

## *The Sale of Items in Museum Collections*

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### I. INTRODUCTION

FOR MANY YEARS, museums have been used as repositories for items donated by benevolent people either during their lifetime or by will. Curators and managers once unquestioningly accepted these donations. Many museums amassed large collections in this manner. It was not simply a case of museums not asking about the history of an item or how the donor had come to acquire it: at times, insufficient consideration was given to the cultural value of the item and whether it would be of interest to either researchers or the viewing public, and what it might cost to store. Little thought was given as to what the future might hold.

The process of management of museum collections has changed in recent years and senior officers in the museum sector have become cautious in relation to accepting items and formally accessioning them into their permanent collections.<sup>1</sup> In particular, officers have become increasingly aware of the danger of accidentally acquiring illicit material that has been looted and exported from overseas. Reviews of collections have become regular and more thorough. It has become apparent that, at least in some cases, irresponsible accessioning of items has created a financial dilemma for the museum concerned. Furthermore, there is greater awareness that storage of museum items can be a costly business. Some items, such as those made with animal or vegetable fibres, are vulnerable to decay due to changes in temperature and attacks by pests. Collections may be expensive to preserve. For example, in 1996, the Director of the National Maritime Museum declared that it cost £20,000 per year to care for 3,000 flags in its collection.<sup>2</sup> Large items stored outside may begin to deteriorate in wet weather. The costs of storage have become a matter of acute concern in the face of government financial cutbacks. Unless a museum is independently wealthy, it is vulnerable in a recession: cuts in financial support from central or local government may mean unambitious displays, staff redundancies, shorter opening hours or even closure.

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<sup>1</sup> Guidance is provided by pt 5 of the Code of Ethics of the Museums Association; and the Department for Culture Media and Sport, *Combating Illicit Trade: Due Diligence Guidelines for Museums, Libraries and Archives on Collecting and Borrowing Cultural Material* (2005).

<sup>2</sup> C Milner, 'Greenwich Sell-off Triggers Art Row' *Sunday Telegraph* (29 October 1996).

In certain circumstances, an item can be removed from a museum collection. It will be done by a process of deaccession and, if the removal is intended to be permanent, this removal will be described as ‘disposal’. However, the phrase ‘disposal’ does not tell us what will happen to that object: it may be transferred to another museum, sold, destroyed or repatriated to its source country. The transfer of an item to another museum, or its repatriation to a community, can be welcomed because it will normally be done in order to increase public engagement. In contrast, if an item from a museum collection is sold to a private collector, it may be lost forever to the viewing public. Consequently, a sale can be controversial. If only a few restrictions exist, there is a risk that these items will be viewed purely in financial terms: members of its governing body may see their sale as a simple way to raise money for other causes. Even where the decision to remove items has been taken as part of a review of the collection by the museum curators and staff, without a desire to obtain cash as a primary motive, mistakes can be made.

The sustainability of museums does not simply have a financial dimension. The items in museum collections have a cultural value and the museums exist to serve the long-term public benefit. Museums must therefore be sustainable in the sense of being relevant to people today, whilst caring for collections for the benefit of generations to come. There is thus a tension between two different schools of thought. On the one hand, some people consider that all items in museum collections need to be preserved for future generations, while, on the other hand, there is a concern that museums should enjoy sufficient flexibility to evolve in response to social and economic changes.<sup>3</sup> These issues have been the focus of debate.<sup>4</sup> However, I would suggest that the more fundamental question is the extent to which the law, as opposed to ethical principles, does and should provide guidance in relation to the care and disposal of cultural objects forming part of museum collections.

This chapter concentrates on transfers and sales to other museums and auction sales to the highest bidder. It explores the application of the law and ethical principles to the disposal of unwanted items. It demonstrates that the law provides museums with guidance which is currently inadequate by itself. But it maintains that this gap should be filled by ethical principles, which have a vital role to play in assisting museums in deciding what they should and should not do in order to fulfil their role of engaging with current members of the public whilst acting as stewards of their collections for the benefit of future generations.

## II. CULTURAL VALUE

Cultural objects enjoy a special status because of their intrinsic cultural value.<sup>5</sup> They are a source of information relating to our past, assisting us in understanding how the

<sup>3</sup> Museums might therefore be expected to act as moral activists in relation to issues such as social inclusion and human rights: R Sandell, ‘On Ethics, Activism and Human Rights’ in J Marstine (ed), *The Routledge Companion to Museum Ethics* (London and New York, Routledge, 2011) 129.

<sup>4</sup> For a collection of essays on this debate, see P Davies (ed), *Museums and the Disposal Debate* (Edinburgh, MuseumsEtc Publishing, 2011).

<sup>5</sup> S Guest, ‘The Value of Art’ (2002) VII(4) *Art Antiquity and Law* 305.

world and our nation have evolved. They help to define us as human beings. Elsen observes that: 'Art tells us who we are and where we came from.'<sup>6</sup> Merryman has commented that: 'A cultural object embodies or expresses or evokes some aspect of the culture of its time and place.'<sup>7</sup> It is precisely these attributes which prompt members of the public to go to museums to admire these objects and to learn more about them.

Cultural objects are therefore complex because of their dual nature: they will have a financial value in the marketplace and yet will also possess cultural value in terms of creativity and information. To an extent, their financial value will be linked to their cultural value. For example, over the centuries, archaeologists have gathered information about the past, which formed the archaeological record. This information eventually became absorbed into national stories of development and civilisation.<sup>8</sup> Objects of antiquity which were integral to these stories attracted great interest. Some of these objects were acquired by museums, but others were purchased by private collectors. Increasingly, as these types of items were amassed in collections, whether public or private, their financial value soared.

Everyday items normally have a relatively short life and are regularly bought and sold without any detailed consideration of their history. However, cultural items deserve special protection, so that they can be safeguarded for the benefit of mankind in the long term. Increasingly from the eighteenth century onwards, international conventions and agreements have recognised the special status of cultural property.<sup>9</sup> In 2002, the UK government acceded to the United Nations Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.<sup>10</sup> This Convention requires Contracting States to take steps to protect their own cultural items and to prevent the illicit movement or transfer of cultural objects which have been stolen or illegally exported. Article 5(e) calls for the establishment of ethical codes for curators, collectors and dealers in order to encourage compliance with its principles. Museums in the UK follow guidance in the Code of Ethics, which has been produced and revised by the Museums Association (which is an independent association representing museums and galleries in the UK). The Code of Ethics provides a set of general ethical principles. It requires museums to take care in acquiring cultural objects and to refuse any object with a dubious provenance.<sup>11</sup> It is therefore not unreasonable to expect

<sup>6</sup> A Elsen, 'Why Do We Care about Art?' 27 *Hastings Law Journal* 951, 952. For further discussion of the notion that art is special and is a mirror of culture, see PM Bator, 'An Essay on the International Trade in Art' (1982) 34 *Stanford Law Review* 275, 304–06. See also D Watkins, 'The Value of Art or the Art We Value?' (2006) XI(3) *Art Antiquity and Law* 251, 258.

<sup>7</sup> JH Merryman, 'Counterfeit Art' (1992) 1 *International Journal of Cultural Property* 27, reproduced in JH Merryman, *Thinking About the Elgin Marbles* (The Netherlands, Kluwer Law International, 2009), 468.

<sup>8</sup> See Y Hamilakis, 'From Ethics to Politics' in Y Hamilakis and PH Duke (eds), *Archaeology and Capitalism: from Ethics to Politics* (Walnut Creek, CA, Left Coast Press) 15, 17.

