

PEARLS OF LAW

SANDRA OKE

sandra.oke@norfolk-partners.com



Who Really Owns A Painting: the Artist or the Buyer?

Recently, Art lovers were delighted about the unexpected discovery of a Caravaggio painting in an attic in Southern France. Caravaggio was one of history's greatest Baroque painters. He had several masterpieces which include stories from the Bible.

The newly-discovered painting whose authenticity is still being ascertained had been left for more than 150 years in a property in Toulouse. The piece called 'Judith Beheading Holofernes,' shows the biblical heroine Judith beheading an Assyrian general, and is thought to have been painted in Rome.

The fundamental legal issues arising from the above scenario have to do with authenticity and ownership. These issues that have to be considered by painters, art-collectors and art connoisseurs. The authenticity of a painting determines its estimated value and recognition.

The Caravaggio painting mentioned above has generated a lot of debate regarding its authenticity. Some specialists regard the painting as a 'true original' and a 'masterpiece' but others acknowledging its 'undeniable quality' argue that it is a copy.

The issue of authenticity of another Caravaggio painting was one of the main considerations in **THYWATES v SOTHEBY'S** [2014]. The case concerned the identification and classification of a painting and whether the painting was wrongly identified as a copy of The Cardsharps. Mr. William Thywates sold the painting 'The Cardsharps' in 2006 to Mrs. Adam for £42,000 after Sotheby's advised him that it had been painted by one of the Carravaggio's followers. Mr. Mahon one of Mrs. Adam's friends restored the painting and declared that it was a Caravaggio dating back to 1595. This view was held by other art experts. It was placed on loan to the Museum of the Order of St John at Clerkenwell in London and insured for £10 million. Mr Thwaytes brought an action against Sotheby's for allegedly giving him "negligent" advice about the painting's worth, and his lawyers accused the auction house of not consulting enough experts



and not testing the painting sufficiently before the sale. The Judge ruled that Sotheby's had a right to rely on connoisseurship and expertise of their specialists in the OMP" who were highly qualified and examined the painting thoroughly. The judge added that Sotheby's process and its own experts demonstrated that the auction house reasonably believed that the quality of the painting was "not sufficiently high to indicate that it might be by Caravaggio."

This leads us to the other fundamental issue about the ownership of artwork. Let us picture this scenario.

Rosa Menendez an avid Art collector whose family has been in the business for several generations acquires a beautiful painting from an auction. She displays the life-size painting in her living room but because of its size she decides to make smaller copies of it. Later she changes her mind and decides to sell it to a gallery but before the sale an Interior décor magazine is authorised to take photographs of her living room for its centre-spread and the painting appears in the photographs. Subsequently, she commissions the

photographer to take photos of her home. After several years she decides to sell her home and gives a letting agency copies of the professional photographs of her home which is displayed on its website and other promotional material.

The narrative above deals with issues relating to ownership of paintings. One major point to note is that although the purchaser of a painting owns it, certain rights including intellectual property rights are reserved for the artist. Intellectual property rights have to be specifically acquired by the purchaser. Therefore a purchaser cannot alter a painting without the artist's permission, so Rosa is prohibited from making smaller copies of the painting. Most laws give visual artists the exclusive right to alter and modify their work.

Section 5 (b) of the Copyright Act vests the following exclusive rights on an Artist to:

- (i) reproduce the work in any material form,
- (ii) publish the work,
- (iii) include the work in any cinematograph film,
- (iv) make an adaptation of the work,
- (v) do in relation to an adaptation of the work in subparagraphs (i) to (iii) of this paragraph.

The United States after signing the Berne Convention took a further step by enacting the Visual Artists Right Act 1990 which vests two rights to authors of visual works: the right to prevent intentional distortion, mutilation or other modification of the work which would be prejudicial to his or her honour or reputation; and the right to prevent the destruction of a work of "recognised stature."

Regarding the photographs of the painting appearing in the magazine and the website and promotional material of the letting agency. This is an infringement of the copyright of the artist. The purchaser of the painting, Rosa does not have the right to distribute the work commercially without the owner's permission, so the Magazine does not have the right to print the photos and distribute them to the public. However depending on the way the photographs are used the magazine might be able to claim the defence of fair use.

Conversely, using a photograph in a painting also raises copyright concerns. In an American case **CARIOU v PRINCE** a series of paintings incorporated the photographs of French photographer Patrick Cariou from his 2000 book Yes, Rasta (Powerhouse) and was displayed at a show at Gagosian Gallery. Cariou brought an action for copyright infringement against Prince, Gagosian Gallery, Lawrence Gagosian and catalogue publisher Rizzoli. In March 2011, U.S. District judge Deborah Batts ruled against Prince and ordered the defendants to destroy the remaining copies of the catalogue and unsold paintings that make use of Cariou's photographs. Subsequently, the decision was overturned and re-evaluated based on the defence of fair use. Judge B.D. Parker stated that "We conclude that the district court applied the incorrect standard to determine whether Prince's artworks make fair use of Cariou's copyrighted photographs." The court further concluded that all but five of Prince's works made fair use of Cariou's copyrighted photographs.

