Museums, Restitution and the New Charities Act

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The recently passed Charities Act 2022 has the potential to introduce new possibilities for charity trustees in England and Wales (including museum trustees) to make disposals of charity property, which would have an impact on the restitution of cultural objects from museum collections. The power to make 'ex gratia payments' already exists in section 106 of the Charities Act 2011, but the new legislation would expand this in two important ways. The first is by allowing trustees of institutions otherwise prevented by statute from disposing of property (e.g. national museums) to seek authorisation for such disposals when these are motivated by a moral obligation, with the approval of the Charity Commission, Courts or Attorney General. This change specifically overrides the 2005 High Court decision in Attorney General v. Trustees of the British Museum. *The second change will allow trustees to make ex gratia disposals of low-valued trust property without the requirement for approval, the value of which is to be measured along a sliding scale based on the gross income of the charity. Both these new powers will enable institutions in England and Wales to act much more confidently in pursuing the restitution of objects in their collections when there is a strong moral case for doing so. With important matters involving the Benin Bronzes already being considered by the Charity Commission, the recent legislative changes have the potential of making a significant impact on restitution cases to come. In October 2022, the Government stated that before these provisions could come into force it must first seek to fully understand their implications for national museums and other charities.*

Charity law in England and Wales is set to change and this could have a significant impact on museums dealing with restitution claims for cultural objects in their collections. The majority of museums in England and Wales are established as charities, either as charitable trusts or (as in the case of most national museums) as charities established by statute. Charity law affects the duties and powers of the trustees of such museums, establishing benchmarks for making decisions, which must generally further the charity's purpose and be made in the best interests of the charity.[1] There exist rare recourses by which trustees can seek external approval (such as from the Charity Commission) for actions that might not further the charitable purpose or the charity's interests. Trustees of museums always need to pay special attention to changes in charity law as these can have an impact on their broader duties and the recourses available to them.

1 See the Charity Commission guidance, *The Essential Trustee: What you need to know, what you need to do* (CC3), 3 May 2018.

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The Charities Act 2022 was passed this year, on the same day as the Russian invasion of Ukraine (24 February 2022) and so its passage, perhaps forgivably, went largely unnoticed by the press. The entry into force of the legislation was also not immediate, but will instead be staggered over the course of 2022 and 2023 according to its commencement provision.[2] The legislation does not represent a complete overhaul of charity law in the way the Charities Act 2011 repealed and replaced its predecessor, the Charities Act 1993. Instead, the new Act will make targeted changes to the Charities Act 2011, which will remain the primary legislation in this area. Some of the new changes include giving charities additional powers and flexibility in amending their governing documents, in deciding how to procure goods and services, and in borrowing from their permanent endowments in specific circumstances.[3] But the most important change in the context of art and antiquities – that is, the change that could have a significant impact for years to come on the museum sector – will be the expanded situations in which charity trustees can make ex gratia applications of charity property.

Background

The traditional rules around 'ex gratia payments' derive from the 1970 case of *Re Snowden*.[4] That case involved two separate matters: in one, charitable legatees sought the approval of the Attorney General for payment of sums from an estate that had a much higher value than had been contemplated by the testator; in the other, administrators sought similar approval from the court for payment out of an estate to charity. In neither case had the payment been allowed by the relevant charitable instrument. Considering the matters together, Cross J. approved the authorisations, despite the fact that such payments were not expressly permitted under the terms of the trusts. Authorisation could be given, according to Cross J., for payment "motivated simply and solely by the belief" held by the trustees or administrators that the charity is "under a moral obligation to make the payment".[5] Referring to such payments directly as "ex gratia payments", he further cautioned that:

> It is however a power which is not to be exercised lightly or on slender grounds but only in cases where it can fairly be said that if the charity were an individual it would be morally wrong of him to refuse to make the payment.[6]

The case gave rise to what can be called the '*Snowden* principle', whereby the Attorney General (or court) could authorise charity trustees to make ex gratia transfers of charity property where the act is motivated by a moral obligation. Since that case, the power to make ex gratia payments has been authorised by the Attorney General and the court on numerous occasions.[7] It would however apply in relatively limited circumstances, at times when the trustees felt a moral compulsion that would not allow them, ethically, to act otherwise. And, despite the specific reference to use of the term 'payment' in

2 Charities Act 2022, s. 41(4). The implementation plan is set out by the Charity Commission in guidance published on its website at <www.gov.uk/guidance/charities-act-2022-implementation-plan> [accessed 13 Oct. 2022].
3 See Charities Act 2022, ss. 1-4, 9-13 and 30.
4 [1970] Ch. 700.
5 *Ibid.* at p. 709.
6 *Ibid.* at p. 710F-G.
7 See Charity Commission, Ex gratia *Payments by Charities* (CC7), OG539, May 2014.