<sup>9</sup> For example, the idea that cultural property must be protected because it is the heritage of all mankind is emphasised in the Preamble to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 216, 240. See further K Chamberlain, *War and Cultural Heritage* (Leicester, Institute of Art and Law, 2004) 7–8.

<sup>10</sup> 14 November 1970 (1971) 823 UNTS 231, 10 ILM 289.

<sup>11</sup> See pt 5 of the Museums Association's Code of Ethics 2008; DCMS guidance, *Combating Illicit Trade: Due Diligence Guidelines for Museums, Libraries and Archives on Collecting and Borrowing Cultural Material* (2005).

museums to exercise the same high level of diligence when they are considering the deaccessioning and disposal of cultural items.

It might be assumed that the law is adequate to govern the disposal of items from museum collections. The law can regulate situations where people consent to hold property for the benefit of others rather than themselves. The mechanism is a trust, and trustees will be under a legal obligation to take reasonable care of trust property. If trustees fail to insure trust property or if they transfer such property to a person who is not entitled to it, they will be in breach of trust. But is trusts law sufficient in this context? It can be argued that what the law can provide works well in a situation which is concerned with legal entitlement and business-like conduct. The law offers a framework to regulate dealings in any type of property, where a person has the legal estate (the trustee) and holds it for a beneficiary or for a charitable purpose. Yet applying principles of private law alone to dealings with cultural property may not necessarily be appropriate, particularly where one needs to consider how the acquisition, care and disposal of cultural items may benefit future generations. This is because these items will usually be significant in terms of human relationships, such as an individual's family ties, or spiritual beliefs, or sense of belonging within a local community. This is where the law may be at the edge of its frontier and where ethical principles may be needed to provide guidance.

### III. STEWARDSHIP

Ethical principles will normally be irrelevant where the governing body of a museum decides to dispose of commonplace items, such as unwanted office furniture or equipment. However, in the case of cultural items, the position is different. Cultural items may assist in creating a sense of cultural identity, establishing common bonds and bringing communities together. It is because of these qualities that they attract ethical duties. Once one recognises, for example, that cultural items may be used to support a sense of group identity, it then becomes a natural (and ethical) step to assume that one should consult local communities when it is proposed to dispose of them.

In response to increasing professionalism, ethical principles have been articulated in a formal manner in codes within the museum sector,<sup>12</sup> followed by the archaeological sector. These codes, which often combine both legal and ethical considerations, usually provide that professionals are 'stewards' or guardians of cultural property in their care. The notion of stewardship suggests that there will be responsibility for the care of cultural property over a substantial period of time. Like trustees in law, stewards are expected to avoid any conflict of interest and should not purchase any items for which they have responsibility. However, the role of a steward should be distinguished from that of a trustee. First, trustees do not necessarily have any expertise in relation to the property in their care: they may be chosen by the testator or donor due to a family relationship or friendship, for example; even charity trustees (including museum trustees) may be selected for their business acumen and their

<sup>12</sup> See, eg the Museums Association's Code of Ethics 2008 and the International Council of Museums (ICOM) Code of Ethics 2004. The American Association of Museums (AAM) introduced its first statement of ethical principles in 1925.

potential for establishing partnerships with corporate sponsors rather than on the basis of their knowledge of the property held by the charity. In contrast, the concept of stewardship (or guardianship) is normally associated not only with professional care,<sup>13</sup> but also with intimate knowledge and appreciation of the cultural value of the property in question.<sup>14</sup>

Various common threads emerge in considering how ethical considerations apply to cultural property. An understanding of cultural value will mean that the steward will be sensitive to the relationship between communities and their heritage.<sup>15</sup> Thus, it is increasingly recognised by archaeologists in this country and elsewhere that their discipline is not the exclusive preserve of trained professionals and that the public are stakeholders in their heritage and deserve to be consulted where appropriate.<sup>16</sup> For museums, this may mean reflecting on new ways to share the rights and responsibilities of heritage objects. In both sectors, there is intense concern to avoid commodifying cultural property. Consequently, in the archaeological sector, ethical considerations may dictate that professionals should not offer expert advice to people such as dealers and collectors. The rationale is that assisting such people merely helps to fuel the illicit trade in archaeological artefacts by increasing the interest of collectors in certain types of object. There is concern that, from an ethical perspective, archaeologists should not put themselves in a position where they seem to be encouraging others to buy and sell antiquities in the market, thereby encouraging an environment where the cultural dimension of objects is viewed as subsidiary to the price that they may realise.

Sustainability is also part of stewardship. In the UK, this point is reflected in the Code of Ethics of the Museums Association.<sup>17</sup> It is also recognised by the Institute for Archaeologists, who observe in their professional guidance that:

Protection and enhancement is part of stewardship for the global environment. By managing change, stewardship sustains valued assets so that they can meet the needs of today's communities and remain available for the benefit of future generations. Stewardship reflects the public value of the historic environment by encouraging active involvement in its management and prompting community awareness.<sup>18</sup>

In the archaeological sector, stewardship is linked to the archaeological record. The emphasis is upon stewardship of information, as the objects themselves eventually

<sup>13</sup> See, eg the By-Laws, *Code of Conduct* (2009), of the Institute for Archaeologists which, in its Introduction, stated that: 'Archaeology is the study and care for the physical evidence of the human past.'

<sup>14</sup> *Standard and Guidance for Stewardship of the Historic Environment* (2009) of the Institute for Archaeologists, para [1.5].

<sup>15</sup> A Pantazatos, 'Does Diaspora Test the Limits of Stewardship? Stewardship and the Ethics of Care' (2010) 62 *Museum International* 96, 99.

<sup>16</sup> As regards the US, see Principle 1 of the Code of Ethics of the Society for American Archaeology (SAA), which was first adopted in 1996: 'Stewards are both caretakers of and advocates for the archaeological record for the benefit of all people; as they investigate and interpret the record, they should use the specialized knowledge they gain to promote public understanding and support for its long-term preservation.' In relation to 'collaborative stewardship', see A Wylie, 'The Promise and the Perils of an Ethic of Stewardship' in L Meskell and P Pells (eds), *Embedding Ethics* (Oxford and New York, Berg Press) 47, 65.

<sup>17</sup> Code of Ethics, para [6.0].

<sup>18</sup> *Standard and Guidance for Stewardship of the Historic Environment* (2009) of the Institute for Archaeologists, para [1.4].

may be handed over to the local landowner or a museum.<sup>19</sup> In the museum sector, ethical principles have a longer history and are more complex because they are concerned with the acquisition of the objects themselves and their preservation in the long term.

The Museums Association's Code of Ethics has evolved over a period of more than 35 years. It has been revised at times after consultation with the museum sector, enabling it to have sufficient flexibility to deal with new problems which have emerged. In its current form, the Code of Ethics opens by stating that: 'Museums behave as ethical guardians as well as owners of collections. They never relinquish the trust invested in them, without public consent.'<sup>20</sup> The Code goes on to provide further general principles, such as the proposition that museum officers should never view items in collections as their personal property.<sup>21</sup> They are expected to recognise the public purpose of museums and to put the public interest before other interests.<sup>22</sup> The Code emphasises that museums must hold the items in their care for the benefit of the public and should encourage people to explore the collections for inspiration, learning and enjoyment. Museums are expected to consult stakeholders, such as donors, and also the public at large. Museums must be sustainable and must manage their collections in a responsible manner.