Conclusion

The foregoing paragraphs clearly illustrate that the purchaser of a copyrighted work possesses limited rights, the full rights can only be exercised by the artist, the creator of the work.

EMERGING LEGAL AND POLICY REFORMS IN THE PETROLEUM SECTOR IN NIGERIA: CONTINUED FROM PAGE 14

of petroleum tax as required under the JVs, as a result of weak monitoring and possibly connivance on the part of officials of the NNPC.

The Impact of The Proposed Legal And Policy Reforms On The Anti-Corruption Drive Within The Petroleum Sector

Decriminalisation of breach of contractual obligations- This is perhaps the most important potential outcome of the proposed restructuring of the behemoth that is the NNPC. As indicated by the GMD of the NNPC and the Minister of State for Petroleum, the unbundling of the NNPC will result in its fragmentation into 7 private companies with individual CEOs. It could very well be that the breach of terms of contracts executed for the exploration, prospecting, mining, sale, distribution or marketing of oil will then take the form of purely commercial breaches, entitling the relevant company to approach the civil courts for a remedy in damages or specific performance, as opposed to being a criminal infraction necessitating the intervention of the law enforcement agencies. This obviates the need for protracted criminal prosecution at government's expense, in matters that can either be resolved out of court between parties or which parties will be required to bear their individual cost.

More importantly however, this may resolve the question of the insufficiency of our criminal laws to deal with complex, multi-layered commercial and financial transactions in this very specialised

sector, many of which will have a tangential impact on innocent third parties in foreign jurisdictions.

The State deals with crimes at several levels, one of which is the preventive. The introduction of greater policy and legal reforms within the sector, particularly the restructuring of the NNPC and the reduction of the powers of the Minister of Petroleum, both proposed by the new Petroleum Industry Governance Bill, will dispense with the prevailing opacity of the NNPC's activities and increase transparency and accountability in the sector in line with global best practices, and result in the prevention of criminal and fraudulent activity within the sector.

The Prosecution and Recovery Of Corruption Proceeds

Having identified the nature of infractions arising from the transactions discussed above, the question that arises is: what happens to the proceeds of corruption and illicit activity in the petroleum sector upon discovery?

Thankfully, the EFCC Act (see Sections 24-31 of the Act) provides for the seizure and eventual forfeiture of assets acquired vide illicit or criminal activity (including any monies so obtained). This is without prejudice to the prosecution of any accused persons.

It is worth mentioning that, by the very nature of the petroleum industry, assets are most likely to be held by corporate entities across jurisdictions

who are capable of dissipating their assets at short notice. It is for this reason that the EFCC Act also provides for interim preservative orders in the form of Mareva or Anton piller injunctions to forestall the destruction or transfer of proceeds of crimes.

However, a transaction might emanate from a particular jurisdiction and cut across other jurisdictions. The nature of the transaction raises a multi-jurisdictional issue particularly in relation to the law that would apply. It is therefore important to include in the contractual agreement the jurisdictional legislation that would apply in the event of any breach. This will also necessitate the deployment of the Mutual Legal Assistance Regime. Thus, apart from prosecution, the recovery process, which involves tracing/identifying, freezing, seizing, confiscation/forfeiture, requires effective Mutual Legal Assistance (MLA) to ensure the recovery and repatriation of proceeds from wherever they are hidden. MLA is an indispensable tool in the recovery process.

Conclusion

In sum, as commendable as the emerging ingenuity of extrapolating the objectives of existing laws to cater to an area of likely legal infractions arising from commercial transactions, it is however, pertinent to sound a note of warning on the dangers of criminalising commercial transactions. While it is not out of place for the appropriate government agencies to identify the criminal contents of any transaction and prosecute same, and achieve fiscal

probity, transparency and accountability, care must be taken not to discourage genuine investors, except the government is able to prioritise the gains of such criminal prosecution of commercial transactions over and above other interests. Most of the transactions involving crude oil undertaken by NNPC are carried out using methods, which require more layers of fiscal dealings, difficult calculations and greater opacity in them. There are hardly any direct methods utilised. Examples of these methods include - Alternative JV finance, Product exchange contracts, offshore processing contracts, In-kind payments of operation tax and royalty debts.

As an alternative to the undue criminalisation of commercial transactions, the government should put in place policies and reforms that promote transparency and accountability.

The role of the Judiciary in resolving these knotty issues cannot be downplayed. Capacity- building amongst judicial officers through Workshops and seminars of this nature to ensure familiarisation with the peculiarities and complexities of the petroleum sector is therefore indispensable to the development of a robust judicial attitude to cases of corruption or breach of contractual obligations within the petroleum sector.

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