Snowden, it has been understood that such a power exists in regard to disposals of any trust property according to moral obligations, not only to monetary payment.[8]

In the Charities Act 1993, the *Snowden* power was extended by statute so as to be exercisable by the Charity Commissioners as well as the Attorney General and court. This was provided at section 27:

> (1)…. The [Charity] Commissioners may by order exercise the same power as is exercisable by the Attorney-General to authorise the charity trustees of a charity –
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> (a) to make any application of property of the charity, or
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> (b) to waive to any extent, on behalf of the charity, its entitlement to receive any property
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> in a case where the charity trustees –
>
> (i) (apart from this section) have no power to do so, but
>
> (ii) in all the circumstances regard themselves as being under a moral obligation to do so.

After the repeal of the 1993 Act, a similar provision appeared in the subsequent charity legislation, the Charities Act 2011, at section 106. There were several differences, one of which was that the then recently-formed Charity Commission, established in 2006, was the relevant body now being referenced:[9]

> **106 Power to authorise ex gratia payments etc.**
>
> (1) Subject to subsection (5) [the possibility of the Commission referring the matter to the Attorney General where it considers this desirable], the Commission may by order exercise the same power as is exercisable by the Attorney General to authorise the charity trustees of a charity to take any action falling within subsection (2)(a) or (b) in a case where the charity trustees—
>
> (a) (apart from this section) have no power to take the action, but
>
> (b) in all the circumstances regard themselves as being under a moral obligation to take it.
>
> (2) The actions are—
>
> (a) making any application of property of the charity, or
>
> (b) waiving to any extent, on behalf of the charity, its entitlement to receive any property.

Since the power applies in section 106 to 'any application of property', authorisation may in principle be sought by charity trustees who wish to dispose of an artwork belonging to the charity where the trustees feel morally obliged to return it to a past owner, even

8 Two recent examples will be considered below: the authorisations given by the Charity Commission for Jesus College, Cambridge and the Horniman Museum and Gardens to restitute Benin Bronzes to Nigeria. See also Robert Nieri, 'The Case of the Benin Bronzes: charities and ex gratia applications', *Shoosmiths Viewpoints*, 9 Aug. 2022.

9 As a result of a change brought about by the Charities Act 2006, which established the Charity Commission in its contemporary form.

if this did not further the objects of the charity. Most museums in England and Wales are charities, thus making this an available recourse for trustees when contemplating the deaccessioning of works from their collections in response to a morally-compelling claim for restitution.

This would not, however, be the case for national institutions. Although national institutions (such as the British Museum, the National Gallery and Tate) are charities run by trustees, they are considered 'exempt charities' under the terms of the Charities Act 2011,[10] which means compliance with their legal duties is not generally overseen by the Charity Commission but by the 'principal regulator', which for these institutions is today the Department for Digital, Culture, Media and Sport (DCMS).[11] This would not in itself prevent such institutions from seeking *Snowden*-type relief from the court or Attorney General, nor indeed from making an application to the Charity Commission under the legislation.[12] What prevents this is the fact that nearly all national institutions in the UK are governed by statute, and these statutes set out clear restrictions on trustees' powers to dispose of collection objects, usually providing only very narrow exceptions to these restrictions.[13]

Three examples of such statutes are the British Museum Act 1963, the National Heritage Act 1983 and the Museums and Galleries Act 1992. The first of these, the British Museum Act 1963, governs the British Museum and the Natural History Museum, providing a general restriction on disposal at section 3(4) for the Trustees of the British Museum (the same restriction applies to the Trustees of the Natural History Museum as well)[14]. Faced with this restriction, the Trustees may avail themselves of the exceptions only in the following circumstances:

- If the object is a duplicate;[15]
- If the object is printed matter originating from after 1850 of which a copy is already held;[16]
- If the object is considered by the Trustees to be unfit for retaining in the collection and can be disposed of without causing detriment to the interests of students;[17]
- If the object has become 'useless' for the purposes of the museum due to damage, deterioration or infestation;[18]
- In order to transfer the object between the two institutions;[19]
- In order to transfer the object to another national institution in the UK.[20]