The Code of Ethics is valuable because it provides a form of guiding principles to regulate the ethical conduct of the museum sector. The Code's general principles have been supplemented by a booklet entitled the 'Disposals Toolkit', which supplies further principles. The Ethics Committee of the Museums Association holds regular meetings at which it considers confidential applications from individual museums seeking further guidance in relation to the application of these principles. The Code of Ethics permits the governing bodies of museums to take responsibility for their conduct, whilst encouraging them to seek advice from various sources.

The Code of Ethics is not merely an aspirational set of principles: members of the Museums Association expect their colleagues to adhere to them. There is an ultimate sanction: those who flagrantly break the rules can be thrown out of the Museums Association, and they may then be unable to apply for government grants. This approach, whereby the Code does more than merely encourage members to act in an ethical manner, has the potential to act as a brake on change; even so, the Code is kept under review by the Museums Association and the museum sector is regularly consulted on topical issues.

<sup>19</sup> See the By-Laws, *Code of Conduct*, of the Institute for Archaeologists, para [3.5]: 'A member shall ensure that the record, including artefacts and specimens and experimental results, is maintained in good condition while in his/her charge and shall seek to ensure that it is eventually deposited where it is likely to receive adequate curatorial care.'

<sup>20</sup> Museums Association, Code of Ethics, para [1.0]. The International Council of Museums (ICOM) has a Code of Ethics which suggest, at [2.0], that inherent in the nature of public trust is the notion of stewardship. The ICOM's principles have been generally accepted within the international museum community.

<sup>21</sup> Ibid, para [1.3].

<sup>22</sup> Ibid, para [2.1].

#### IV. NATIONAL MUSEUMS

Statutory principles exist to regulate disposals of items from national museum collections in the UK. For example, the British Museum Act 1963 provides that trustees of the British Museum and the Natural History Museum have a statutory duty to keep items in their collections.<sup>23</sup> The emphasis is upon accessibility by the public. Consequently, the trustees may decide to keep part of their collection in storage, but, even so, they must make items available for inspection by members of the public, such as researchers, upon request.<sup>24</sup> The trustees may decide to lend items for public exhibitions (and, in the case of the Natural History Museum, for the purposes of research), taking account of such matters as the rarity of the item, its physical condition and any risks to which it is likely to be exposed.<sup>25</sup> The 1963 Act does allow the trustees of the British Museum and the Natural History Museum to sell, exchange or give away an item from their collections if it is a duplicate, if it is a print made after 1850 where a copy is available or if the item is unfit to be retained in the collection and its removal would not be to the detriment of researchers.<sup>26</sup> There is also a statutory power to transfer items between specified national museums.<sup>27</sup> Apart from these limited exceptions, the trustees are prohibited from transferring or selling items.

The main statute governing other national museums is the Museums and Galleries Act 1992.<sup>28</sup> Its provisions affect museums as diverse as the British Library, the Imperial War Museum, the National Portrait Gallery, the Science Museum, the Tate Gallery and the Victoria and Albert Museum.<sup>29</sup> In addition, there are a number of other statutes which relate to particular museums. The museums have different missions: the Victoria and Albert Museum promotes the aesthetic world, for example, while the National Portrait Gallery is concerned, unsurprisingly, with portraits. It might therefore be assumed that the relevant statutes would vary greatly one from another. In fact, this is not the case. All of the statutes, including the British Museum Act 1963 and the Museums and Galleries Act 1992, have common threads. They all emphasise that trustees must take care of items in their collections. They focus on public benefit and direct the trustees to ensure that items from the collections are exhibited to the public or are readily available to researchers. In order to broaden

<sup>23</sup> British Museum Act 1963, s 3(4). The two museums can transfer items from one to the other: *ibid*, s 9(1), as amended by the Museums and Galleries Act 1992.

<sup>24</sup> *Ibid*, ss 3, 8.

<sup>25</sup> *Ibid* ss 4, 8(3), as amended by Museums and Galleries Act 1992, s 11(2), sch 8.

<sup>26</sup> British Museums Act 1963, ss 5(1), 8(3), as amended by the Museums and Galleries Act 1992, s 11(2), sch 8, para 1.

<sup>27</sup> British Museums Act 1963, s 9, as amended by the Museums and Galleries Act 1992, s 11(3), sch 9. The statutory power to transfer to other museums is provided by s 6 of the Museums and Galleries Act 1992.

<sup>28</sup> The 1992 Act amended the British Museum Act 1963, thereby affecting the powers and responsibilities of the trustees of the British Museum and the Natural History Museum.

<sup>29</sup> See Museums and Galleries Act 1992, sch 5, pt I (amended by SI 2000/2955). The statute also extends to the Armouries, the Wallace Collection, the Museum of London, the National Gallery, the National Maritime Museum, the National Museums and Galleries of Merseyside, the Historic Buildings and Monuments Commissions for England, the National Library of Scotland, the National Museums of Scotland and the National Galleries of Scotland. As regards Welsh museums, see the Government of Wales Act 2006, sch 11, para 30.

public engagement, they provide that museums can make loans of items from their collections, but must have regard to the purposes for which a loan was requested (such as a public exhibition), the interests of stakeholders, the physical condition of the item and any risks to which it might be exposed.<sup>30</sup>

The Museums and Galleries Act 1992 permits museums to transfer items to other national museums.<sup>31</sup> However, the Act more generally imposes restrictions on sale, exchange or gift which are similar to the British Museum Act 1963.<sup>32</sup> The 1992 Act and other relevant statutes permit certain museums to dispose of items which are duplicates, or which are items which are unsuitable to be retained in the collection and where their removal would not be to the detriment of researchers and other members of the public.<sup>33</sup> The restrictions vary according to the mission of the museum. For example, an additional ground for disposal is given to the National Portrait Gallery: it is permitted to sell a portrait where the trustees are satisfied the identification of the person in the portrait which was originally provided has been discredited. Yet, as the main purpose of the National Portrait Gallery is to maintain a collection of portraits of the most eminent persons in British history, this additional power of disposal fits with the mission of the museum. In contrast, the Wallace Collection Board has a duty to maintain the collection of objects known as the ‘Wallace Collection’ intact; the Board therefore cannot either add or remove any items from the collection.<sup>34</sup>

At first glance, these statutory provisions appear to severely restrict the powers of museums to dispose of items. Thus, for example, even if museum trustees would like to return items in order to satisfy a moral obligation, such as by repatriating an item to a source country, they may not be able to do so if their governing statute prohibits it.<sup>35</sup> It is only where the statute is silent or ambiguous that the trustees may seek authorisation from the Charity Commissioners or the courts to sanction a scheme which involves a change of purpose but which does not conflict with the statute.<sup>36</sup> The rigid statutory prohibition on the deaccessioning and disposal of items, apart from in narrowly confined circumstances, has caused problems. For example, the UK government established a Spoliation Advisory Panel in 2000 to make recommendations when there was a request for the return of cultural items from those who had been stripped of their possessions during the Holocaust period. However, some museums did not have the legal power to

<sup>30</sup> Museums and Galleries Act 1992, s 5(1), (2). In relation to other statutes applying to designated museums, see the National Maritime Museum Act 1934, s 2(3); the Museum of London Act 1965, s 6; the National Heritage Act 1983, ss 7, 15, 19, 28; the Imperial War Museum Act 1920, s 2(1), as amended by the Museums and Galleries Act 1992, s 11, sch 8, para 9, sch 9.

<sup>31</sup> Museums and Galleries Act 1992, ss 4(4), 6.

