfügung had the legal effect of confiscating the painting or whether, because the painting was transferred to the Foundation before 30th January 1933, the Verordnung prevails and had the effect that the painting was not confiscated.

Although at one point Professor Brunner expressed some doubt, in general both experts agreed that, although the confiscation of all the assets of the Art Foundation whether or not they had been transferred after 30th January 1933 lacked a legal basis, the confiscation under the Verfügung was not null and void ("nichtig") but was merely open to be challenged by appropriate legal remedies and was effective unless and until such legal remedies were taken to have the Verfügung declared invalid ("rechtswidrig"). In other words, the Verfügung was, to put it loosely in English terms, only voidable and not void and had legal effect until successfully challenged in court. No such challenge took place.

Professor Brunner took the view that there was no conflict between the Verfügung and the Verordnung. It was necessary to read them together. Read together, all that was confiscated by the Verfügung and Verordnung were those assets transferred to the Art Foundation after 30th January 1933. But there is no evidence that any assets were transferred to the Foundation after that date. Nor is there any basis for supposing that the Verfügung was passed in the mistaken belief that the assets were transferred to the Foundation for Art and Science after 30th January 1933. (A memorandum for the file dated 24 June 1949 asserts that the Foundation for Art and Science was created in 1934, but the same memorandum refers to Foundation Statutes 23rd March 1928 at its head and contradicts such a belief in the following page). In my judgment the Verfügung and the Verordnung are inconsistent. Nevertheless I accept that the consequences are that the Verfügung, which was never challenged, was legally effective; in other words was not "nichtig" but only "rechtswidrig". Accordingly the painting, which was in Thüringia on 6th July 1945, was confiscated.

The Law of 9th October 1945

On 9th October 1945 the Soviet Military Administration in Germany (SMAD) passed a law ("Gesetz") concerning the securing and expropriation of Nazi property. By paragraph 19:-

> "The confiscation orders (Verfügung) made pursuant to the police regulations (Verordnung) concerning the confiscation of assets of former members of the national socialist German workers party on 6th July 1945 (Government Gazette page 3) are valid as expropriation orders within the meaning of this Act, even if such orders had not been published."

The effect of the paragraph was to expropriate the assets of the Art Foundation. Both Professors agree that if the picture was confiscated by virtue of the Verfügung, as I have already concluded, the consequence of the law of 9 October 1945 was to expropriate it. Thus, title to the painting passed to the Land of Thüringia in October 1945 because the painting was at that time within the territory covered by the Soviet Military Administration.

Order No 124 (SMAD) The Law of 4 December 1945, Order No 38 (SMA) and the Law of 24 July 1946

Even if the painting was expropriated by the Law of 9 October 1945, Cobert contend that the October 1945 Law was repealed by the Law of 4 December 1945 and the painting was no longer the subject of expropriation. That issue turns on the proper construction of those two laws and the effect of Orders (SMAD) passed by the Soviet Military Administration for Germany pursuant to which local Orders (SMA) were made by the Soviet Military Adminstration in Thüringia and the two local Thüringian laws were passed. Both Professors accepted that, after October 1945, the Soviet Military Administration appreciated that the German authorities may have been over-eager in their confiscation and expropriation of assets, in the belief that their owners may have belonged to organisations forbidden or disbanded by the Soviet Military Command. The overall policy of the Soviet Military Administration between October 1945 and July 1946 was to secure assets located in areas under its jurisdiction which might, on due consideration, fall to be expropriated and to allow time for considering whether all the assets previously confiscated and expropriated should be subject to expropriation. Accordingly, on 30th October 1945 by Order 124 (SMAD) assets located in the zone occupied by the Red Army were declared the subject of sequestration if

they belonged to persons listed in that order. That order did not itself cover the Foundation. The instructions to the Order did not assist me. By a Law (Gesetz) of 4 December 1945 concerning the repeal of the Law of 9 October 1945 by order of the Soviet Military Administration for the Land of Thüringia :-

> "Paragraph 1.
>
> In view of the exhaustive regulations contained in orders of the Supreme Chief of Soviet Military Administration in Germany concerning the sequestration and temporary administration of some categories of assets in Germany (Order No 124 of 30th October) ... the Thüringian law of 9th October 1945 concerning securing and expropriation of nazi assets ... is hereby repealed.
>
> Paragraph 2.
>
> All matters pending at the time of this Act coming into force with authorities responsible pursuant to the Thüringian expropriation law of 9th October 1945 are as far as they are subject to the provisions of Orders No 124 and 126 in their current state handed over to the authorities appointed, according to these Orders and to existing and future execution regulations"

The translation probably does not do justice to the original.

Order No 38 (SMA), of 25 January 1946, of the Soviet Military Administration in Thüringia was passed in order to carry out Order No 124 within the region of Thüringia. It imposed sequestration upon the museum at Gotha (item 134) and the castle at Reinhardsbrunn (item 173). It is agreed that the sequestration, which referred only to buildings and installations, covered their contents.

Professor Werner takes the view that the effect of Paragraph 2 of the Law of 9 December 1945, is to maintain the expropriation under the Law of 9 October 1945 because the painting was covered by Order No 124 when read with its consequential local Order No 38.

Was the Expropriation by the Law 9 October 1945 Repealed by the Law of 4 December 1945?

The question whether the Law of 4 December 1945 had the effect that the painting was no longer the subject of expropriation turns on the proper interpretation of Paragraph 2 of that Law. I do not think that any reliance can be placed upon the fact that the repeal purported to be retrospective. Professor Werner took the view that the Law of October 1945 was effective despite its retrospective effect and appeared to accept in cross-examination that a repeal of such expropriation was possible even if it was retrospective.

Cobert contends that Paragraph 2 is a merely procedural, transitional measure which has nothing to do with the substance of expropriation repealed by Paragraph 1. Professor Brunner's evidence was that Order 124 (SMAD) and Order 38 (SMA) merely provide for sequestration, and not expropriation, for the purposes of deciding whether subsequent expropriation might take place later.

In my judgment, detailed analysis of the Law of October 1945 and Paragraph 2 of the Law of 4 December 1945 leads to the conclusion that the expropriation of the painting by the Law of 9 October 1945 remained effective.

In order to establish that the expropriation of the painting under the Law of 9 October 1945 remained effective despite the Law of 4 December 1945, the plaintiffs must establish:-

(1) that the expropriation was one of the "matters pending at the time of this Act (Law of 4 December 1945) coming into force with authorities responsible pursuant to the Thüringian expropriation Law of 9 October 1945".

(2) that the painting was subject to the provisions of Order No 124.

If those conditions were satisfied then, pursuant to Paragraph 2 of the Law of 4 December 1945 the painting was handed over to the authorities appointed in its "current state"; in other words its legal status was maintained.

The scheme of the Law of 9 October 1945 was:-

(1) Assets liable to be expropriated were to be registered with Honorary Commissions established to check lists of assets and ensure compliance with the Law (Articles 13 and 14).

(2) The President of the Land of Thüringia was to decide which assets were to be expropriated (Article 7). Notice was to be served on former owners, if necessary by substituted service (Articles 7 and 8).

(3) A decision of expropriation had the effect of confiscation (Article 9).

(4) Land expropriations were to be notified to the Land Registry so that the appropriate changes could be entered (Article 10).

(5) The President of the Land had power to order temporary confiscation pending a decision as to expropriation (Article 12)

(6) Objections by third parties, other than spouses, claiming the assets could be lodged within 6 months (Article 17).

Matters would be pending, within the meaning of Paragraph 2, under those Articles when the Law of 4 December 1945 came into force.

It is important to emphasise that the painting, having been confiscated by the Verfügung of 6 July 1945 was treated as expropriated under the Law of 9 October 1945 without the need for the procedure under Articles 7, 8, 13 and 14. By Article 19 (which suffered from a number of translations):-

> "The confiscation orders made pursuant to the police regulation concerning the confiscation of assets of former members of the National Socialist German Workers Party of 6 July 1945 ... are valid as expropriation orders within the meaning of this Act, even if such orders have not been published."

The closing paragraph of Article 19 read:-

> "Assets which have been confiscated by the Occupation Authorities, or which will be confiscated in future are considered to be expropriated under the provisions of this

> Law. In such cases an expropriation decree by the President of the Land of Thüringia is not required."

Thus expropriation of the painting under the October Law did not depend upon any decision of the President of the Land but was effected by Article 19.

In my judgment, although expropriations falling within Article 19 had effect without the need for any further decision by the President of the Land such expropriations did fall within the meaning of "matters pending" under Article 2. They were still subject to the six month period for objection under Article 17 of the Law of October 1945.

Order 124 made provision for similar procedures under a fresh regime. The assets listed in Paragraphs 1 and 2 of that Order were to be notified to Local Administrations (Paragraph 3). Those Administrations were required to find and take into custody assets which were then to be registered and notified to military commanders (Paragraph 4).

It is to be noted that Order 124 itself made no provision for confiscation of assets. The function of confiscation was delegated to the local administrations by Paragraph 4.

The collection previously owned by the Art Foundation fell within Order 124 by virtue of Order 38. It is true that Order 38 was only enacted pursuant to Order 124 on 25 January 1946. It was faintly argued that the painting did not, therefore, fall within Order 124 as at the date of the Law of 4 December 1945. But, in my judgment, it is clear that for the purposes of Paragraph 2 of the Law of 4 December 1945 Order 38 must be read with Order 124 (the letter dated 16 January 1946 from the Director to the Trustee of the confiscated assets copied to the

State Commission for the execution of Orders No 124/126 and the letter dated 17 November 1947 support that view).

I accept Mr Layton QC's submission that it makes no sense if confiscations which had already been carried out by local authorities pursuant to the Verfügung of 6 July 1945 were no longer legally effective but were to be subject to the regime under Order 124 of notification and decision by the local administrations under Paragraph 4 of that Order. The correct view, in my judgment, is that the legal effect of previous confiscations remained effective under Paragraph 2 of the Law of 4 December 1945. The status of the collection confiscated by the Verfügung of 6 July 1945 was preserved by Paragraph 2 without the need for the procedures under Paragraphs 3 and 4 of Order 124; the collection remained subject to confiscation. If, moreover, the legal status of the collection was preserved by Paragraph 2 it follows that the collection remained subject not only to confiscation but also to expropriation. It is difficult to see how assets such as the collection, including the painting, retained their status as confiscated assets but not their status as expropriated assets. There was, after all, no provision for returning assets which had been expropriated to their original owners such as the Art Foundation. In my judgment, therefore, Professor Werner is correct in his opinion that the painting remained subject to expropriation. The effect of the Law of 4 December 1945 was to replace the regime which had previously existed under the Law of 9 October 1945 with the regime under Order 124 but not to repeal the confiscations which had been carried out prior to the Law of 9 October 1945 and which took effect as expropriations under that Law.

Contemporary documents 1945 to 1947

Both sides rely upon documents written between 1945 and 1947 to support their rival contentions as to the effect of the legislation passed in 1945 and 1946. Those documents provide a glimpse of the difficulties of administration in the post-war turmoil in Germany. They demonstrate the increasing confusion of those responsible for administering the Art Foundation. The Laws governing the legal status of the Art Foundation were not drafted with the precision to be expected in times of peace and stability. They are primarily concerned with difficulties in administration and not with legal status. But in my judgment those documents do at least support three propositions:-

(1) The assets of the Art Foundation had been confiscated with effect from July 1945;

(2) The trustee (Treuhänder in German has been loosely translated as trustee) appointed in 1945, acted under the authority of the Land and reported to the Land.

(3) There was no reference to expropriation by the Law of 9 October 1945.