10 See Charities Act 2011, Part 3 ('Exempt charities and the principal regulator') and Schedule 3, which lists the relevant exempt charities.
11 Charities Act 2011, ss. 25-26.
12 Charities Act 2011, s. 106; previously it was Charities Act 1993, s. 27.
13 One exception is the Horniman Museum and Gardens, which is a DCMS-sponsored 'national museum' but is not governed by statute (for more on the Horniman, see below); another is the National Army Museum, which is governed by Royal Charter.
14 Through the operation of s. 8(3) of the British Museum Act 1963.
15 *Ibid.*, s. 5(1)(a).
16 *Ibid.*, s. 5(1)(b).
17 *Ibid.*, s. 5(1)(c).
18 *Ibid.*, s. 5(2).
19 *Ibid.*, s. 9.
20 Section 3(4) of the British Museum Act 1963 and s. 6 of the Museums and Galleries Act, which includes a list of such institutions at Part 1 of Schedule 5. The above apply to the

Of course, these exceptions would appear on the whole unlikely to apply to material sought in a restitution claim, with the possible exception of duplicates or 'unfit' objects. The duplicates ground has been used in the past for this purpose by the Trustees of the British Museum, but in a way that has come to be regretted: in 1950-51, the Museum deaccessioned 25 Benin Bronzes which it considered to be 'duplicates' in order to transfer them to Nigeria, but has since stated that this categorisation had been a mistake.[21] As for the 'unfit' exception, many have argued that this could be a ground for return, in appropriate circumstances, but the Trustees have never acquiesced to this view.[22] The current De-Accession Policy of the British Museum interprets a duplicate as "identical in every significant respect" to an object in the collection and unfit as "no longer useful or relevant to the Museum's purpose" and its retention "would not be of benefit either to scholars or the general public".[23]

The National Heritage Act 1983 governs the Victoria and Albert Museum, the Science Museum, the Armouries and the Royal Botanic Gardens, Kew. It provides specific restrictions on disposals for the Boards of Trustees of each of these bodies, with exceptions for duplicates, objects considered 'unsuitable' (note the similarity to 'unfit' above) and objects that have become useless, as well as the possibility to transfer objects to other UK national institutions.[24] The Museums and Galleries Act 1992 governs the National Gallery, Tate, National Portrait Gallery and Wallace Collection. While the National Gallery and Wallace Collection would be unable to dispose of collection items in any meaningful way for restitution, the Tate has exceptions for 'unsuitable' or useless objects, while the National Portrait Gallery has exceptions for duplicates, wrongly identified portraits and useless objects.[25]

Statutory Restriction and Moral Obligation

Attorney General v. Trustees of the British Museum

The question whether trustees of national institutions such as the ones referred to above would be able to obtain *Snowden* relief (or an authorisation under the Charities Act) to overcome the general restriction on disposal in their governing legislation was put to the Vice-Chancellor at the High Court in 2005 in *Attorney General v. Trustees of the British Museum*.[26] In that case, the British Museum Trustees had been approached by a

Natural History Museum Trustees under British Museum Act 1963, s. 8(3).

21 See the British Museum webpage *Benin Bronzes* under the heading 'How did the objects come to the British Museum?' found at <www.britishmuseum.org/about-us/british-museum-story/contested-objects-collection/benin-bronzes> [accessed 13 Oct. 2022]: "At the time these objects were seen as 'duplicates' of other objects retained in the collection, something which later research has shown to be incorrect".

22 For instance regarding the 'Gweagal' shield: Elizabeth Pearson, 'New Endeavours and Old Wounds' (2018) XXIII *Art Antiquity and Law* 197. So too for the Ethiopian tabots: Alexander Herman, 'British Museum Must Recognise its own Powers in Matters of Restitution', *Art Newspaper*, 29 May 2019; Mark Brown, 'UK urged to Return Sacred Treasures Hidden away for 150 years to Ethiopia', *Guardian*, 11 Oct. 2021.

23 See British Museum, *De-Accession Policy*, 2018, at 3.5.

24 National Heritage Act 1983, ss. 6(3), 14(3), 20(3), 27(2) and Part 1 of Schedule 5 of the Museums and Galleries Act 1992.

25 Museums and Galleries Act 1992, s. 4.

26 [2005] EWHC 1089 Ch.

body representing the heirs of Dr Arthur Feldmann, a man robbed by the Nazis of his art collection in Czechoslovakia in 1939 and later tortured and killed by them in 1941. Four Old Master drawings from his collection had been acquired after the Second World War by the Museum, three by purchase in 1946 and the fourth by bequest in 1949. When approached in 2002 by the Commission for Looted Art in Europe (CLAE), a non-profit organisation representing the victim's heirs, the Trustees felt morally compelled to return the drawings to the family, but were uncertain whether they had the power to do so under the terms of the British Museum Act 1963. They sought *Snowden* authorisation from the Attorney General, who himself made an application for a determination by the High Court in order to clarify the legal position. Was *Snowden* relief available when it conflicted with a museum's own governing legislation?