<sup>32</sup> *Ibid*, s 6.

<sup>33</sup> *Ibid*, s 4(4), (5). See further the Imperial War Museum Act 1920, s 2; the Museum of London Act 1965, s 5(2); the National Heritage Act 1963, ss 6(3), 14(3), 20(3), 27(2); the British Library Act 1972, sch para 11(4). However, the National Gallery is not provided with this statutory power of disposal: the Museums and Galleries Act 1992, s 4(3).

<sup>34</sup> Museums and Galleries Act 1992, s 4(6).

<sup>35</sup> *Attorney General v Trustees of the British Museum (Commission for Looted Art in Europe intervening)* [2005] EWHC 1089, [2005] Ch 397, 412.

<sup>36</sup> *Ibid*, 408–09. See further *Re Shipwrecked Fishermen and Mariners’ Royal Benevolent Society* [1959] Ch 220; *Re Royal Society’s Charitable Trusts* [1956] Ch 87.

return the item because they were governed by legislation which prevented them from doing so. Parliament was forced to intervene and the Holocaust (Return of Cultural Objects) Act 2009 permitted museums to comply with the Spoliation Advisory Panel's recommendations.<sup>37</sup>

However, further examination of the legislation governing national museums reveals that the curators and their governing bodies have considerable discretion in relation to the disposal of items despite the restrictions imposed upon them. For example, there is considerable discretion permitted in relation to the destruction of a cultural item: museums are entitled to destroy an item where it has become useless for the museums' purposes by reason of damage, physical deterioration or infestation with destructive organisms.<sup>38</sup> It is no doubt expected that curators will attempt to save and repair such items where they can. Yet the decision to destroy may be made in relation to items which are not damaged at all. For example, in the 1950s and 1960s, some museums destroyed plaster copies of sculptures because they were mere copies. The National Museums Directors' Council noted that:

The contempt then felt for all kinds of copies even resulted in the destruction of Richard Evans' copies of Raphael's frescoes for the Vatican Loggia. These had been acquired by the V&A ... with a Treasury grant of £310 (approximately £50,000 today) and had occupied a prominent and influential place in its displays from 1843 onwards.<sup>39</sup>

The limited guidance provided by legislation in relation to destruction means that items in collections have been at risk where they have fallen out of fashion and where no one seemed to want them.

These statutes also provide curators and their governing bodies with a broad discretion to dispose of items by way of transfer or sale where they are unsuitable to be retained in the collection and where their removal would not be to the detriment of researchers. Serious blunders have been made by museums over the years. For example, in 1949, the Victoria and Albert Museum sold some chairs at auction; it was later discovered that the chairs were of great cultural value, having been part of a set of chairs commissioned in the eighteenth century by Doge Paolo Renier of Venice. In the meantime, the purchaser of the chairs had turned them into stools and mirror frames.<sup>40</sup> There have been a number of sales between the 1950s and the 1970s which followed the same pattern: museums selling at a low price and learning subsequently that the items were far more valuable in both cultural and financial terms than was appreciated at the time. It is evident that curators and their governing bodies sometimes exercised poor judgment not only in relation to acquisitions during this period, but also in relation to sales. Gradually, the tide began to change. The public outcry when the Tate Gallery sold one of its paintings led to the Cottesloe Report on the

<sup>37</sup> *Official Report*, 8 May 2000, col 349, c 491. The Spoliation Advisory Panel has received only a small number of claims and has generally been successful in resolving them. See generally NE Palmer, *Museums and the Holocaust* (Leicester, Institute of Art and Law, 2000).

<sup>38</sup> British Museum Act 1963, ss 5(2), 8, as amended. In relation to other museums, see the Museums and Galleries Act 1992, s 4(4), (5). See also, eg the National Heritage Act 1983, ss 6(3), 14(3), 20(3), 27(2).

<sup>39</sup> National Museums Directors' Council, *Too Much Stuff? Disposal from Museums*, 27 October 2003.

<sup>40</sup> *Ibid.*

Sale of Works of Art in 1964,<sup>41</sup> which emphasised that even where museums had the legal power to dispose of items in their collections, they should only do so where it could be demonstrated that the disposal was in the public interest.

But is it a criticism of these statutes that a more detailed scheme relating to disposal was not laid down in order to restrain the excesses of idiosyncratic curators and their governing bodies? I suggest not. In this field, where cultural value can be subjective and open to review, and where museums differ so widely in their purposes, it might well have been impossible to have created detailed rules which could be applied uniformly to all museums. Furthermore, the consideration which should dominate whenever a museum acquires or disposes of an item is whether it is acting in the public interest in doing so. This issue is complex and it can be argued that the law should be supplemented by ethical principles which are more flexible and which can focus more effectively upon the public interest.

#### V. DISPOSALS BY OTHER MUSEUMS: ETHICAL CONCERNS

There is no special legislation governing museums other than the national museums.<sup>42</sup> However, the Museums Association's Code of Ethics provides principles which apply uniformly to all museums in the UK, regardless of their purpose or size. Until 2007, the principles in the Code which related to disposals of items from museum collections largely reflected the legislation which applied to national museums. Museums were expected to dispose only where there were good curatorial reasons and where it was in the public interest to do so. The original set of ethical principles drafted in 1977<sup>43</sup> established a strong presumption against transfer or sale outside of the museum sector, encouraging disposal of superfluous items to other museums instead. The 1994 revision baldly stated that: 'Decisions to dispose should never be taken as a means of raising money.' This prohibition on what is known as 'financially motivated' disposal stayed in place until 2007. Unfortunately, these ethical principles had an obvious drawback: they relied upon consensus amongst the members of the Museums Association and there were no legal mechanisms which could be called into play to prevent irresponsible sales.

The lack of legal control over sales of items from the collections of museums other than national museums came to the public notice after a number of instances where local authorities sold items in order to meet a budget deficit. For example, in 1991, Derbyshire County Council sold items from the collection in the Buxton Museum and Art Gallery in order to plug a shortfall in its finances: as this contravened the ethical guidelines, it was expelled from the Museums Association.<sup>44</sup> However, the most

<sup>41</sup> *Report of the Committee of Enquiry into the Sale of Works of Art by Public Bodies* (1964). See N Merriman, 'Museum Collections and Sustainability' (2005) *MLA: Research and Evaluation* 7.

<sup>42</sup> Although s 12 of the Public Libraries and Museums Act 1964 empowers local authorities to maintain museums, they may establish an art fund to be used for the purchase of objects for exhibition: *ibid*, s 15, sch 2.

<sup>43</sup> Code of Practice for Museum Authorities.

<sup>44</sup> See T Jenkins, 'Just Say No: You Cannot Be Too Careful in Embracing Disposal' in Davies (n 4) 72; S Heal, 'The Great Giveaway' (2006) 106(10) *Museums Journal* 32–35. More generally, see I Robertson, 'Infamous De-accessions' in A Fahy (ed), *Collections Management* (London, Routledge, 1995), 168, 170.

notorious case involved Bury Metropolitan Borough Council, which, in 2006, sold a painting, 'A Riverbank' by LS Lowry, from its collection at Bury Museum and Art Gallery. Bury Metropolitan Borough Council had purchased the painting from the artist for £175 in 1951. It was sold for £1.4 million and this money was not applied for the benefit of the remaining collection, but was used instead to pay for social services. Representatives from Bury Metropolitan Borough Council suggested that the painting was not central to the museum's collection, which was primarily concerned with nineteenth-century and contemporary works of art. Even so, the decision to sell on the open market was made without any attempt to see if another museum might wish to buy it. Moreover, the decision was not made by the curator but by the local authority. The Museums Association observed that: 'Treating a museum's collection as a financial asset is absolutely contrary to the Council's obligations to safeguard the museum collections in its stewardship for current visitors and future generations.'<sup>45</sup> The Disciplinary Committee of the Museums Association severely reprimanded Bury Museum and Art Gallery which resigned from the Association.