Anton Etthoefer was appointed as trustee to administer the confiscated assets on 16 July 1945. On 9th January 1946 the Vice-President of the Land wrote to the Soviet Military Administration in Weimar warning that troops were taking away property of the House of the Duke of Saxe-Coburg-Gotha, which, he asserted, was under the supervision of the State Office for Public Education. He asked for immediate intervention to prevent removal of the museum objects which, he said, belonged to the Land of Thüringia. On 16th January 1946 the

Director von Schenk wrote to the trustee of the confiscated assets complaining that objects had been removed by, amongst others, Professor Alexeyev. The letter was copied to the State Commission for the Execution of Orders 124/126 at Weimar. On 28th January 1946 Geithner, the Director of Administration, sought orders to stop removal of objects from the Museum from the Presidential Chancellery at Weimar. On 16 February 1946 the trustee of the confiscated assets sought to prevent release of the confiscated assets of the Family Foundation asserting that, by Order 124, they had been confiscated for the benefit of the Soviet Military Administration. He referred to confiscation pursuant to the Government Gazette dated 16 July 1945. On 6th May 1947 the Vice-President of the Land wrote to the Department of the President requesting that the trusteeship pursuant to 124 be assigned to the Ministry of Finance. On 16 September 1947 a draft Memorandum from the Ministry of Finance recorded confiscation of the Duke's assets under the Order of 6 July 1945. It recorded that the assets were affected by Order No.124 and that the trustee was Etthoefer under the supervision since May 1947, of the Ministry of Finance. On 17th November 1947 the Ministry of Justice addressed a review to the Officer in Charge for the execution of Order 124. Apparently that Officer had taken the view that the assets of the Duke had been confiscated on the strength of the Police Order of 6th July 1945. The author of that review asserted that the Order of 6th July 1945 had been rendered redundant (there was, I accept, a mis-translation which originally translated redundant as invalid). He stated that the Law of 9 October 1945 had replaced the previous order and had itself been repealed by the Law of 4 December 1945. He said that the assets of the former Duke had been sequestered and expressed astonishment that the person responsible for Order 124 had not been informed. Later, the review says that Etthoefer is under the direct jurisdiction of the First Vice-President and receives his instructions from him. The review concludes:-

> "Considering the importance and political implications, irrespective of the possibility that huge claims for damages may be lodged against persons involved in this matter, we consider it a matter of urgency to clarify, as precisely as possible, the legal situation of individual cases, and to keep precise documentation on them."

I doubt whether the author of that letter could have imagined that his plea for clarification, as a matter of urgency, would remain unanswered at least for another 50 years. I observe, that this review cited a letter from the State Commission dated 19 January 1946, 11 days before Order 38 was enacted, which like the letter from von Schenk three days before regarded the assets as falling under Order 124 despite the fact that Order 38 had not yet been passed.

As I have already noted, none of these documents refers to the expropriation of 9 October 1945. Further documents, on which Cobert relied, do not provide any greater clarification. They demonstrate the increasing confusion. On 2nd July 1946, the trustee of the confiscated assets in a letter to the State Commission for the execution of Orders No.124 and 126 under the heading "Assets of the Duke of Saxe-Coburg-Gotha" stated that he had been made personally responsible for the preservation and protection of all confiscated assets of the Duke which had been sequestered. He said he would undertake the preliminary work to effect the handover. A Memorandum dated 4 February 1947 concerning a discussion with the trustee of the former Duke's assets on 27 January 1946, refers to the fact that the Family Foundation's assets had been confiscated by the Police Order of 6th July 1945. It continued:-

> "The art treasures remaining at Friedenstein Palace and the Library which formerly contained 300,000 volumes, have been severely decimated through war events and actions of the Occupation Forces. There is, however, still a

> sizeable portion of art treasures remaining, which have not yet been catalogued.....further art treasures, approximately worth Reichsmark 30 million, have been taken to Coburg (American Occupation Zone)."

A letter dated 28 April 1947 to the Ministry for Public Education referred to former state art collections at Gotha and spoke of the difficulty of making an inventory. This had been locked away, with all the art objects, by the Soviet Military Administration. The current Administration of the State collections could not obtain access. An undated letter, thought to have been written in 1947, spoke of the museums being under the authority of the Soviet Military Administration. It warned of a Russian Major appearing at the Museum, looking for art objects. Geithner was asked to inform the state authorities if anyone tried to remove anything. On 18 September 1947 the Director of the Institutes for Art and Science Gotha (the organ through which the Land administered the art foundation), complained of lack of funds to the trustee. On 28 July 1948 the Land gave instructions for payment to the Institute, the funds to be taken from the confiscated assets of the Duke.

In my judgment, these documents do not support Cobert's contention that control of the assets had not been passed to the Land. Etthoefer was trustee of the confiscated assets and the repeated pleas to departments in Weimar either to prevent removal of assets or for money, demonstrate, to my mind, that control of the assets had passed to the Land. This material was concerned with problems of administration. The authors were not, in the main, concerned with the true legal status of the assets. In those circumstances I can place no reliance upon the fact that they make no reference to the law of 9 October 1945. It is not surprising, given the political upheaval in the ruin of Germany, that they cast no light on the ownership of the

collection. If they shed little light now that is not surprising after the shadows of the past 50 years.

Order No.154/181 of 21st May 1946 and the Law of 24th July 1946

In the light of my conclusion that the painting was taken out of the territory under the jurisdiction of the Soviet Military Administration in January, 1946, the Law of 24 July 1946 cannot assist the plaintiffs. However, since the effect of the Order No.154/181 of 21 May 1946 and the Law at 24 July 1946 which followed that Order were the subject of evidence from Professors Werner and Brunner, I should record the issues between them and my conclusions based upon their evidence.

By Order No.154/181 dated 21 May 1946 ("concerning utilisation of sequestered and confiscated assets based on Order 124"):-

It was ordered that:-

"1. Sequestrated assets which belonged to the Hitler state and to its central authorities and which are located within the Soviet occupation zone, are to be put under the authority of competent German administrative authorities in the Soviet occupation zone of Germany....

2 .Sequestrated and confiscated assets which belonged to the Nazi party and its organisations or to Nazi party leaders, are to be transferred to the possession and disposal of German local government authorities of the Laender and Federal territories wherein such assets are located.....

3. The transfer of the respective assets into the possession and disposal of German local government of laender of federal territories is to be carried out accompanied by appropriate legally binding lists"

(The translation in the plaintiffs' supplementary bundle at 27 was corrected during the course of the hearing).

By the Law of 24 July 1946,

"Concerning the delivery of sequestered and confiscated assets by the Soviet Military Administration to the Land of Thüringia" :-

"Article 1.

The assets .... which were confiscated or sequestered by the Soviet Military Administration according to Orders No.124 ... of 30 October 1945, and which are to be delivered to the state of Thüringia based on Orders No 154/181 ... 21st May 1946 ... are upon such delivery expropriated without compensation for the benefit of the state of Thüringia".

Article 4:-

"Any sequestered assets which do not come under the Orders No.124 .. of 30 October 1945 are to be returned to their original owners, without delay".

Professor Brunner took the view that expropriation could only be effected by a four-stage procedure:-

1) that the assets fell within Order 124 (read with Order 38)

2) that the assets fell within Order 154

3) that the assets fell within the law of 24 July 1946 and

4) that there should be a physical handing over of control to the Land of Thüringia following the passing of the Law of 24 July 1946.

Professor Brunner did not take the view that it was necessary that each and every item in the Art Foundation's collection should be physically handed over but, he asserted, physical control had to be passed to the Land of Thüringia following and in consequence of the Law of

24 July 1946. Cobert contend that no such physical control passed to the Land following the Law of 24 July 1946. The trustee was the trustee of confiscated assets but his control was not the control of the Land. Cobert rely upon the documents to which I have already referred demonstrating that physical control remained with the Soviet Military Administration and not with the Land. It refers in particular to a copy of a document sent to the State Office for Public Education in Weimar dated 26 June 1946 referring to art works under lock and key at Friedenstein Palace and Castle Reinhardsbrunn in which it was said that it would be advisable to make an application to the Soviet administration at Potsdam in relation to the fate of the art works. The letter, to which I have already referred, from Etthoeffer, dated 2nd July 1946, said that he had been made personally responsible for the preservation and protection of all confiscated assets of the Duke which had been sequestered by Order of the Chief of Administration of the Soviet Military occupation for Thüringia, Major General of the Guards Kolesnitschenko. By Memorandum dated 27 January 1946 in relation to developed real estate confiscated pursuant to Order 124/126, the trustee said he could not hand over that property to the state. I have already referred to the District Education Office letter dated 28 April 1947 which spoke of the difficulties of making inventories when the lists had been locked away by the Soviet Military Administration. The letter from the Central Administration Office for Public Education in Berlin spoke of the Museum at Gotha being under the authority of the Soviet Military Administration.

The difficulty with Professor Brunner's views is that, if he is correct, the art collection was not expropriated as a result of the Law of 24 July 1946 and thus should have been returned to the Foundation pursuant to Article 4 of that Law. I find that conclusion surprising. It is plain that it was the intention of Order 154/181 and Article 1 of the Law of 24 July 1946, that assets

confiscated or sequestered by Order 124 were to be transferred to the Land of Thüringia. I am unable to envisage any reason why the art collection, which undoubtedly fell within Order 124 (read with Order 38) should have formed an exception to this process of expropriation. The scheme of Order 154/181, and of the Law of 24 July 1946 was that assets which fell within Order 124 were to be handed over pursuant to Order 154/181 and upon handover expropriation took effect by virtue of the Law of 24 July 1946. But that does not mean that assets which had already been handed over fell outwith the scope of the expropriation of the Law of 24 July 1946. It was not, in my judgment, the intention of the legislation that assets which fell within Order 124 and which had already been handed over should not be expropriated. As Mr Layton Q.C. submitted, Order 154/181 provided the mechanism for handover in respect of those assets which had not yet been handed over. Expropriation took place with effect from the time of handover.

I do not regard the documents upon which Cobert relied as demonstrating anything more than the reality of the influence exerted by the presence of the Soviet Military Command in that part of Germany. In my judgment the trustee had been in physical control of the assets of the Art Foundation under the supervision of the Land ever since 1945. If the painting had been within the territorial jurisdiction of the Soviet Military administration in July 1946 and had not hitherto been expropriated, then the Law of July 1946 would have effectively expropriated that painting as part of the collection of the Art Foundation.

I.3 Dissolution of the Foundation on 14th October 1950

The plaintiffs now contend, by an amendment during the course of the trial, that when the Minister of Justice of the Land Thüringia purported to dissolve the Art Foundation on 14th October 1950 the painting passed to the Land Thüringia by universal succession. When the Länder were dissolved in 1952, the property of the Länder devolved to the German Democratic Republic [East Germany] and on unification to the Federal Republic of Germany. Cobert accepts that if dissolution had the effect for which the plaintiffs contend then, on unification, title devolved either to the Federal Republic of Germany or to the City of Gotha.

The importance of this contention is that, if it is right, the whereabouts of the painting in 1950 is irrelevant. The Land Thüringia became owner even though the painting was not in its possession but was in the Soviet Union.

The contention raises two fundamental issues.

(1) Did the dissolution pronounced by the Minister of Justice of the Land Thüringia have extra-territorial effect as a matter of German law?

(2) Will an English Court recognise or enforce a claim to title based upon the purported dissolution?

Was the Dissolution Effective to Transfer Title to the Painting to the Land?