In response, the Vice-Chancellor was categorical: when it comes to a charity affected by a clear statutory bar on disposal, neither the Attorney General nor the court would be able to override this, either under *Snowden*[27] or through powers available under section 27 of the then-applicable Charities Act 1993. The disposal of objects vested in the Trustees as part of the collection would have to occur pursuant to the terms of the British Museum Act 1963 (i.e. its enumerated exceptions). Interestingly, the Trustees did not attempt to argue that disposal might be possible under the 'unfit' exception, perhaps to avoid the exception being used again with respect to more controversial returns (the fear of the so-called 'slippery slope'), so this point was not raised before the court. Nor was an argument advanced that title to the drawings may not be held by the Trustees in the first instance. The latter could in theory be used in situations where stolen property is claimed and the claimant can show that it still holds title at the expense of the Trustees. In such scenarios, return may be possible on the basis that the property never 'vested' in the Trustees and therefore was unaffected by the section 3(4) prohibition. All parties in the Feldmann case accepted that the Vice-Chancellor should approach the issues on the assumption that the heirs did not have a claim at law or in equity, though this point was not admitted by CLAE as representative for the heirs.[28] This led to an *obiter dictum* in which the Vice-Chancellor conceded the possibility that, were the heirs to establish original and continuing title to the drawings in later proceedings, the restriction would not apply, allowing the Trustees to 'compromise a claim'.[29] Otherwise no such compromise would be possible.[30]

For the Vice-Chancellor, if objects are vested in the Trustees, moral considerations such as those contemplated in *Snowden* were irrelevant: "They are, alone, incapable of disapplying s. 3(4) or justifying a failure to observe its terms".[31] The very existence of statutory exceptions to section 3(4) proved there could be no further implied exceptions relating to moral obligations.[32] It was held by the Vice-Chancellor that "nothing less than some statutory authority is required to justify a departure from statutory obligations imposed on trustees".[33] Nor could the Trustees waive the protection afforded by the limitation period under the Limitation Act 1980 or its predecessor, "otherwise than on legal advice".[34]

27 See above note 4.
28 *Attorney General v. Trustees of the British Museum*, above, note 26 at para. 8.
29 *Ibid.*, at para. 38.
30 *Ibid.*, at para. 39.
31 *Ibid.*, at para. 40.
32 *Ibid.*, at para. 41.
33 *Ibid.*, at para. 42.
34 *Ibid.*, at para. 43. See also Sir Anthony Mason, 'Statutory Obligation v. Moral Obligation in

After this 2005 decision, the Feldmann heirs (this time without the assistance of CLAE) brought a claim against the British Museum before the Spoliation Advisory Panel (SAP). The heirs and the Museum were keenly aware of the Vice-Chancellor's decision in the High Court and so jointly presented the Panel with a proposed solution which would involve the Museum making a payment to the heirs rather than restituting the drawings.[35] In a report dated 27 April 2006, the Panel chose to recommend an ex gratia payment to the heirs in recognition of their strong moral claim, a remedy available under the SAP's Terms of Reference and so according with the provisions of the British Museum Act 1963.[36] The Panel recommended a payment of £175,000, taking into account a valuation of £186,000 provided to the Panel and adjusting this down slightly to take account reasonable insurance and any sale expenses by the Museum. The recommendation was then approved by the Secretary of State, the recommended sum paid to the heirs and the matter of the drawings settled, with the pieces remaining in the collection of the British Museum.

Three years later, Parliament introduced legislation to override the restrictions imposed on trustees of national institutions insofar as they affected the ability to return art looted in the Nazi-era to claimants. The Holocaust (Return of Cultural Objects) Act 2009 allowed the disposal of objects from national collections, but only in cases where the SAP had recommended the return and the Secretary of State had approved it.[37] Ironically, the matter that prompted the change in law did not involve Nazi persecution of Jewish victims, as in the case of Dr Feldmann, but rather a religious manuscript from the Chapter Library of the Monastery of Benevento in Italy that had been acquired towards the end of the Second World War by a British serviceman from a second-hand bookseller in Naples.[38] Having located the manuscript at the British Library, a claim was brought by the Chapter Library before the SAP. After the SAP's report in 2005 recommending the manuscript's return, it became clear that amending legislation was needed: the manuscript had been transferred to the British Library from the British Museum in 1973 and so the restriction on disposal from the British Museum Act 1963 applied to the Library as well.[39] Legislation was eventually proposed as a Private Member's Bill and duly passed on 12 November 2009, thereafter allowing for returns from national collections in the aforementioned manner.[40] Returns of this nature from national museums have since occurred in (only) three instances: the Benevento manuscript from the British Library (in 2010), three Meissen figures from the Victoria & Albert Museum (in 2014) and a Constable painting from the Tate (in 2015).[41]

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the World of Charity' (2006) XI *Art Antiquity and Law* 101.