A large number of museums and galleries have registered under the Accreditation Scheme, which is now administered by the Arts Council of England (ACE), but which was formerly the responsibility of the Museums, Archives and Libraries Association (MLA). The Scheme sets out nationally agreed standards in relation to the management of collections. It follows the principles to be found in the Museums Association's Code of Ethics, particularly as regards serving the long-term public interest by safeguarding museum collections and respecting the interests of stakeholders. As a consequence of the local authority's actions, the MLA removed the accredited status of Bury Museum and Art Gallery, thereby making it ineligible to apply for government grants.

In 2007, the Culture, Media and Sport Committee interviewed a large number of witnesses to obtain evidence relating to the general health and vitality of museums across the country. Despite the conduct of Bury Metropolitan Borough Council in relation to the Lowry painting, the Museums Association took a balanced view. It was supportive of responsible disposals of items from collections, stating that:

Museums collect for the long term. But that does not mean that their collections are set in stone. They should grow and develop in response to changing needs and priorities. That needs to include the possibility of disposing of objects that no longer fulfil a need and are not appropriate to a museum's mission, especially those that would be more accessible to the public elsewhere.<sup>46</sup>

Other witnesses to the Culture, Media and Sport Committee confirmed that there was a growing recognition that there were items in collections across the country which should not have been acquired and which were costly to store and take care of.<sup>47</sup> But there was a fear that any encouragement of disposal of unwanted '1970s ephemera' would put 'a light bulb on in the councils' minds that perhaps they could sell off their pre-Raphaelites'.<sup>48</sup>

<sup>45</sup> Sixth Report, *Caring for Our Collections*, para [3.11], HC 176-II, published on 27 June 2007.

<sup>46</sup> *Ibid*, [3.8].

<sup>47</sup> *Ibid*, Ev 7, Q9 (Dr Maurice Davies, Deputy Director, Museums Association).

<sup>48</sup> *Ibid*, Ev 7, Q9 (Ms Helen Wilkinson, Policy Officer, Museums Association).

The Committee discussed the question of whether legislation was needed in order to protect collections from being sold off in a reckless manner. However, it was suggested that it might be difficult to draft legislation which was sufficiently flexible.<sup>49</sup> A different concern related to whether the legislation should encourage disposal or not. As the issues were so complex, it was decided not to press for legislative action.

## VI. TOO MUCH STUFF?

At one time, the generally held view appeared to be that museums must keep items in their collections forever. This approach was challenged in 2003 by a document entitled *Too Much Stuff?* which was published by the National Museums Directors' Council (NMDC). The document noted that in a number of instances, museums could not afford to preserve items, which had gradually fallen into decay before being destroyed. It was argued that it would be better to rationalise collections and to sell, transfer or lend items, as appropriate, in order to ensure that the items were preserved and used. This strategy would mean that resources could be released and directed to other items in the collection.<sup>50</sup>

The NMDC observed that various museums have far more items than they can display. For example, the Natural History Museum has 70 million specimens. However, items not on display should not necessarily be removed from the collection because they may be needed by researchers. On the other hand, museums have items in their collections which either should never have become part of the collection in the first place or which could be more popular if located elsewhere. For example, in 2000, the British Museum transferred its photograph collection to the national collection of photography at the Victoria and Albert Museum in order to increase public access and engagement.<sup>51</sup> Similarly, the National Museum of Antiquities of Scotland transferred Irish archaeological material to the National Museum of Ireland. There is no public benefit in merely hoarding items.

More controversially, the NMDC discussed whether British museums should be able to trade up without censure, as their American counterparts can do, selling items from their collections to raise finance to purchase a more interesting and higher-quality item in the same field.<sup>52</sup> Yet, there are obvious dangers if museum curators and their governing bodies were to regularly engage in buying and selling. One risk is that there would be a temptation to sell items which were out of fashion—and such items will not realise high prices. An associated risk is that if items were sold and then these sales were viewed (with the benefit of hindsight) as

<sup>49</sup> Ibid, Ex 7 Q11 (Rosemary McKenna, MP, Member of the Culture, Media and Sport Committee).

<sup>50</sup> National Museums Directors' Council (n 39) 13.

<sup>51</sup> Ibid, 7.

<sup>52</sup> See further D Fincham, 'Deaccession of Art from the Public Trust' (2011) XVI *Art Antiquity and Law* 93, 99.

a major mistake, the museum might not be able to afford to reacquire them. The NMDC concluded that:

There is a place for both museums which improve and refine their collections through purposeful disposal and for those which retain the evidence of other generations' tastes and attitudes, and provide opportunity for re-evaluation and rediscovery of a particular works as taste changes.<sup>53</sup>

This conclusion might not seem particularly helpful at first sight. How would you be able to determine whether the governing body had acted improperly in selling an item? But it must be recalled that every museum is different and each has its own mission statement. The answer then becomes clear. If a museum is dedicated to contemporary art, it may well be that it *should* be permitted to sell and purchase in order to satisfy its mission. At the other end of the spectrum, a museum which is dedicated to preserving the items which catalogue the life of one family should not ordinarily sell any of those items because its mission will be to preserve the current collection. Be that as it may, in the period leading up to 2007, the Code of Ethics banned museums from selling on the open market to buy a 'better' item.

#### VII. FINANCIALLY MOTIVATED DISPOSALS: SELLING TO RAISE MONEY

In 2005, the Museums Association published a report, *Collections for the Future*, which suggested that museums needed to consider how to make the most of their collections. It accepted that this might involve disposals in cases where the items could be better used elsewhere. The report signalled a cautious reappraisal of the ethical restraints upon disposal in response to concerns that they might simply encourage stagnation. Following the publication of the report, the Museums Association engaged in extensive consultation and received over 90 individual submissions from museums and other organisations. There appeared to be a consensus that sales for financial reasons to raise money would be tolerated in the museum sector in certain limited circumstances. As a result, the Code of Ethics was revised in 2007 and the current version was published in 2010.

The principles relating to disposals of items from collections can be found in Part 6 of the Code, which divides disposals into those which are 'curatorially motivated' and those which are 'financially motivated'. The distinction is important because financially motivated disposals are hedged round with severe restrictions to be found in paragraph 6.14, which is set out below. However, perhaps surprisingly, no definition is offered of a financially motivated disposal.

The Code of Ethics states that museums should:

**6.13** Refuse to undertake disposal principally for financial reasons, except in exceptional circumstances, as defined in 6.14.

Financially motivated disposal risks damaging public confidence in museums and the principle that collections should not normally be regarded as financially negotiable assets.

<sup>53</sup> National Museums Directors' Council (n 39).

6.14 Consider financially motivated disposal only in exceptional circumstances and when it can be demonstrated that:

- It will significantly improve the long-term public benefit derived from the remaining collection;
- It is not to generate short-term revenue (for example to meet a budget deficit);
- It is as a last resort after other sources of funding have been thoroughly explored;
- Extensive prior consultation with sector bodies has been undertaken;
- The item under consideration lies outside the museum's established core collection as defined in the collections policy.