I should record, at the outset, that the Federal Republic of Germany's reliance upon the dissolution of the Art Foundation to trace their title came very late in the day. There was no reference to it in the original pleadings or in the evidence of Professor Werner exchanged before trial. My comments are not meant as a criticism; inevitably during the course of this case the focus on particular issues changed and new material arrived throughout the trial. Nevertheless the lateness of the submission meant that it was difficult for Cobert fully to deal with it. In particular, criticisms of Professor Brunner's evidence on this point, which I shall detail later, were not warranted; Professor Brunner's evidence did not deal with this point in full at the outset because the point had not been made. He was compelled, through no fault of his own or that of Cobert, to deal with the point at the last minute. It would, therefore, be unfair to criticise any omissions in his evidence. Rather, the lateness of the submission requires the evidence on behalf of the Federal Republic of Germany on this point to be scrutinised with particular rigour.

By Article 87 (1) of the BGB:-

> "If the fulfilment of the object of the foundation has become impossible, or if it endangers the public interest, the competent authority may give the foundation another stated object or may dissolve it."

By Article 88 of the BGB, on the dissolution of a foundation the assets pass to the person specified in the constitution.

This Article was implemented in Thüringia by Article 14 of the Thüringian Implementation Regulation 16 May 1923.

According to Professor Brunner, in his original report (paragraph 149):-

> "According to Article 14 of the then applicable Thüringian Implementation Regulation to the German Civil Code dated 16 May 1923 upon its abolition, a foundation's property passed to the state of Thüringia."

There was no translation of Article 14 in evidence before me although the plaintiffs asserted that it provides:-

> "The property of the foundation falls upon its dissolution to the state, if its constitution does not otherwise provide".

Since Professor Brunner agrees that that is the effect of Article 14, I do not think that the absence of a translation matters.

By a decision of 26 June 1941 of the Oberlandesgericht in Jena, Paragraph 10 of the Art Foundation Statutes was altered so as to provide that:-

> "Changes in statutes affecting the purposes of the Foundation and its assets, as well as decisions about the application of assets in the case of dissolution of the Foundation requires the unanimous consent of the Board of Directors. The latter is also required for the dissolution of the Foundation."

(The previous Statute made no specific reference to dissolution and referred to a majority of at least two thirds).

Paragraph 11 was altered so as to provide:-

> "Should the Foundation be dissolved or its former purposes no longer be applicable, its assets, as far as taxation laws do not provide any restrictions, are to be used for public and charitable benefits ..."

On 17th July 1998, before I had given judgment, I received further written evidence from Professor Brunner as to the effect of the amendment of 26th June 1941 and written evidence from Professor Werner in response.

Professor Brunner takes the view that this provision in the Foundation's Statutes was disregarded when the Foundation was dissolved; there was no resolution of the Board of the Art Foundation, nor was approval of the Family Foundation obtained. The founder's wishes were to take priority over the provisions of Article 88 of the BGB and Article 14 of the Thüringian Implementation Regulation.

By the time of the dissolution there was no Board of Directors in Thüringia. They had, so far as I am aware, moved to Coburg in West Germany. They made no resolution to specify a beneficiary. In those circumstances, the assets passed to the Land of Thüringia pursuant to Article 14 (Professor Werner relied upon the commentator Seifart in support of that proposition).

Professor Brunner did not dissent from the proposition that if the dissolution was valid and no beneficiary was specified, then Article 14 of the Thüringian Implementation Regulation of 16 May 1923 would have the effect that property passed to the Land. However, of more significance was his view that the failure of the Directors to specify the beneficiary confirmed that the dissolution pronounced by the Minister of Justice was in substance an act of expropriation. The absence of any reference to the Board of Directors, either in relation to dissolution or in relation to the specification of the beneficiary on dissolution, merely confirms that the dissolution was a unilateral sovereign act of expropriation. It is to that contention I now turn.

Expropriatory Intention lying behind the Dissolution

Cobert contend that, although in form the Ministry of Justice purported to dissolve the Art Foundation, in substance this was an expropriation because the Foundation was dissolved for the purpose of expropriating its assets and with the intention that those assets should pass to the Land. This submission is of importance in relation to both the first and second issues (identified at the beginning of this Section). Under German law it is accepted that an act of expropriation will not have extra-territorial effect. Moreover, if, in substance, the dissolution amounted to expropriation, it would not be recognised by the English courts, because, at the time of dissolution, the painting was not in the possession of the Land Thüringia.

Cobert rely on documents leading up to the dissolution in support of the contention that the act of dissolution was in substance an act of expropriation. On 28th July 1948, the Ministry of Finance in Weimar requested an examination whether:-

"1. The Foundation of the Duke of Saxe-Coburg-Gotha's family;

2. The Duke of Saxe-Coburg-Gotha's Foundation for Art and Science are still existent and to be considered valid entities"

A file memorandum from the Ministry for Public Education dated 21 March 1949 said:-

> "Nothing has come to the attention of the Ministry of Public Education concerning a dissolution of the two Foundations as legal persons under private law by the Ministry of Justice under paragraph 87 (mistranscription in translation) of the Civil Code, due to their inability to fulfil the Foundation purpose. As a matter of fact, the Foundation's purpose can still be carried out in relation to both foundations."

.....(the memorandum then refers to expropriation of private assets in December 1948).

The memorandum concludes in a handwritten note:-

> "Also to the Arts Department with a request for information whether these two Foundations are to become state property".

On 19 August 1949, Dr Thiemann from the Ministry of Education wrote to the Ministry of Finance:-

> "As there are no moneys available, and without touching on the valuable items in the Collection, not even the salaries of the Foundation employees can be paid, it will be correct to also dissolve this Foundation as per paragraph 87 of Civil Code. As the Foundation Statutes do not contain guidelines as to what is to be done with the assets in such a case, the Land of Thüringia will become the owner as per paragraph 14 of the ... (Regulation 16.5.1923)"

The letter continues:-

> "The Land of Thüringia would also need to examine the question which of the former Foundation employees could be re-deployed in the State Museum and the State Library."

By letter dated 9 December 1949 from the Ministry of Public Education to the Ministry of the Interior, Dr Thiemann wrote:-

> "In case of dissolution of the Art Foundation under paragraph 87 of the Civil Code, the Foundation assets would - as per paragraph 14 of the Thüringian Order of Execution of Civil Code of 16 May 1923 - transfer to the Land of Thüringia, because the Foundation Statutes do not nominate who should receive the assets upon dissolution.
>
> In addition, we refer to our letter of 19.8.1949 whereby the legal situation of the Art Foundation is made perfectly clear."

Whilst I do not accept Dr Thiemann's claim to clarity, in my judgment this correspondence does not establish that the act of dissolution was an act merely concerned to ensure the transfer of the assets of the Art Foundation to the Land. In my judgment, they support the conclusion that the Land was of the opinion that the Foundation was no longer able to fulfil its purposes and, accordingly, should be dissolved under Article 87 of the BGB. This had the effect of passing the assets of the Art Foundation to the Land, but in my judgment that effect was not the intention lying behind the act of dissolution. Dr Thiemann's statement that the Foundation Statutes did not nominate the beneficiary (letter 9 December 1949) was correct. It is apparent that he was unaware of the amendment of 1941. This was not surprising but, in my judgment, it does not reveal an intention to disregard the wishes of the Board. It merely

reflects the reality that there was no Board of Directors in Gotha. The fact that the Board of Directors had moved from Gotha to Coburg in West Germany leads to Cobert's next submission relating to the seat of the Foundation.

The Foundation Seat

Professor Brunner was also of the opinion that the purported dissolution of the Foundation by the Minister of Justice of the Land Thürigia was ineffective, because the Land had no jurisdiction to do so. He said that its jurisdiction depended upon the location of the seat of the Foundation. By 1950 he says that the actual management and seat could only have been in Coburg. His reasoning depends upon the facts relating to management of the Art Foundation in the late 1940s and upon his interpretation of Article 80 of the BGB.

The facts relating to the Art Foundation's Seat

A report from the Ministry of Finance of the Land Thüringia complained that records of the Art Foundation's assets were held in Coburg and that both the Family and Art Foundations were managed in Coburg and refused to hand over documents. (This document was not translated). It is apparent from a letter from Oberlandesgericht Bamberg (in West Germany) to the Oberlandesgericht Erfurt in Thüringia dated 16 March 1950 that the Oberlandesgericht Bamberg was prepared to take over supervision of the Foundation. By a decision of the

Oberlandesgericht Bamberg dated 30 June 1951 it was recorded that, in relation to the Family Foundation the supervisory authority formerly exercised by the Oberlandesgericht Gera (in Thüringia) had been moved by the Board of Directors from Gotha to Coburg in accordance with the Foundation Statutes. By a decree of 7 December 1960 the court in Bamberg stated that the Art Foundation should not be left without supervisory authority and recorded that:-

> "As the Family Foundation as well as the Art Foundation must not be left without a supervisory authority, and the Administrative Seat for both Foundations is at Coburg, the Bamberg Court of Appeals entailed estate senate will, effective from 1.1.1961, assume supervisory authority also of the Art Foundation".

This was recalled in a letter dated 5 February 1968.

The formal decision of the Oberlandesgericht Bamberg recording relocation of the Art Foundation's seat was recorded by a decision of the Oberlandesgericht Bamberg on 30 March 1976.

In the light of the evidence that the management of both Foundations was being carried out in Coburg from the 1940s onwards Professor Brunner's view was that the seat of the Foundation was in Coburg at the time of the purported dissolution and accordingly the Land Thüringia had no authority to dissolve the Art Foundation.

I do not agree that the Land Thüringia had no authority to dissolve the Art Foundation. It is true that it would only have authority while the seat of the Art Foundation remained within

Thüringia. But in my judgment, whatever the reality as to the actual management of the Foundation, its seat, under German law, by virtue of Article 80 of BGB remained in Thüringia. By Article 80:-

> "The seat of the Foundation is deemed, unless otherwise provided, to be the place where its management is carried on."

I accept Professor Brunner's evidence that, in reality, management of the Art Foundation was carried out in Coburg. It could hardly be otherwise since the Art Foundation itself had no control over its property insofar as that property was situated in Thüringia. But I accept Professor Werner's evidence that the seat of the Foundation remained, as a matter of German law, in Thüringia and that that seat was not changed until 30 March 1976. Pursuant to Article 80 of the BGB the place of the Foundation's management was not its seat because the Statutes otherwise provided. In those circumstances the competent authority, namely the Land Thüringia, did have power to dissolve the Art Foundation.

Did the Property of the Art Foundation including the Painting situated then in the Soviet Union Pass to the Land Thüringia?

The Federal Republic of Germany contend that once it is established that the seat of the Foundation was in Gotha and the competent authority was the Ministry of Justice of Thüringia, then property passed to the Land Thüringia by universal succession. The meaning of universal succession, foreign to English law, was explained by Lord Keith of Avonholm in

National Bank of Greece and Athens S.A v. Metliss [1958] A.C. 509. He cites one passage from Stair:-

> "Heirs in law are called universal successors *quia succedunt in universum jus quod defunctus habuit*, they do wholly represent the defunct, and are as one person with him, and so they do both succeed to him active, in all the rights belonging to him, and passive in all the obligations and debts due by him. .... the extinction of a corporation under statute or decree and the passing of all its rights and liabilities to a successor exhibits, in my view, all the features of a universal succession." (530-531)

The importance of this contention is that, if there was universal succession, the property of the Art Foundation passed to the Land even if that property, including the painting was situated within the Soviet Union.

Cobert contend, on the basis of Professor Brunner's evidence, that the doctrine of universal succession cannot apply because at the time the Art Foundation was in fact being managed in West Germany in Coburg. It cannot be said that the act of dissolution had any effect on the Art Foundation in Coburg or works of art under its effective control in West Germany at that time. Mr Brindle QC says that there is no room for the application of universal succession in relation to the Art Foundation once it is accepted that the dissolution did not have the effect of transferring title to works of art in West Germany to the Land Thüringia in East Germany. He submits that either there is universal succession in which event title to all the property passes to the successor wherever it is situated or there is expropriation which will only have effect in relation to assets within the territorial jurisdiction of the expropriating authority.