35 *Report of the Spoliation Advisory Panel in Respect of Four Drawings now in the Possession of the British Museum*, 27 April 2006, para. 38.

36 *Ibid*., para. 39.

37 Holocaust (Return of Cultural Objects) Act 2009, s. 2.

38 See *Report of the Spoliation Advisory Panel in Respect of a 12th Century Manuscript Now in the Possession of the British Library*, 23 March 2005. See Tullio Scovazzi, 'The Return of the Benev. VI 29 Missal to the Chapter Library of Benevento from the British Library' (2011) XVI *Art Antiquity and Law* 1, and Jeremy Scott, 'The Continuing Saga of the Beneventan Missal', conference paper delivered at the Institute of Art and Law conference 'Culture and Conflict', 27 Jan. 2014.

39 British Library Act 1972, Schedule 1, s. 11(4)(a).

40 See Norman Palmer, 'Responding to Conscience: The Holocaust (Return of Cultural Objects) Act 2009' (2010) XV *Art Antiquity and Law* 87.

41 For the British Library, see *Report Concerning a Claim in Respect of a 12th century*

Apart from Nazi-looted art, the only other material for which Parliament has passed legislation to override statutory restrictions are human remains. The Human Tissue Act 2004 confers on the trustees of nine listed institutions the power to remove human remains from their collections where "appropriate to do so for any reason" (which could include returning them to a family or community of origin).[42] This power applies only to remains less than one thousand years old and so could not be used, for example, to return ancient mummies to Egypt. The law leaves the decision to the discretion of the trustees. Since the Act was passed in 2004, there have been examples in which the repatriation of remains to overseas Indigenous communities has been approved by the relevant trustees,[43] and others where it has not.[44]

Apart from these two categories, no legislation had been passed seeking to override or limit the restrictions imposed on the trustees of national institutions. Within such a landscape, trustees remain severely restricted in terms of dealing with a claim for restitution of an object in the collection. Apart from Nazi-era loot and human remains, return is possible only under one of the enumerated statutory exceptions or in situations where property had never vested in the trustees *ab initio*.[45] The first of these scenarios would rely on trustee discretion, while the second would be extremely rare.[46] Neither offers much hope to prospective claimants, which helps to explain the paucity of examples in which national institutions have restituted objects to claimants.[47]

The Charities Act 2022

New Powers for Ex Gratia Applications of Charity Property

The current legal position, as described above, will soon change. The Charities Act 2022 introduces an amendment[48] to section 106 of the Charities Act 2011[49] which will significantly increase the options available to charity trustees. When it comes into force, the new paragraph 1(a) of section 106 will allow trustees to seek the authorisation of the

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Manuscript now in the Possession of the British Library (2010), for the Victoria and Albert Museum see *Report Concerning 3 Meissen Figures in the Victoria and Albert Museum*, and for the Tate see *Report Concerning Constable Painting in the Tate Gallery* (though note the displeasure voiced by the Tate in relation to the latter).

42 Human Tissue Act, s. 47(2).

43 Returns from the Natural History Museum (Tasmanian remains, Torres Strait Islander remains) and the British Museum (Tasmanian ash bundles and the Māori bone fragments).

44 British Museum Trustee decisions on the Māori tattooed heads and Torres Strait Islander skulls.

45 As indicated in *Attorney General v. Trustees of the British Museum*, see above, note 26.

46 For example, with stolen property in which title had not expired despite the passage of time under the relevant Limitation Act or title-conferring transactions in foreign jurisdictions (which bestow title on good faith purchasers or possessors).

47 See, for example, the refusal by the Trustees of the British Museum to return eleven Ethiopian tabots under the 'unfit' exception at s. 5(1)(c) of the British Museum Act 1963: Alexander Herman, 'British Museum Must Recognise its own Powers in Matters of Restitution', *Art Newspaper*, 29 May 2019; Mark Brown, 'UK urged to Return Sacred Treasures Hidden away for 150 years to Ethiopia', *Guardian*, 11 Oct. 2021, citing a legal opinion provided by Samantha Knights QC favouring return of the tabots under the 'unfit' exception.

48 Charities Act 2022, s. 16.

49 A variation on s. 27 of the earlier Charities Act 1993, itself an extension of the *Snowden* power.

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