Paragraph 6.15 adds a final touch to the list of restrictions with arguably the most important point of all: the proceeds of sale must be ring-fenced 'solely and directly for the benefit of the museum's collection'.

Although this change was made in 2007, there have been relatively few applications to the Museums Association's Ethics Committee until very recently. As more applications are anticipated in the future, however, this distinction between curatorially motivated and financially motivated disposal called out for fresh scrutiny. The Code does not provide a definition of a financially motivated disposal and does not specify whose motivation matters. Even so, it would appear that it is the motivation of the governing body, rather than the motivation of the curator, which is significant. It is the governing body which has the power to arrive at a decision to dispose.<sup>54</sup> For example, in the case of the sale of the Lowry painting by Bury Metropolitan Borough Council, it appeared that the decision to sell was being made by local authority councillors. There was no evidence that a curator had made a decision beforehand on the issue or had even been consulted. It can be objected that it is artificial to place so much emphasis upon the intention of the governing body, as it may be difficult to pin down people's knowledge and motives.<sup>55</sup> For example, shortly before the Code of Ethics was revised in 2007, the Watts Gallery decided to sell two paintings to pay for construction work. Although this was presented as a curatorially motivated disposal and received approval from the Museums Association, it could more readily have been interpreted as a financially motivated disposal.<sup>56</sup> There was a risk that a disposal would be classified as a financially motivated disposal only if the governing body of a museum was brazen enough to acknowledge it, as in the case of Bury Metropolitan Borough Council.

In the absence of any definition, a reference to motivation did not appear to be satisfactory as a trigger for the series of restraints set out in paragraphs 6.13 and 6.14 of the Code of Ethics. Yet creating a definition for the first time has proved difficult because there was no consensus amongst museums who responded to a consultation exercise carried out between May and July 2012. It is important to

<sup>54</sup> Some local authorities have adopted a Cabinet system, whereby decision-making powers are devolved upon particular individuals (Cabinet portfolio holders) who are executive Cabinet members; see Egeria and Farrer & Co, 'Moving to Museum Trusts' produced for the MLA in 2006, at 23.

<sup>55</sup> In the civil law, the common law torts such as conversion are simple to apply because there is no need to bring forward proof of the recipient's state of mind; in contrast, the position in equity in relation to 'unconscionable' receipt poses more difficulties: *BCCI v Akindele* [2001] Ch 437 (CA); *Starglade Properties Ltd v Nash* [2009] EWHC 148; *Law Society v Isaac & Isaac International* [2010] EWHC 1670.

<sup>56</sup> For critical discussion, see D Rykner, 'UK Deaccessioning' *The Art Tribune* (2008) 1 March.

create a definition which does not alienate a large section of the museum sector; any definition also needs to be sufficiently flexible to apply in an appropriate manner to a wide variety of fact situations. A compromise was reached and can be found in the draft Due Diligence Guidelines Relating to Sale of Items from Museum Collections, which provide detailed guidance to all museums in relation to transfers and sales. The Due Diligence Guidelines state that a sale will be financially motivated if a primary reason for disposing is to raise funds.<sup>57</sup>

The definition of financially motivated disposal, which was newly created in the draft Due Diligence Guidelines, had to satisfy one fundamental test. The definition needed to mesh with other guiding principles on disposal which are clustered together in Part 6 of the Code of Ethics. Frequent reference is made to the need to safeguard collections for future generations. Although it might seem strange to place so many restraints on disposals which are financially motivated, this approach is more readily comprehensible once one appreciates that the overarching theme of the Code of Ethics is the necessity of serving the long-term public interest. The new definition of a financially motivated disposal reflects the concern to protect the public interest: where the primary reason for sale is to raise funds, special checks are necessary because the decision to sell an item presents a risk that an item of great cultural value may be lost to the public forever.

#### VIII. THE ROLE OF LAW

The law has an essential role to play in determining entitlement to property. Any museum will need to ensure that it has legal title to an item before it can consider disposing of it. If items have been lent to a museum,<sup>58</sup> it will have a possessory title but not a legal title and should not sell; if it does so without disclosing the nature of its title, it will be liable to a purchaser for breach of contract.<sup>59</sup> Equally, some museums have been established as charities with property provided on trust as a 'permanent endowment'. The governing body of the museum will not be able to deal freely with such property because of the restrictions imposed by the trust.<sup>60</sup> Statutes governing national museums acknowledge this point and state that a museum may not be able to dispose of an item if it is subject to a trust or condition.<sup>61</sup> Equally, codes of ethics will make reference, either implicitly or expressly,<sup>62</sup> to the issue of ownership.

<sup>57</sup> These draft Due Diligence Guidelines were drawn up by the author, working with Maurice Davies and Sally Colvin of the Museums Association, liaising as appropriate with Isabel Wilson and Sam Rowlands at the Arts Council of England and representatives from its regional counterparts.

<sup>58</sup> It may also be provided that, if the museum is a charity and has ceased to display the item donated, an automatic gift over to another charity will take effect.

<sup>59</sup> Sale of Goods Act 1979, s 12.

<sup>60</sup> Charities Act 2011, ss 273, 274,. As regards applications to the Charity Commissioners to vary the terms of the trust, see the Charity Commission's webpages: Spending Permanent Endowment [http://www.charitycommission.gov.uk/Manage\\_your\\_charity/spend\\_permanent\\_endowment.aspx](http://www.charitycommission.gov.uk/Manage_your_charity/spend_permanent_endowment.aspx).

<sup>61</sup> Even if a transfer is possible, that museum will hold the item subject to the trust or condition: the British Museums Act 1963, ss 5(1), 8(3); the Museums and Galleries Act 1992, s 6.

<sup>62</sup> Paragraph [6.8] of the Museums Association's Code of Ethics states vaguely that governing bodies must take into account 'all legal and other attendant circumstances'; para [2.0] of the ICOM's Code of Ethics is somewhat more legalistic in tone, referring to 'rightful ownership' and documentation.

There are also certain general principles relating to good governance which apply across the museum sector. For example, trustees and directors will owe fiduciary duties to the museum, which will include avoiding any undisclosed conflicts of interest.<sup>63</sup> Equally, senior employees who have responsibility for the collections may owe fiduciary duties too.<sup>64</sup> Part 2 of the Museums Association's Code of Ethics reflects the law by stating that members of governing bodies and employees of museums must put the public interest first and must 'avoid any private activity or pursuit of a personal interest that may conflict or be perceived to conflict with the public interest'.

Beyond issues of entitlement to property, and fiduciary duties and duties of care, the law operates in a piecemeal way. Governance structures vary. Local authority museums make up approximately 40 per cent of the museums in the UK.<sup>65</sup> In the past, they have been owned and run by local authorities as part of their civic responsibilities. Some local authorities have adopted a Cabinet system, whereby decision-making powers are devolved upon particular individuals who are executive Cabinet members.<sup>66</sup> An alternative is scrutiny committees which will oversee the management of the museum. Other museums are regulated by the law of trusts and others have registered as a company limited by guarantee. Some museums are registered as charities and must therefore comply with charity law.<sup>67</sup> However, a large number are not charitable. For example, a museum's collection may be held for purposes which benefit a company as well as the public so that it is not exclusively charitable.<sup>68</sup> Furthermore, the collections held by local authorities are not usually held on charitable trusts, but are treated as belonging to the local authority and are held for its statutory purposes.<sup>69</sup>

A drawback in creating a legal framework to govern the process of deaccessioning and disposal is the complexity of the task. Apart from the different legal forms of governance which may have been adopted, the items which museums hold for the benefit of the public can vary greatly, from fine art, to machines, to the flora and fauna of the natural world. Furthermore, although the main purpose of all museums is to act for the long-term public benefit, they may have very different missions.