I do not accept the evidence of Professor Brunner on this point. His proposition that the dissolution did not have extra-territorial effect depended firstly on his view that because the dissolution was an act, in substance, of expropriation it had, like expropriation, no extra-territorial effect. Secondly his views were based on what he described as "German practice concerning the property in Bavaria". The dissolution had no effect on property in Bavaria, and because there was no reason to distinguish between assets in Bavaria and assets in the Soviet Union, it had no effect upon assets within the Soviet Union.

I have already considered whether the dissolution amounted to an act of expropriation. In my judgment it did not and its effect is not therefore to be limited to the territorial jurisdiction of the dissolving authority as it would have to be if that dissolving authority must be regarded as an expropriating authority. As to his second ground, it seems to me that the reason why the dissolution had no effect upon title to the assets in West Germany is not because the doctrine of universal succession did not apply but because West Germany did not recognise the extra-territorial effect of dissolution within East Germany in relation to assets in West Germany. It was the very problem of the effect of dissolution on assets in both parts of a divided Germany which led to the passing in West Germany of the Law for the Supplementation of the Law for the Amendment of Provisions concerning Entailed Estates and Foundations dated 3 August 1967. The problem is familiar to the courts of this country because of the Carl Zeiss Stiftung litigation. (None of the authorities in relation to that litigation were cited to me, but Buckley J.'s review of the history of that action in **Carl Zeiss Stiftung v Rayner & Keeler (No.3)** [1979] Ch.506 at 528 to 536 has a certain resonance in this action).

Article 1 of the Act of 3 August 1967 amends paragraph 2a of the previous Act dated 28 December 1950 as follows:-

> "If the Civil Law Foundation formed on the basis of German legal provisions had its seat on 8 May 1945 outside the territory over which this law has validity (in other words outside West Germany) and if it had assets within the territory of validity of this Act (West Germany) a duly competent superior state authority of the land in which the assets are located can exercise the supervisory function. It can hereby take all decisions which it regards as necessary in order to keep the Foundation alive or continue. In particular it may move the seat of the Foundation without being bound by provisions of the Statutes. The superior state authority may transfer the exercise of its competence to another authority."

The law of 1967 was necessary because West Germany did not recognise acts relating to a Foundation in East Germany or that any of those acts had any effect on assets of that Foundation in West Germany The reason why the dissolution of the Art Foundation in East Germany had no effect on the assets in West Germany is not because the doctrine of universal succession did not apply but because West Germany did not recognise the dissolution in East Germany and consequently did not recognise its effect.

Conclusion as to Dissolution

For the reasons I have given I am satisfied:-

1. that the seat of the Art Foundation was in Gotha in 1950;
2. that the Ministry of Justice of Thüringia was the competent authority with power to dissolve the Art Foundation pursuant to Article 87 of the BGB;
3. that the dissolution was not an act of expropriation;

4 that by universal succession, title to the property of the Art Foundation, save insofar as that property was in West Germany, which did not recognise the dissolution, passed to the Land Thüringia.

In the light of those conclusions I must now turn to the question as to whether an English Court recognises the Plaintiffs' title either in relation to expropriation or in relation to dissolution of the Art Foundation.

I.4 Recognition or Enforcement in an English Court of FRG's Title to the Painting Under German Law

If, under German law, title to the painting passed to the Federal Republic of Germany, the question arises whether an English court should recognise or enforce that title. Cobert, firstly, relies upon the principle that English Courts will not recognise a governmental act affecting private property rights when the property is situated outside the territory of that government. (Rule 122 in Dicey & Morris, q.v.supra). Secondly, Cobert invokes the principle that English courts will not entertain an action to enforce the penal, revenue or other public laws of a foreign state. (Rule 3 in Dicey & Morris).

These contentions have no bearing on my conclusion that title passed to the Land Thüringia (and thence to the Federal Republic of Germany) by the expropriatory Law of 9 October 1945 and that the expropriation of the art collection was not repealed by the Law of 4 December 1945. That expropriation was effective and will be recognised by our courts because, at that time, on my findings of fact, the painting was within the territory over which the Soviet Military Administration had jurisdiction (see **Princess Paley Olga v. Weisz** [1929] 1 KB 718

at 725) and was in the possession of the trustee. The Federal Government of Germany is merely seeking to protect rights of property which had vested prior to this action and to enforce those rights under the general law of property. Professor Mann states in Further Studies in International Law (1990)

> "It should also be accepted that if a State confiscates a chattel situated within its territories, but it does not obtain possession, it cannot recover it by action in a foreign country to which its original owner may have been able to take it." (356-7).

These contentions are, however, of particular importance in relation to my alternative conclusion that on dissolution, in 1950, title to the painting passed to the German Democratic Republic nothwithstanding that the painting was in the Soviet Union.

Was the dissolution a governmental act ?

The principle, on which Cobert relies, is summarised as Rule 122 in Dicey & Morris:-

> "A governmental act affecting any private proprietary right in any movable or immovable thing will be recognised as valid and effective in England if the act was valid and effective by the law of the country where the thing was situated (lex situs) at the moment when the act takes effect, and not otherwise."

It is important to emphasise that the submission of Cobert is wider than its earlier submission, in relation to German law, that the dissolution was in substance an expropriation. The act of dissolution of the Art Foundation was, it is said, a governmental act which affected private property rights. In those circumstances the effect of the dissolution namely the transfer of the

title to the painting, from the Art Foundation to the German Democratic Republic will not be recognised by the English Court.

The issue turns on the question whether the pronouncement of dissolution by the Minister of Justice of the Land Thüringen was in substance a pronouncement relating to the status of the Art Foundation or was in substance a governmental act transferring property rights to the Land.

It is plain that, in order to make the distinction, I must consider the substance of the action of the Minister of Justice and not merely have regard to its form (see Diplock J in **Adams v. National Bank of Greece and Athens S.A.** ([1958] 2 QB 59 at 75 and 77). In Studies in International Law (Oxford 1973) Professor Mann writes:-

> "It is equally certain that in these matters the court will not allow itself to be misled by appearances: on the contrary, it will investigate whether what the plaintiff asserts is in substance a prerogative right the direct or indirect enforcement of which is being sought. (page 502)"

Governmental acts which transfer property rights, fall within that class of case, which Nourse J, in **Williams & Humbert Ltd v. W & H Trade Marks(Jersey) Ltd** [1986] AC 369 at 378-379, described as those which English courts will not enforce on grounds of public policy (Class II laws). They are those :-

> "whose validity and effect within the territory of the foreign state are recognised but which will not be directly or indirectly enforced in England. This can now be seen to be an application of the wider rule that English law will not enforce foreign laws which purport to have extra-territorial effect :see

Bank Voor Handel En Scheepvaart N.V. v. Slatford [1953] 1 QB 248"

(379E).

In that case, Devlin J. held that the decree of a foreign government would not be effective to transfer property situated in this country whether or not the law was confiscatory or penal (see page 263). In the House of Lords in **Williams & Humbert** (q.v. supra) Lord Templeman stated the principle as:-

> "The public law of a sovereign state cannot change the title to property which never comes within the jurisdiction of that state." (431G)

Such public laws are to be contrasted with those acts which, in substance, are merely concerned with the status of a corporation or foundation. Such acts fall within the principle described as Rule 155 :

> "The existence or dissolution of a foreign corporation duly created or dissolved under the law of a foreign country is recognised in England."

The contrast may be made between **Adams** (q.v.supra) and **The National Bank of Greece and Athens S.A v. Metliss** [1958] AC 509. **Metliss** affords an example of the English court recognising that a foreign decree was an act relating to the status of a corporation and recognising, accordingly, the consequences of that status. It concerned a decree of 1953 whereby two banks were amalgamated into a third. The effect of the amalgamation was to put the new bank in exactly the same position as the former bank before amalgamation. Since English law recognised the status of the new bank so also it recognised the consequences of

its status, namely the assumption of the former bank's liabilities (see Viscount Simonds at 525 and Lord Tucker at 529).

In **Adams (q.v.supra)** the Greek Government, by legislative decree of 1956, with retrospective effect, sought to absolve the defendant bank from the obligations of the original guarantor bank in respect of bonds. Diplock J held that the law of 1956 was not a law of succession or a law relating to capacity or status but in substance discharged liabilities and altered rights which had vested in English law. Under English rules of private international law that decree was not effective to discharge the liability of the bank as guarantors under the bonds.

In my judgment the Federal Republic of Germany is correct in its contention that the pronouncement by the Ministry of Justice of the dissolution of the Art Foundation was merely a pronouncement which concerned the status of the Foundation. It was a decision made because:-

> "The fulfilment of the object of the Foundation has become impossible" (pursuant to Article 87 of the BGB.)

In those circumstances the dissolution should be recognised by this court pursuant to Rule 155 and its consequences ought to be recognised. Those consequences included the transfer of the property of the Art Foundation, pursuant to paragraph 14 of the Land Thüringen Implementation Regulation of 16 May 1923. In my judgment the act of dissolving the Art

Foundation was not an act done under that which Lord Templeman describes as "the public law of a sovereign state" or that which is described by Professor Mann as an exercise of a prerogative right or analogous to a foreign decree transferring property. It was, in my judgment, an act concerned solely with the status of the Art Foundation. The Art Foundation was dissolved in accordance with the German Civil Code. The Art Foundation was duly dissolved under the law of its place of creation. English law should, therefore, recognise the effects, under that law, of the dissolution.

Is This Action an Action for the Enforcement directly or indirectly of a Penal Revenue or other Public Law of a Foreign state?

Cobert contend that even if the act of dissolution fell outwith Rule 122 nevertheless the action in this case is the direct or indirect enforcement of a public law of a foreign state. Rule 3 in Dicey & Morris (page 97) provides:-

> "English courts have no jurisdiction to entertain an action:
>
> (1) for the enforcement, either directly or indirectly, of a penal revenue or other public law of a foreign State; or
>
> (2) founded upon an act of state."

The rationale of the Rule is that to enforce a claim based upon a penal, revenue or other public law of a foreign state is to permit an assertion of sovereign authority by one state within the territory of another.

Mr Brindle QC contends that the claim, insofar as it relies upon title derived from the dissolution decree of 1950, falls foul of Rule 3. Even though the law is not penal or a revenue law, it is a public law of a foreign state. It will not be enforced in relation to property that was not within the territory of the Land at the time of dissolution. In support of the proposition that there is a third category of laws, other than penal and revenue laws, which will not be enforced by an English court Mr Brindle QC relies upon the judgment of Lord Denning MR in **AG of New Zealand v. Ortiz** [1984] 1AC 20 to 21, a reference to Rule 3 by Lord Mackay in Williams & Humbert at 437C and in particular the decision of the Court of Appeal in **United States v. Inkley** [1989] QB 255 at 264 to 265. Whilst there remains some doubt as to whether a residual category of public law exists (see Dicey & Morris page 105), in this case I do not think it matters. It is clear that the touchstone of the third category is an act done by a state by virtue of its sovereign authority. (see Lord Denning in **AG of New Zealand v. Ortiz** at 21A). Acts which do not amount to an exercise of sovereign authority outside that authority's own territorial limits fall outwith Rule 3. Even if one recognises a third catagory of public law, in addition to penal and revenue laws, it must, at least be eiusdem generis to those laws. It must be an act *de jure imperii* and not *de jure gestionis*.