<sup>63</sup> Eg, *Keech v Sandford* (1726) Cas temp King 61, [1558–1774] All ER Rep 230, Lord Chancellor's Court; *Boardman v Phipps* [1967] 2 AC 46 (HL); *Bishopsgate Investment Management Ltd v Maxwell (No 2)* [1994] 1 All ER 261 (CA).

<sup>64</sup> *Brinks v Abu-Saleh (No 3)* [1996] CLC 133, where Rimer J held that a security guard was a fiduciary.

<sup>65</sup> I Lawley, 'Local Authority Museums and the Modernizing Government Agenda in England' (2003) 1 *Museum and Society* 75.

<sup>66</sup> Egeria and Farrer & Co (n 53) 23.

<sup>67</sup> For specific guidance provided for charitable trustees, see *The Essential Trustee*, <http://www.charitycommission.gov.uk/Publications/cc3.aspx>.

<sup>68</sup> There is a risk to the collection if the collection is not held for charitable purposes and the company becomes insolvent: see *In the Matter of Wedgwood Museum Trust Ltd (in administration)* [2011] EWHC 3782 [8]–[10].

<sup>69</sup> Museums run by local authorities are regulated by the Public Libraries and Museums Act 1964. It is possible for local authorities to transfer their collections into separate charitable trusts, but this is unusual. Instead, some local authorities have created charitable trusts relating to the management of the museum in order to gain fiscal advantages. In this situation, the museum's collections will be retained by the local authority and will be lent to the charitable management trust. See Lawley (n 64); Egeria and Farrer & Co (n 53).

The difficulties are demonstrated by the hypothetical example of a museum which discovers that it has a forgery in its collection. Many curators would wish to dispose of any forgeries which have been discovered. Yet, if a museum's key concern was aesthetics, such as the Victoria and Albert Museum, it might be decided to retain a known forgery on aesthetic grounds. Thus, given the particular mission of the museum and the specialist nature of a curator's work, it may be difficult if not impossible for an outside observer to determine whether an item is unsuitable for a particular collection and whether the governing body has acted properly in deciding to dispose of it.

The law can respond to such a complex situation by providing simple statements. One of the great strengths of the Trustee Act 2000 is the fact that its principles relating to trustees' duty of investment and their use of agents can be easily applied to all trusts, big and small. Similarly, the Sale of Goods Act 1979 applies to all types of sales, whether it concerns large-scale international contracts for oil or consumer purchases of low-cost items. However, as the Museums Association's Code of Ethics provides general principles and a system of self-regulation of the profession, it is difficult to see what legislation dealing with disposal would add, beyond offering legal sanctions in cases of non-compliance.

Nevertheless, the UK government's decision to reduce its financial support for museums has prompted further discussion as to whether further regulation was needed to ensure that museums acted responsibly.<sup>70</sup> For example, there have been calls for the government to establish a special advisory panel on deaccessioning, with a range of experts who can help to prevent mistakes being made, where items of great cultural value are sold cheaply and disappear into obscurity.<sup>71</sup> This call for reform may well be appropriate in relation to fine art. However, it would be problematic to establish a panel which can pronounce on every type of item which a museum may choose to dispose of. Even if such a panel is established, it is unlikely to offer general guidance to curators and their governing bodies in relation to taking care over the management of the disposal process.

There is also a danger that any calls for law reform will overlook the most obvious and fundamental point: that museums exist to benefit the public in the long term. How can legislation concretise such an abstract concept? It is here that I would maintain that the law fails museums and why ethical principles have become so valuable. Marstine has argued as follows:

But the most significant difference between law and ethics is that the former is characterised by constraints—what one cannot do—while the latter concerns ever-shifting opportunities—what one can do—for the common good.<sup>72</sup>

Marstine's argument rings true in relation to disposals. Apart from entitlement, museums will need to ensure that there is a system of good governance, regardless

<sup>70</sup> See E Manisty and J Smith, 'The Deaccessioning of Objects from Public Institutions: Legal and Related Considerations' (2010) XV *Art Antiquity and Law* 1. See further D Fincham, 'Deaccession of Art from the Public Trust' (2011) XVI *Art Antiquity and Law* 93; Davies (n 4).

<sup>71</sup> See P Mould, 'In the Basement' *Art History News* (9 May 2011).

<sup>72</sup> J Marstine, 'The Contingent Nature of the New Museum Ethics' in Marstine (n 3) 3, 7.

of whether they are charities or not. Yet, as will be demonstrated below, the law has relatively little to say on what museums *should* do for the common good.

#### IX. LONG-TERM PUBLIC BENEFIT

Museums can apply for registration as charities because their main purpose is to advance education in general or, in particular, the arts, culture, heritage or science.<sup>73</sup> In order to assist the governing bodies of museums, including those seeking charitable status, the Charity Commissioners published a research report in August 2002, entitled *Museums and Art Galleries*, which provides guidance in relation to the qualities expected of museums which make them deserving of charitable status.<sup>74</sup> Paragraphs 7–9 of the report explain that the collections and exhibits must have an educational value. The report repeatedly emphasises that the collection must have merit.<sup>75</sup> This principle rests on decided cases. Thus, in *Re Pinion*,<sup>76</sup> the testator had provided in his will that his studio and its contents should be kept intact as a museum. Harman LJ noted that most of the items were utterly worthless and concluded that the gift ‘has neither public utility nor educative value’.<sup>77</sup> A particular difficulty with the testator’s gift was that he had directed that the items should be exhibited as a whole; as Davies LJ observed, although there were some chairs which had some educative value, ‘they would be smothered by the intolerable deal of rubbish’.<sup>78</sup> The Charity Commissioners’ report reflects established law, but its insistence upon merit would appear to add pressure upon museums to dispose of any item which is viewed by experts as of poor educative value.<sup>79</sup>

The other key concern in the report was public access and it therefore encouraged museums to lend objects to further public engagement.<sup>80</sup> The report does not expressly discuss sale, but states that:

There is no objection to storage of exhibits for good reasons but there comes a point where ‘storage’ becomes hoarding if there is no reasonable expectation that they can or will be exhibited. Where a museum or art gallery runs into this sort of difficulty we would expect the trustees to consider whether their holding of such collections is for the public benefit if access to the public, or interested sections of it, is in practice negligible or non-existent.<sup>81</sup>

<sup>73</sup> Charities Act 2006, s 2(b)(f). See further *Re Holburne* (1885) 53 LT 212; *Re Spense* [1938] Ch 96; *Royal Choral Society v Inland Revenue Commissioners* [1943] 2 All ER 101 (CA); *Re Delius* [1957] Ch 299. Membership of the Museums Association gives rise to a presumption that the collection has merit: RR10 (Version 08/02) para [10], Annex [A.7].

<sup>74</sup> RR10 (Version 08/02). See <http://www.charity.commission.gov.uk/Library/guidance/rr10text.pdf>.

<sup>75</sup> *Ibid*, paras [7]–[11], [14], Annex [A.1–18], [B.15–16].

<sup>76</sup> *Re Pinion* [1965] Ch 85 (CA).

<sup>77</sup> *Ibid*, 106.