For the reasons I have already given, the act of dissolution by the Ministry of Justice was an act concerned solely with the continuing existence of the Foundation. The decision to dissolve was dictated solely by the condition of the Foundation. It was not an exercise of sovereign authority. Thus, to bring an action which seeks to protect rights which trace their

origin to the dissolution is not an attempt to exercise sovereign authority in this country. In my judgment English courts can and should recognise a title derived from the dissolution of 1950 and enforce an action which seeks to protect those rights. _ _

I.5 Return of the Painting to the German Democratic Republic in 1987

The Federal German Republic's contention that the painting must have entered the German Democratic Republic in 1987, on its way to West Berlin, led to a spirited argument as to whether that itself had in law the effect of perfecting an inchoate expropriation. Sadly, it is unnecessary to resolve the question whether the fact that the painting may have passed over or through the territory of the German Democratic Republic had that legal effect. No such fact has been established. There is no evidence as to how the painting came into West Berlin. In those circumstances there is no factual basis upon which to found a conclusion, if such a conclusion could be reached, that as a matter of law title was thereby perfected.

I.6 City of Gotha's Claim to Possession

This issue arises only if the Federal Republic of Germany fails to establish title to the painting and it is owned by the Art Foundation. It is based upon a short passage in Professor Werner's supplementary opinion. The Schlossmuseum in Gotha is owned and operated by the City of Gotha. The Schlossmuseum's right to possession arises, it is said, under Paragraph 3 of the Statutes of the Art Foundation which provide that the collection should be

made available for public use. A possessor has the right to demand restitution of possession from:-

"the person whose possession is defective relative to him"

(See Article 861 of the BGB).

The museum was assigned to the City of Gotha from 1952 (see paragraph 177 of Professor Brunner's opinion). However, I accept Professor Brunner's evidence that it does not follow that the art collection was in the possession of the museum. The museum was an establishment of the Art Foundation; it was not itself a separate legal entity capable of holding independent legal rights to possession. The fact that the museum was located within the City of Gotha does not establish any legal right. Nor could a right to possession in the City of Gotha be derived from the purpose of the Foundation. The purpose merely establishes obligations in the representative bodies of the Foundation, the statute does not create any independent right to possession in the City of Gotha. I conclude, in accepting Professor Brunner's evidence on this point, that the City of Gotha has no right to possession. Even if it could be said to have had the right of possession once the museum was assigned to the City of Gotha in 1952 the painting itself had long since ceased to be in that city. For those reasons, if the Federal Republic of Germany's claim had failed the City of Gotha's claim would have suffered a similar fate.

Mr Layton QC on behalf of the City of Gotha contended that Professor Brunner had, in cross-examination, conceded that the city had a claim for recovery. The concession, such as it was, was made in the context of a question concerning the right to bring an action after unification

and related to possession of the collection now. Professor Brunner's answers, placed in their proper context, cannot be understood as undermining his previous opinion.

II.2 Is the German Limitation Period relevant?

I turn now to consider whether the Federal Republic of Germany's claim is time-barred. The plaintiffs' contend that German law is irrelevant. If they are right the action is not time-barred. Now that it is accepted by Cobert that there has been no good faith purchase of the painting, under English law the claim is not time barred nor is the Federal Republic of Germany's title treated as extinguished pursuant to Section 3 of the Limitation Act 1980. Section 4 provides a special time limit in the case of theft. No thief nor persons taking the stolen chattel from the thief, may take advantage of the limitation period provided for in Section 3. The period of limitation only starts if and when the stolen painting was purchased in good faith.

The dispute as to whether the German limitation period applies turns on a proper interpretation of the Foreign Limitation Periods Act 1984. Section 1 provides:-

> "(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter:-
>
> (a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and
>
> (b) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply.

(2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account.

(3) The law of England and Wales shall determine for the purposes of any law applicable by virtue of subsection (1)((a) above whether, and the time at which, proceedings have been commenced in respect of any matter; and accordingly, section 35 of the Limitation Act 1980 (new claims in pending proceedings) shall apply in relation to time limits applicable by virtue of subsection (1)(a) above as it applies in relation to time limits under that Act.

(4) A court in England and Wales, in exercising in pursuance of subsection (1)(a) above any discretion conferred by the law of any other country, shall so far as practicable exercise that discretion in the manner in which it is exercised in comparable cases by the courts of that other country.

(5) In this section "law", in relation to any country, shall not include rules of private international law applicable by the courts of that country or, in the case of England and Wales, this Act.

Section 4 provides:-

"(1) Subject to subsection 3 below, references in this Act to the law of any country (including England and Wales) relating to limitation shall, in relation to any matter, be construed as references to so much of the relevant law of the country as (in any manner) makes provision with respect to a limitation period applicable to the bringing of proceedings in respect of that matter in the courts of that country and shall include:-

(a) references to so much of that law as relates to, and to the effect of, the application, extension, reduction of interruption of that period; and

(b) a reference, where under that law there is no limitation period which is so applicable, to the rule that such proceedings may be brought within an indefinite period.

(2) In subsection (1) above "relevant law", in relation to any country, means the procedural and substantive law applicable, apart from any rules of private international law, by the courts of that country."

It is plain from Section 1 and Section 4 of the 1984 Act that the Act has no application unless German law falls, in accordance with the rules of English private international law, to be taken into account:-

> "in the determination of any matter."

Mr Layton QC, on behalf of the plaintiffs, contends that German law is irrelevant to the plaintiffs' claim for wrongful interference in England with goods acquired in England. There is no connecting factor to link the claim with Germany. The rules of English international law are rules which apply to foreign law if:-

> "The issue before the court affects some fact, event or transaction that is sufficiently closely connected to a foreign system of law to necessitate recourse to that system ..." (Cheshire & North Private International Law (12th Edition) page 5).

The tort has been committed in England by a Panamanian company which acquired the painting in England.

I cannot accept this submission, attractive though its simplicity be. The claim under Section (2)(1) of the Torts (Interference With Goods) Act [1977] is classified in Goff & Jones The Law of Restitution (4th Edition) (pages 75 to 76) as a restitutionary proprietary claim. It is a claim to protect and enforce rights deriving from the plaintiffs' ownership of the painting. Assertion of those rights depends upon the plaintiffs' assertion of title which, it is accepted, must be determined under German law.

But Mr Layton QC 's proposition that the 1984 Act has no application relies upon a more subtle submission. That submission requires a distinction to be made between the issues relating to title and limitation. German limitation law has no relevance to the issue whether the Federal Republic of Germany can trace its title by establishing the painting was expropriated or that title passed on dissolution of the Art Foundation. Once it has successfully traced its title to the painting, title is no longer in issue and German law is no longer relevant. The sole issue remaining is one of English law relating to the conversion of a painting in England. German law applies to the question of title because English conflict rules apply the lex situs, but it has no application in relation to limitation.

Mr Layton QC supports that contention by consideration of how the issue would have been resolved before the 1984 Act. German limitation law would not have been relevant because if it had been applicable it would have been regarded as procedural; it did not extinguish title. English limitation law would have governed the claim.

At the core of the 1984 Act lies the principle that the period of limitation applicable under the lex causae should be applied. (see The Law Commission's Report Classification of Limitation in Private International Law 1982 No.114 paragraphs 4.3 and 4.11). The principles of international law are permeated with that which in earlier days was the lingua franca of international law jurists. But the Latin does not illuminate. The lex causae is the law governing the question (see Dicey & Morris page 30). But what is the question? In the language of Section 1 (1) and Section 4(1), of the 1984 Act: what's the matter?

The problem arises because Section 1(1) appears to suggest that any law which is to be applied on any substantive issue should also apply to limitation, thus giving rise to many cases where Section 1(2) would apply. Several laws would be applicable to various aspects of a dispute. In his article on time limitation in English law (1985 LMCLQ 497) P.A. Stone amply demonstrates how this approach is contrary to the purposes of the Act particularly in relation to breach of contract. It is clear that the Act intended limitation to be governed by the proper law of the contract (see Law Commission Report 3.9, 4.4 and 4.6). That is likely to have been the law chosen by the parties. Yet if Section 1 means that any law applied in relation to any substantive issue should also apply to limitation that principle cannot be followed. There are many cases where the issue of validity or capacity may have to be considered and where those laws differ from the proper law of the contract. Mr Stone's solution is to apply the limitation rules applicable to the proper law of the contract; he does not elucidate the process of statutory construction which permits so sensible a conclusion.

I was referred by both parties to passages in Chapter III of Dicey & Morris dealing with the "incidental or preliminary question". The chapter opens with the dispiriting observation that:-

> "It is a technical problem of considerable difficulty which was first noticed by academic writers on the Continent."

The authors of Dicey & Morris suggest a flexible approach taking into account policy considerations. (see page 55). I can well understand such an approach in relation to the problems identified by P.A. Stone in relation to contract. It provides an uncertain guide in the instant case.

Unless it is possible to say the "matter" is only the claim for wrongful interference with the painting and not the issue of title, Section 1(2) governs this action and both German and English limitation law applies. It is agreed that if Section 1(2) applies, the effective limitation period is which ever is the shorter (see e.g. Dicey & Morris page 187). Section 1(2) was directed to the double actionability rule relating to tort, (pursuant to which there are two leges causae). The Law Commission Report No. 114 said:-

> "... the general rule requires the court to take into account both the lex loci delicti and our law. Normally, therefore, there are in effect two leges causae governing such cases, one of which will always be English law; in regard to limitation the effective period will be the one described by either the relevant foreign law or by its English equivalent, whichever should be the shorter.
>
> 4.15 We recommend ... that the rules of limitation in force in England and Wales should not be excluded in cases where both the foreign and the law of England and Wales are to be taken into account under the rules of private international law in the determination of any issue by the court;"

It seems clear that but for the dual actionability rule Section 1(2) would not have been enacted. It derogates from the principle that where foreign law falls to be applied, that country's law of limitation should also be applied. Such a rule resolves the difficulties which had arisen from the need to distinguish between procedural and substantive law. The long title makes it clear that the Act sought to remove the need to consider whether a foreign limitation law was merely procedural or was a matter of substance:-

> "An Act to provide for any law relating to the limitation of actions to be treated, for the purposes of cases in which effect is given to foreign law or to determinations by foreign courts, as a matter of substance rather than as a matter of procedure."

Thus, it seems to me, consistent with the statutory principles contained in the 1984 Act, a court should strive to identify one law as governing the issue to be determined rather than two. The plaintiffs' submissions have the merit of achieving that objective by restricting Section 1(2) to cases where the double actionability rule applies. No significance is to be attached to the continuing existence of Section 1(2); the double actionability rule was abolished by Section 10 of the Private International Law (Miscellaneous Provisions) Act 1995 but that rule still applies in relation to the determination of issues arising in any defamation claim (Section 13).

It is tempting to follow the approach contended for by Mr Layton QC and to regard the issues relating to title as distinct from the action for conversion in order to fulfil the purpose of the 1984 Act and to isolate one law as governing the issue. By that means Section 1(2) is confined merely to the one remaining tort where the double actionability rule survives. There is, however, in my judgment an insuperable difficulty to this approach. There seems no particular difficulty in adopting that approach in a case such as this, where the German law of limitation is merely procedural and does not affect the plaintiffs' title to the painting. In such circumstances, adopting the flexible approach suggested by Dicey & Morris, there seems no good reason why the German law of limitation should affect a tort committed in this country in relation to a painting in this country. But, in my judgment, there would be far greater difficulty if the foreign law of limitation was substantive, in other words if the foreign law extinguished property rights. In such a case it would be difficult to say that there were not two laws governing the matter in issue. That was the conclusion of Waterhouse J in **The Cintas Foundation Incorporated v. Sotheby's Unlimited and Fondarm International Establishment.** (Unreported) 11 February 1995. In that case questions arose as to two

paintings by a Spanish impressionist. Under Cuban law, after the expiry of the limitation period, title was extinguished. Waterhouse J concluded that there were two leges causae and accordingly section 1(2) applied. (see page 63). The Judge's reasoning was not set out in full because, in the light of his decision on other issues, it was obiter. That decision exposes the difficulty in adopting the approach advanced by Mr Layton QC. If, as he was disposed to suggest, there may be two leges causae where the foreign limitation law is substantive then it becomes necessary for a court in this country to consider whether the foreign law is procedural or substantive. To do so seems to me to run counter to one of the fundamental purposes of the 1984 Act which is to avoid the necessity for making such decisions. Whilst I accept that it is desirable, consistently with the purpose of the 1984 Act, to identify one lex causae, in my judgment that consideration is outweighed by the importance of avoiding the need to distinguish between foreign substantive and foreign procedural laws. The arguments relating to the policy of the Act do not permit me to ignore the plain words of section 1(2). In my judgment the laws of both Germany and England govern the matter before the court; they both fall to be taken into account in the determination of a matter which involves issues as to title as well as to the protection of the rights which flow from that title. Accordingly Section 1(2) of the 1984 Act applies. Thus German limitation law applies.

II.3 Limitation Under German Law.

I have had evidence on this issue from Professor Siehr on behalf of the plaintiffs and from Professor Brunner on behalf of Cobert. The following propositions of German law are not in dispute:-

i. The right to recovery is statute barred after a period of thirty years (Article 195 of the "BGB").

ii. No title is transferred to the person in possession by the expiry of the limitation period of thirty years.

iii. The limitation period begins when the claim arises (Article 198 BGB).

iv. The thirty year period continued to apply even when the painting was outside Germany within the Soviet Union.

v. Time runs irrespective of whether the claimant is aware of the existence of the claim or the identity of his opponent.

vi. A new claim for recovery arises against each new possessor.

It follows from that proposition that a new thirty year limitation period began to run each time the picture changed hands. But a succeeding possessor can take advantage of the period of time which elapsed while his predecessor was in possession pursuant to Article 221.

The legal dispute depends upon the effect of paragraph 221 BGB which provides:-

> "If a thing, with regard to which a claim *in rem* exists, comes by succession (Rechtsnachfolge) into the possession of a third party, the time of prescription which elapsed during the time of possession by the predecessor in title is reckoned in favour of (translated before me as benefits) the successor in title."

(Articles 195, 198 and 221 of the BGB refer to "Verjährung". This has been translated as "prescription" but has been called "limitation" in evidence before me to distinguish it from prescription in the sense of usucaption.)

If Article 221 applies, the last acquirer of possession benefits from all periods of the limitation period which have expired in the hands of his predecessors (see e.g. von Feldman 1993 Marginal Note 2). Thus all the periods of possession which have elapsed during the period of previous possessors can be credited to Mrs Breslav (see Professor Brunner paragraph 117).

Under German law there is a basic distinction between an original acquisition of possession and a derivative acquisition of possession. Derivative possession arises where possession is obtained from a previous possessor.

Professor Siehr says that the 30 year period of limitation provided by German law has not expired for two reasons:-

> (1) Article 221 has no application to a transfer from the person who may loosely be described as a bailor to a bailee. The person who in English law would be described as a bailee is regarded, under German law, as being in direct possession. The bailor is in indirect possession. When possession of the

painting was handed to Mrs Dikeni by Fürst, Fürst became the indirect possessor and Mrs Dikeni the direct possessor. Article 221 has no application to that transfer.

(2) Even if, contrary to that proposition, Article 221 does have effect, it has no effect where a direct possessor misappropriates the asset. In such a case the direct possessor cannot take the benefit of any previous limitation period and cannot pass that benefit on to any successor. Thus when Mrs Dikeni, in breach of her obligation to Fürst, misappropriated the painting when she transferred it to Rohde, the art dealer in Berlin, or alternatively Rohde himself misappropriated it, time will only have started to run from the date of that misappropriation.

The Application of Article 221 to a Transfer from Bailor to Bailee

Professor Siehr's proposition is that there is no 'Rechtsnachfolge' between a bailee, i.e. someone in direct possession, and a bailor (who, after transfer, is in indirect possession). This was a proposition only raised fully in a supplemental opinion delivered after the trial started. There may have been some indirect reference to the proposition in his earlier report at paragraphs 24 to 26 but his opinion previously concentrated upon the effect of a misappropriation. Professor Brunner's view is that the distinction between possession as bailee and proprietary possession has no bearing upon the applicability of Article 221(see paragraph 108 of his report). His view is that the decisive consideration is how direct

possession has been established. If direct possession was obtained by voluntary transfer then Article 221 applies (see paragraph 109). Although in cross-examination he appeared to suggest that a bailee could not rely upon Article 221, looking at his evidence as a whole and particularly his replies in re-examination I became satisfied that he had not changed his view and did not agree with Professor Siehr.

The concept of indirect possession is explained in Article 868 BGB:-

> "If a person possesses a thing as usufructuary, pledgee, ... lessee, depository or in a similar relationships by virtue of which he is as against another, entitled or obliged for a time to have possession, the other person is also a possessor" (indirect possession).

By virtue of Article 986 the direct possessor may rely upon any rights the indirect possessor has to refuse delivery as against the owner. Article 986 (1) provides:-

> "The possessor can refuse the delivery of the thing, if he, or the indirect possessor from whom his right of possession derives, is entitled to the possession as against the owner. If the indirect possessor does not have the authority as against the owner to hand over the property to the possessor, the owner may demand the delivery of the thing to the indirect possessor or, if the latter cannot or will not accept the possession again, to himself."

The proposition that a bailee cannot take advantage of Article 221 because there is no 'Rechtsnachfolge' between indirect and direct possessor finds support in a number of commentaries. Coing states:-

> "In respect of the cases of Article 868 it will have to be taken into account that the (direct) possession obtained with the consent of the predecessor on the basis of one of

the legal relationships set out in Article 868 does not exclude simultaneous (indirect possession) of the predecessor, i.e. the limitation period continues to run against the claim against the indirect possessor and that, if the indirect possessor is entitled to possession against the owner on the basis of the completion of any limitation period in his favour, also the direct possessor (the tenant, borrower, bailee etc.) may refuse the return of the object on the basis of 986 subsection (1). *The application of section 221 is therefore excluded in the cases of letting agreements (Miete), leases (Pacht), loans, bailments etc.*" (Marginal Note 5). (My emphasis).

Further support can be found in Dilcher at paragraph 7(c) and Walter (paragraph 4) who says:-

"There is no succession into possession between the direct and the indirect possessor. Pursuant to Article 868 the indirect possession exists in parallel. However the time of possession of the indirect possessor must be taken into account for the benefit of the direct possessor insofar as the direct possessor can refuse the return of the object pursuant to Article 986 sub-paragraph (1) where the limitation period against the indirect possessor has expired."

Johanssen in his commentary on Article 221 at Marginal Number 3 may support that proposition although I have difficulty in understanding it due to problems with the translation (rechtsbeständige was originally translated as "in a valid manner" then subsequently as "non-dependent" but it is difficult to understand what is meant by "whereby proprietary possession is not necessary"). (Nobody explained to me how there could be a non-derivative possession which was not proprietary).

There are commentaries on Article 221 which take the contrary view. Peters states at Marginal Note 7:-

"The provision is applicable to the succession in relation to direct possession as well as in relation to indirect possession. If the previous direct possessor creates indirect possession by handing the object over to a third party, the previously

> running limitation period continues to run against him (i.e. against the previous direct and now indirect possessor), and Article 221 is applicable for the benefit of the direct possessor with the consequence that he can rely upon the period which has expired during the possession of the previous possessor, who is now the indirect possessor even if this period was itself not yet sufficient to create a limitation of the action. Article 221 remains applicable where the direct possessor creates proprietary possession (possession as an owner - Eigenbesitz)."

Heinrichs states:-

> "Article 221 provides that in the case of derivative change of possession the time which has expired during the possession of the predecessor benefits the successor. In the case of multiple transfers of possession the time which has expired during the possession of all predecessors benefits the last possessor (prevailing opinion)".

Von Feldmann supports that view. Some reliance was placed upon Bund and Joost in their commentaries on Article 869 but the translations are so opaque that it is difficult to understand the relevance of what they are saying to this issue.

There is no decision in a German court on this issue. A German court would not be bound by the fact that the majority of commentators took a particular view or by the most recent statement of opinions. Where, as here, the reputation of the authors cannot be impugned it would look at the quality of the arguments. I must adopt a similar approach, guided by the evidence of Professors Siehr and Brunner.

The difficulty with Professor Siehr's views are that they were elucidated so late in the day. That is not designed as a criticism but it has led to a conflict which appears to me to be more a matter of legal theory and has little practical effect in this case. The proposition that Article

221 has no application in relation to a derivative possession is too broadly stated. Coing, on whom the plaintiffs rely states:-

> "In the sense of Article 221 one will be able to speak about a "succession" where the new possessor's possession (an amendment to the translation) is based upon a consensus with the previous possessor; this is true even in cases where the right to possession is derived from an unauthorised person, insofar as the provisions of the German civil code provide that rights can be derived from an unauthorised party." (Marginal Note 5).

Walter states:-

> "Article 221 stipulates an exception from this rule for a derivative obtaining of possession by allowing the possessor to benefit from the periods of a limitation period which have expired during the possession of his predecessor. Since the successor is to take over the legal position of his predecessor this provision does not only apply to the possession of the direct predecessor." (Marginal Note 1).

As a matter of machinery it may well be that a direct possessor does not obtain the benefit of periods of limitation which have elapsed during the possession of his predecessor by virtue of Article 221 but rather by virtue of Article 986(1). The essential point is that indirect possession exists "in parallel" to direct possession. As Coing comments, the limitation period continues to run in favour of the indirect possessor (see also Peters q.v. supra). It is the indirect possessor who obtains the benefit of lapse of time by virtue of Article 221 whereas the direct possessor obtains that benefit by virtue of Article 986(1). It does not seem to me that the machinery matters. Subject to Professor Siehr's second point in relation to Unterschlagung, whilst Mrs Dikeni was in possession as a direct possessor time continued to run in favour of her predecessor the indirect possessor Fürst. Fürst obtained the benefit of previous lapses of time through Article 221 and Mrs Dikeni by virtue of 986(1). Similarly, when the painting

was transferred to Rohde subject to the effect of any misappropriation by either Mrs Dikeni or Rohde. In cross-examination (day 6 page 31 to 32 and 33 to 34) Professor Siehr appeared to me to accept that that was the case. He accepted that if after a thirty year period a bailment occurred, both bailee and bailor would be able to rely upon the thirty year period and that the one in direct possession could raise the same objections to a claim by the owner as the bailor; it was, as he accepted, the bailor's limitation period which the bailee could rely upon. Professor Siehr's first point does not assist the plaintiffs.

Subsequent Misappropriation ("Unterschlagung") by the succeeding Possessor.

Professor Siehr is of the opinion that if a succeeding possessor, who has taken possession with the consent of his predecessor, subsequently misappropriates the object, Article 221 is not applicable. Professor Brunner takes the view that the key to the application of Article 221 is voluntary transfer of possession and subsequent misappropriation is irrelevant. Both experts agree that Article 221 is excluded where possession is acquired by unlawful interference with direct possession (Verbotene Eigenmacht) (see paragraph 100 of Professor Brunner's report)). By paragraph 858 BGB:-

> "(1) The person who against the will of the possessor deprives him of possession or interferes with his possession, acts unlawfully ...
>
> (2) Possession obtained by unlawful interference is protected. The successor in possession must admit the defect against himself ..."

Both agree that theft (Diebstahl) is an example of "Verbotene Eigenmacht". The dispute centres on whether Article 221 is inapplicable where the succeeding possessor obtains possession with the consent of the preceding possessor but subsequently misappropriates the asset. The effect of a subsequent misappropriation is the subject of dispute not only between the experts but also in the commentaries on Article 221. Coing, accepted by both Professors to be of particular eminence states in his commentary to the 1957 edition of Staudinger:-

> "Article 221 is not applicable where there is an original acquisition of possession by the succeeding possessor e.g. in the case of prescription, occupation, robbery or theft (Diebstahl). Pursuant to the purpose of the provision its application is also excluded where the possession of the succeeding possessor may have come about with the consent of the preceding possessor but its continuation is based upon a tort (misappropriation (Unterschlagung)) of the succeeding possessor" (Marginal Note 5).

Succeeding commentators have either omitted to deal with the question or have disagreed. Dilcher in his commentary in 1980 in the 12th edition of Staudinger says:-

> "There is no possessory succession where the possession is acquired unlawfully; otherwise the tortious act would be benefited by the possessory succession pursuant to Article 221".

Peters in the 13th edition makes no specific reference to this point but relies upon Article 858 in support of the proposition that Article 221 has no application where the obtaining of possession is without the consent of the previous possessor. The last sentence of Marginal Note 7 (q.v. supra) seems to favour Professor Brunner's view.

Walter confirms that Article 221 is not applicable where the original acquisition was unlawful (Verbotene Eigenmacht) and records Coing's commentary which I have already cited. He makes no comment upon Coing (no weight can be placed upon his use of the word "however" which precedes his reference to Coing; it is unlikely to have been an accurate translation).

It is von Feldmann's Munich commentary (3rd Edn. 1993) which provides the strongest support for Professor Brunner's view:-

> "On the other hand the expiry of the limitation period is not affected where the succeeding possessor, who has obtained possession in accordance with the will of his predecessor, subsequently misappropriates (unterschlägt) the object or continues his possession based upon another tort, regardless of the fact that a different provision would be extremely unpracticable due to the practical difficulty of determining the exact point in time (of the intentions of the misappropriating party) and it would also not be justifiable to restart the limitation period merely upon a change of possession based upon consensus."

There is no preponderance of reasoned views which contradict those expressed by Coing. My conclusion must be based on my judgment of the cogency of the arguments advanced by the experts and the commentaries upon which they rely.

Despite the need for judicial comity the justification of von Feldmann (a judge) for the view that subsequent misappropriation has no effect on the application of Article 221 seems to me unpersuasive. He speaks of the practical difficulty of determining the exact point in time when one in possession forms the intention to misappropriate. That change of intention is, in law, decisive (see Professor Brunner paragraph 105). If during the course of a bailment a bailee intends to keep the object for himself he becomes a proprietary possessor. Whilst that may be

the position in law, as a matter of evidence that change of intention will not be manifest until the bailee does an act inconsistent with the terms of the bailment. In other words, whilst legally the nature of the possession changes at the moment the intention is changed, in reality that change of intention can only be identified when there is some outward manifestation of the change. Professor Brunner agreed that some manifestation would be needed in order to be able to say there had been a misappropriation (day 6 page 48). It does not seem to me that there is any practical difficulty in determining the time of misappropriation when absent some observable act of misappropriation, a change of mind will never be revealed.

Professor Brunner relied upon the importance of a third party being able to rely upon the outward appearance of legality. The justification for the rule that Article 221 applies despite a misappropriation is said to be protection of an innocent third party who should be able to rely upon the outward appearance of the lawful nature of the transaction. I did not find this a persuasive rationale for the distinction between theft and misappropriation. An innocent third party is just as likely to be duped by one who has misappropriated property as by the thief. Neither are likely to reveal their dishonesty. A third party is no more likely to be able to discover a misappropriation than a theft.

Dilcher's justification for the rule that there is no possessory succession where the possession is *acquired unlawfully* namely that a tortious act should not have the benefit of Article 221 applies, it seems to me, with equal force to misappropriation. (see Professor's Siehr's Supplemental Opinion paragraph 3(b)).

Mr Brindle QC relies upon the very concept of unlawful interference (Verbotene Eigenmacht) as providing the key to the problem. One who has obtained possession by consent cannot commit an unlawful interference in relation to the indirect possessor (Professor Brunner paragraph 109). Professor Brunner's view relies upon the commentaries to which I have already referred (paragraphs 113 to 116). In my judgment none of the commentaries provide a convincing rebuttal of Coing's views. Once misappropriation has occurred the nature of possession changes; it is a proprietary possession. In such circumstances it does not seem to me rational that a direct possessor who changes the nature of his possession by misappropriation should be able to pass to a transferee the benefit of the limitation period which elapsed during the time he was a direct but not a proprietary possessor. It seems to me logical that the chain of non-proprietary possession has been broken. Accordingly, on this point, I accept Professor Siehr's view based upon the commentary of Coing. That is not to say that no benefit of lapse of time will pass to the transferee. The transferee will obtain, by virtue of Article 221, the benefit of such time which has elapsed whilst the object was in the possession of the transferor who was guilty of misappropriation (see Professor Siehr day 6 page 10). The transferee will not obtain the benefit of any lapse of time prior to the misappropriation.

In those circumstances I conclude that the German limitation period had not expired at the time proceedings were commenced by the Federal Republic of Germany in 1997 or the City of Gotha in 1993. The period started to run either when Mrs Dikeni misappropriated the painting in 1987 or when, in that year, it was misappropriated by Rohde. The plaintiffs' claim does not fail by reason of the operation of the thirty year German limitation period.

II.4 Public Policy

Had I concluded that the plaintiffs' claim was barred under German Law, it would have been necessary to consider whether that law conflicted with English public policy. I set out my conclusions on that issue; it may provide a framework for further debate and I make further findings of fact relevant to that issue.

Section 2(1) of the Foreign Limitation Periods Act 1984 provides:-

> "(1) In any case in which the application of section 1 above would to any extent conflict (whether under sub section (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.
>
> (2) The application of section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings."

The plaintiffs contend that if the German limitation period has expired it should be disapplied pursuant to section 2(1) because it conflicts with English public policy. I shall determine whether to disapply the German limitation period according to the following principles.

> (1) Public policy should be invoked for the purposes of disapplying a foreign limitation period only in exceptional circumstances. Too ready a resort to public policy would frustrate our system of private international law which "exists to fulfil foreign rights not destroy them" (see Law Commission Report No 114 3.2(ii), 4.35, and Evans J in **Arab Monetary Fund v. Hashim** [1993] 1 Lloyds Rep. 543 at 592 (referring to the Law

Commission's view that it should only apply "in most unusual circumstances" (paragraph 4.39)).

(2) Foreign law should only be disapplied where that law is contrary to a "fundamental principle of justice". (see Law Commission Report No. 114 4.43 and 4.44). In **The Estate of Fuld, decd.** (No. 3) [1968] P. 675 Scarman J said:-

> "an English court will refuse to apply a law which outrages its sense of justice or decency" (698).

In **Oppenheimer v. Cattermole** [1976] AC 249 the House of Lords refused to recognise racially discriminatory legislation on the grounds of public policy; so too our courts would refuse to recognise discriminatory limitation law.

(3) The fundamental principle of justice with which it is said foreign law conflicts must be clearly identifiable. The process of identification must not depend upon a judge's individual notion of expediency or fairness but upon the possibility of recognising with clarity a principle derived from our own law of limitation or some other clearly recognised general principle of public policy (see paragraphs 4.35 and 4.45 of Law Commission Report No 114).

English courts should not invoke public policy save in cases where foreign law is manifestly incompatible with public policy. The Law Commission expected that that approach would be adopted and thus did not recommend the use of the word "manifestly" in its proposed Bill. (Paragraph 4.38).

(4) The English law of limitation serves the purpose of providing protection for defendants from stale claims, encouraging claimants to institute proceedings without unreasonable delay and conferring on a potential defendant confidence that after the lapse of a specific period of time he will not face a claim (Paragraph 4.44 of Law Commission Report 114).

(5) A foreign limitation period will not be disapplied as being contrary to public policy merely because it is less generous than the comparable English provision (see **Durham v. T & N PLC and others** (unreported decision of the Court of Appeal dated 1st May 1996 per Sir Thomas Bingham MR at page 12)). Some reason other than mere length must be identified for invoking public policy (see Law Commission Report 114 Paragraph 4.46).

The plaintiffs rely upon the fact that under German law no account is taken of the plaintiffs' state of knowledge, no account is taken of the fact that the painting was stolen, the defendants were not bona fide purchasers and the defendants were guilty of deliberately and unconscionably concealing Cobert's identity and address.

It is true that there are special rules whereby time does not begin to run in English law until relevant facts could have reasonably been discovered. But those rules only apply in respect of actions for personal injuries (Sections 11 to 14), in respect of latent damage (Section 14(a)), in respect of disability (Section 28), and where there has been fraud or deliberate concealment by the defendant or the action is for relief from the consequences of a mistake (Section 32). It seems to me that the proposition that a foreign limitation period which fails to take account of a plaintiff's state of knowledge is likely to be contrary to public policy is too broad. If a foreign limitation period

relevant to, for example, a personal injury action takes no account of a plaintiff's state of knowledge that arguably would be contrary to our public policy or at least cause a plaintiff undue hardship and thus conflict with English public policy (see per Sir Thomas Bingham MR in **Durham** (q.v. supra pages 11 to 12). Our law in respect of latent damage affords another example. Prior to The Latent Damage Act 1986 the law that time started to run when damage came into existence was described as "unjustifiable in principle" and "harsh and absurd" (see **Pirelli General Cable Works Ltd. v. Oscar Faber & Partners** [1983] 2 AC 1 at 19F).

It is said that it would be contrary to public policy to apply a German limitation period when Cobert deliberately and unconscionably concealed facts relevant to the plaintiffs' claim. The plaintiffs rely upon the fact that Cobert through Mr Montgomery had been told by Mina Breslav that the painting had disappeared from Gotha (see Mina Breslav paragraph 26). Mr Montgomery knew, at least by November 1991, that the painting had been stolen because that is what he told Mr Feigen an art dealer in New York (see Feigen paragraph 4). Mr Montgomery told him that he believed that the statute of limitations had run out in Russia and Germany and would run out in the United Kingdom in approximately two years from the time of their meeting. (see Feigen paragraph 5). When the City of Gotha was contacted by Sotheby's by letter on 16th December 1991 they were told that Sotheby's had been commissioned by a third party to auction the painting. Sotheby's recorded that the painting was listed as lost and stated that it was their policy not to auction objects without first offering them to the previous owner. They made an offer to sell the painting for £700,000 left open until 15 January 1992. Despite requests for the identity of Cobert twice in April 1992 and twice in June 1992, its identity was not disclosed until 19th June 1992 and the address was not disclosed until 16 July 1992. When the painting appeared in Sotheby's catalogue in April 1992 no reference was made to the theft of which Mr Montgomery had spoken to Mr Feigen back in November 1991.

I record these facts not in any criticism of Sotheby's, which has not appeared, but of Cobert who through Mr Montgomery had stated that the painting had been stolen back in November 1991 but subsequently asserted that it was a gift.

Mr Brindle QC, on behalf of Cobert, contends that any deliberate concealment by Cobert has no relevance to the fact that under German law the limitation period had expired. It had expired long before Cobert acquired the painting.

By Section 32:-

> "(1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either
>
> ... (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; .....the period of limitation shall not begin to run until the plaintiff has discovered the ... concealment ... or could with reasonable diligence have discovered it.
>
> References in this subsection to the defendant include references to the defendant's agent ...."

In my judgment Cobert did deliberately conceal facts relevant to the plaintiffs' right of action. It concealed its identity, address, its knowledge of the loss of the painting in 1989 when the painting was acquired, and its knowledge of the theft, exposed by the evidence of Feigen in November 1991. In **Sheldon v. R.H.M. Outhwaite (Underwriting Agencies) Ltd** [1996] 1 AC 102 the House of Lords ruled that the words of Section 32(1)(b) of the 1980 Act applied where the concealment relevant to the facts occurred after the accrual of the cause of action, even if that concealment occurred after the period of limitation had elapsed. In the course of his speech Lord Keith pointed

out that a construction which led to the conclusion that the concealment must be contemporaneous with the accrual of the cause of action would mean:-

> "concealment occurring one month or even one day, after the accrual would afford the plaintiff no protection at all. Perhaps a more cogent argument against the construction is that if it is correct even a concealment taking place more than six years after accrual of the cause of action would bring section 32(1) into play. But that is not a realistic objection, since it is not conceivable that a potential defendant would set out to conceal facts relevant to a cause of action when more than six years had elapsed since its accrual."

Yet it is that inconceivable event which has occurred in this case; Cobert set out to conceal facts long after the time when it believed the German limitation period had elapsed.

Lord Browne-Wilkinson identified the underlying rationale as being that the defendants should not be entitled:-

> "to benefit from their own alleged unconscionable behaviour by deliberately concealing the facts relevant to the plaintiffs' cause of action." (145H).

Lord Nichols thought that both arguments produced unattractive alternatives.

> "If initial concealment should stop time running so equally should subsequent concealment. The underlying mischief is the same." (152E)

But he pointed out the absurdities of the contrary argument that:-

> "The statutory consequence of concealment is to deprive the defendant of the benefit of time, however short or long, which has already run in his favour before there is any question of concealment".

He concluded that, forced to make a choice, he should adopt the approach of Lord Keith and Lord Browne-Wilkinson. (155A to B).

English law, therefore, provides that time will not run in favour of a defendant who is guilty of deliberate concealment whenever that deliberate concealment takes place until the plaintiff has discovered the concealment or could with reasonable diligence have done so.

Notwithstanding the decision in Sheldon, I do not think that it is possible to identify with sufficient clarity a public policy which deprives a defendant of the benefit of time which has already run in his favour before he is guilty of deliberate concealment. Accordingly, it is not possible to disapply a foreign law of limitation merely because that foreign law does not recognise the same consequences of concealment as those which the House of Lords has recognised to be the consequences of Section 32(1)(b). It may be that one can discern a public policy that a defendant should not be entitled to obtain the benefit of deliberate concealment where that concealment has resulted in an action becoming time barred. But a foreign law which ignores deliberate concealment which has no

causative effect upon the expiry of a period of limitation does not seem to me to conflict with any fundamental principle of justice. The decision in **Sheldon** was, in my view, a decision dictated by the wording of the statute and resulted from a process of construction of that statute.

The plaintiffs also rely upon the fact that the painting was stolen from its rightful owner and that the current possessor, Cobert, does not even assert that it or that any of its predecessors purchased the painting in good faith or that Cobert has title to the painting. If English limitation law applied, this action would not be subject to the time limits under section 2 and section 3 of the Limitation Act 1980. Section 4 provides:-

> "(1) The right of any person from whom a chattel is stolen to bring an action in respect of the theft shall not be subject to the time limits under sections 2 and 3(1) of this Act, but if his title to the chattel is extinguished under section 3(2) of this Act he may not bring an action in respect of a theft preceding the loss of his title, unless the theft in question preceded the conversion from which time began to run for the purposes of section 3(2).
>
> (2) Subsection (1) above shall apply to any conversion related to the theft of a chattel as it applies to the theft of a chattel; and except as provided below, every conversion following the theft of a chattel before the person from whom it is stolen recovers possession of it shall be regarded for the purposes of this section as related to the theft.
>
> If anyone purchases the stolen chattel in good faith neither the purchase nor any conversion following it shall be regarded as related to the theft.
>
> (3) Any cause of action accruing in respect of the theft or any conversion related to the theft of a chattel to any person from whom the chattel is stolen shall be disregarded for the purpose of applying section 3(1) or (2) of this Act to his case.
>
> (4) Where in any action brought in respect of the conversion of a chattel it is proved that the chattel was stolen from the plaintiff or anyone through whom he claims it shall be presumed that any conversion following the theft is related the theft unless the contrary is shown.
>
> (5) In this section "theft" includes:-

(a) any conduct outside England and Wales which would be theft if committed in England and Wales;

and references in this section to a chattel being "stolen" shall be construed accordingly."

The conversion in this case followed the theft and was, therefore, "related to the theft" for the purposes of Section 4.

It does seem to me possible to identify, from that legislation, a public policy in England that time is not to run either in favour of the thief nor in favour of any transferee who is not a purchaser in good faith. The law favours the true owner of property which has been stolen, however long the period which has elapsed since the original theft. If German limitation law is not disapplied the result will be to favour a purchaser with no title to the painting who does not even contend that it or its predecessors purchased the painting in good faith. To permit a party which admits it has not acted in good faith to retain the advantage of lapse of time during which the plaintiffs had no knowledge of the whereabouts of the painting and no possibility of recovering it, is, in my judgment, contrary to the public policy which finds statutory expression in Section 4. To allow Cobert to succeed, when, on its own admission it knew or suspected that the painting might be stolen or that there was something wrong with the transaction or acted in a manner in which an honest man would not, does touch the conscience of the court. Moreover, to recognise such a public policy does not in any way undermine the purposes of a law of limitation; there is no reason why a defendant in the position of Cobert should be protected from this claim nor does the recognition of such a public policy discourage claimants from instituting proceedings without unreasonable delay. I can discern no conflict with the essential public interest in a law of limitation by

recognising that the victim of a theft who had no opportunity of bring the claim earlier should be entitled to assert his rights however long the time which has elapsed since the original theft. It is true, as Mr Brindle QC submits, that rather than providing that no limitation period will apply where an action is brought in respect of a stolen chattel, German law provides a lengthy period of limitation. But that consideration seemed to me to be insufficient to subordinate the rights of the victim of the theft in favour of one who has acted without good faith. Nor does it seem to me to matter that the plaintiff in this case is the Federal Republic of Germany, whose own laws it is seeking to disapply. It does not seem to me that the question whether a foreign law should be disapplied on grounds of English public policy can depend upon the nature of the plaintiff seeking to disapply that law. I should, however, make it clear that if the victim of the theft had itself delayed once it had discovered the facts relevant to its cause of action that might well be a ground for not disapplying the foreign law. (see Law Commission Report No 114 paragraph 4.47)

The Federal Republic of Germany has not been guilty of "forum-shopping". It had no control whatever as to where it could bring its action; it was Cobert which chose to buy the painting in England and convert it here.

I should emphasise that my view as to public policy is not founded upon the fact that the chattel in question is a painting which had been on public display in Gotha since the second half of the 19th century. There has been some debate, instigated I fear in part, by my own observations, as to public policy in relation to stolen works of art. I have been referred in relation to public collections of art to Council Directive 93/7/EEC of 15th March 1993 on

"the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State." Article 7 provides a time limit of thirty years after the object was unlawfully removed in which to bring proceedings, a period extended to seventy-five years in the case of objects forming part of public collections. The Directive and in particular Article 7 has been given legislative force in this country in the Return of Cultural Objects Regulations 1994 (SI 1994 No 501) but it is to be noted that the Regulations apply only to cultural objects unlawfully removed from a territory of the Member State on or after 1st January 1993 (see Regulation 1(3)). This country did not give retrospective effect to the regulations as it would have been entitled to do under Article 14.2 of the Directive. I cannot identify from those Regulations any public policy in relation to a painting stolen after the war. Moreover, attractive though it would be to apply some special consideration to a work of art when there exists a possibility of it being displayed, once again, to public view such a consideration should not weigh with me at all. If I had allowed those circumstances to prevail, my observations would have to be numbered amongst "the idiosyncratic inferences of a few judicial minds" (see the unattributed quotation in "The Foreign Limitation Periods Act 1984" PB Carter (1985) 101 LQR 68 at 71).

The plaintiffs rely also upon Section 2(2) of the 1984 Act contending that they would be caused undue hardship if German limitation law was applied. In **Jones v. Trollope Colls Cementation Overseas Ltd** (Times Law Reports 26 January 1990). Farquharson LJ said that:-

> "the word undue added something more than just hardship. It meant excessive or greater hardship than the circumstances warranted."

In **AMF v. Hashim** (q.v. supra) Evans J emphasised that the provision was intended to have a narrow application (page 592). Moreover he said:-

> "It cannot be said that the three year period for claims of this sort (under Gulf law) is so short that the plaintiffs suffer undue hardship merely by reason of the fact that it is imposed. There must be some additional factors which make the hardship excessive in this case"

That additional factor might have arisen if the plaintiffs had been defeated because of transitional provisions which were not easy to apply (see page 593 and Saville L.J. in the Court of Appeal at page 600). In the instant case the additional circumstance upon which reliance is placed over and above the mere impact of a limitation period of thirty years, is that the plaintiffs were the victims of theft and between that theft and 1991, they had no means of discovering the facts which would have enabled them to identify the possessor of the painting and its whereabouts. But it is difficult to see how that additional fact would justify invoking Section 2(2) in circumstances where Section 2(1) did not apply. Either the public policy which I have already identified exists or it does not. If it does not, then all the plaintiffs are, in essence, complaining about is the length of the German limitation period. That by itself is not enough, and in those circumstances had I not been prepared to disapply German law under Section 2(1), I would not have done so under Section 2(2).

Conclusions

This judgment would remain incomplete without a proper tribute to the skill and industry of all counsel involved, ably supported as they were by other members of their respective ateliers, particularly Pamela Kiesselbach, solicitor for Cobert and Dr Michael Carl, solicitor for the plaintiffs. Their submissions, translations and guidance through unfamiliar territory shone as if they had been painted on copper.

For the reasons I have given I conclude that:-

I.1 The painting was taken from Thüringia in January 1946;

I.2 Title passed to the Land Thüringia by virtue of the law of 9 October 1945, the expropriatory effect of which was not repealed by the law of 4 December 1945;

I.3 Had not title passed in 1945 it would have passed to the Land by virtue of the dissolution of The Art Foundation on 14 October 1950;

I.4 English Courts will recognise and enforce the Federal Republic of Germany's title to the painting whether derived from the law of October 1945 or the dissolution in 1950;

I.5 It has not been proved that the painting entered the territory of the German Democratic Republic in 1987;

I.6 The City of Gotha cannot claim possession to the painting;

II.1 The painting was misappropriated in 1987;

II.2 The German law limitation period is relevant;

II.3 The claim is not statute barred under German Law;

II.4 Had the claim been time-barred, German law conflicts with public policy.

In her monograph and catalogue raisonné "Wtewael and Dutch Mannerism" published in 1986, Dr Anne Lowenthal recorded that between 1975 and 1986 eighteen paintings by Wtewael had been recovered from obscurity. She foresaw that more would appear. She recorded that the location of the painting of The Holy Family was unknown. That is no longer correct. For the time being putti blush unseen within an envelope in an office at Sotheby's (where I had the privilege of a judicial peep). Whether my conclusions will result in a greater opportunity for those who enjoy Dutch mannerism or wish to cultivate their antipathies, others will have to decide.