<sup>78</sup> *Ibid*, 108. The same objection caused the trust to fail as a charity in the Scottish case of *Sutherland’s Trustee v Verschoyle* 1967 SLT 106, Court of Session.

<sup>79</sup> See RR10 (Version 08/02), Annex A: ‘In the case of a museum not concerned with art, for example a science museum, we need to be satisfied that the collection(s) and the use made of it/them educate the visitor, or is/are capable of doing so.’

<sup>80</sup> *Ibid*, [A.25].

<sup>81</sup> *Ibid*, [A.27].

This statement can be interpreted as also encouraging disposal of items where there is no sound reason to retain them in the collection. However, no further guidance is offered to assist museums in this regard.

Why does the law have nothing positive to say which will provide further guidance on how museums may serve the long-term public benefit? It is submitted that one reason why there is silence is because of how the law has developed. After the end of the Second World War, money had to be found to support the birth of the welfare state. Private trusts were subjected to heavy taxation. The fiscal benefits which charities enjoyed prompted fresh scrutiny of their stated purposes and whether they were essentially public or private in character. There has been particular attention paid to the question of whether trusts deserved their charitable status rather than upon what should or should not be done for the common good.

The strength of the Code of Ethics is that its principles rest squarely on the premise that every museum, in fulfilling its purpose, must act for the benefit of current members of the public and of future generations. It therefore reminds museums of their obligations to care for their collections and to protect them from any risk of damage or theft. Museums are expected to transfer items to other museums or, failing that, to other public institutions.<sup>82</sup> The principle of ring-fencing the proceeds of sale to be spent on the collection, which can be found in legislation governing national museums,<sup>83</sup> seems rational in the light of public benefit considerations. However, there are other significant principles, most notably that there should be transparent procedures.<sup>84</sup> Museums must also seek the views of stakeholders.<sup>85</sup> It can be argued that if governing bodies comply with the requirement that there must be transparency in the decision-making process, this will encourage consultation, reflection and accountability.

Once an understanding of long-term benefit is absorbed, it assists the museum in grappling with unexpected ethical dilemmas not dealt with in the Code of Ethics itself. For example, suppose a museum offers to transfer an item to other museums. It is possible that more than one museum may offer a home for the object. In this situation, a museum may well choose between the museums by selecting the one which offers the most convincing evidence that there will be active public engagement with the object.

A consciousness that public benefit considerations should always underpin dealings with collections may also assist in determining how legal principles may apply in this area. For example, where an agent is selling property on behalf of another, he will normally owe a duty to obtain the best price.<sup>86</sup> This is because the object of the transaction is solely a commercial one: to bargain for the best financial return. Yet, in the context of the sale of items from collections, the duties of museum directors

<sup>82</sup> Code of Ethics, para [6.10].

<sup>83</sup> British Museum Act 1963, s 5(3) and Museums and Galleries Act 1992, s 6(7). As regards local authorities, sch 2 to the Public Libraries and Museums Act 1964 provides that if any item is sold from a museum or gallery maintained by the local authority, the proceeds of sale may be paid into the art fund.

<sup>84</sup> Code of Ethics, para [6.11].

<sup>85</sup> *Ibid*, para [6.12].

<sup>86</sup> See, in the context of estate agents, *Keppel v Wheeler* [1927] 1 KB 577 (CA).

and trustees are affected by public benefit considerations. They must maintain the reputation of the museum and ensure that further donations are made; they must ensure that the museum continues to enjoy the public's support and that they continue to visit and engage with the collection. In *Harries v Church Commissioners*, the court accepted that trustees are entitled to take account of the objects of the trust in exercising their duty of care.<sup>87</sup> Trustees and directors also owe fiduciary duties to act loyally and in good faith. However, fiduciary duties can be tailored to specific situations.<sup>88</sup> Governing bodies of museums must act within the trusts and powers conferred by their governing document. They must consider the mission of the museum, its reputation and the long-term public benefit in deciding to transfer or sell a deaccessioned item. Where a sale is contemplated, governing bodies may therefore decide to sell a deaccessioned item for less than its estimated financial worth to another museum rather than to put it up for auction and risk selling it to a private collector, with the result that it disappears from public view. A sale at less than full value can be agreed where it furthers the museum's purposes or is otherwise in its interests.<sup>89</sup> For example, a sale at an undervalue is justified where it maintains or enhances the reputation of the selling museum and where it also benefits the public, both now and in the future, because the item is being transferred to another museum to be enjoyed there.

## X. DUE DILIGENCE GUIDELINES RELATING TO SALE OF ITEMS FROM MUSEUM COLLECTIONS 2013

### A. Collections Review

The Due Diligence Guidelines have been drawn up to provide museums with more detailed advice in relation to the transfer and sale of items from collections. They refer to the law and ethics, providing a framework for what a museum should do based upon the mission of the museum and long-term public benefit.<sup>90</sup> The Guidelines refer to the Collections Review which is carried out by the curator and other museum professionals in their capacity as stewards of the collection. Collections Reviews vary in detail from one museum to another. To ensure that museums possess adequate information as they begin the process of disposal, the Guidelines require that certain information should be documented. This information will include: the historical legacy of collecting, including dates when reviews of the collection have been undertaken and any outcomes from such reviews; the number and nature of items selected for transfer to another museum or sale; the impact of the disposal of each item on the remainder of the collection; whether the item

<sup>87</sup> *Harries v Church Commissioners* [1992] 1 WLR 1241.

<sup>88</sup> See, eg, *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91; see further R Lee, 'Rethinking the Content of the Fiduciary Obligation' [2009] *Conv* 236.

<sup>89</sup> This view has been confirmed by the Charity Commission in correspondence with the author. The principle of selling at less than market value to another museum or gallery has been included in the draft Due Diligence Guidelines Relating to Sale of Items from Museum Collections.

<sup>90</sup> These Guidelines were drawn up by the author of this chapter, working with the Museums Association and liaising as appropriate with the Arts Council of England.

would fit better and be more widely used and more accessible in another museum's collection; how the particular items selected for disposal were selected; and why other items were not selected instead. The aim of these questions is to provide a permanent record in relation to a particular disposal and to ensure that, at the initial stage of selection, the process of disposal is being carried out with due care.<sup>91</sup>

The Collections Review is important in another respect. The stated mission of a museum will act as a constraint on disposal. There is an absolute ethical bar on disposing of any item from the 'core' collection of a museum and this prohibition is repeated in the draft Guidelines.<sup>92</sup> Part of the process of any Collections Review should be its scrutiny of items and their link to the mission of the museum, so that it is clear why an item earmarked for deaccession and disposal does not fall within the 'core' collection. However, although the mission of some museums may remain the same over the centuries, the mission of other museums may change and evolve. The Guidelines require information about the history of collecting in order to illuminate whether the decision to deaccession an item is being made on sound curatorially based grounds rather than primarily to raise money. There are also further supplementary matters that are dealt with in the Guidelines. For example, a decision to sell high-value items (such as fine art) relative to the collection as a whole may require a more detailed explanation of how this decision was arrived at in order to ensure that items are not being selected because they are easier to sell than a much larger group of less valuable items.

## **B. Acting with Reasonable Care in Taking Advice and Consulting Others**

All disposals need to be carried out with proper care, regardless of whether they are curatorially motivated or financially motivated.<sup>93</sup> Although the current Code of Ethics encourages museums to take care and obtain advice from others in the sector, it is vague. The draft Due Diligence Guidelines spell out that advice must be obtained not only in relation to an item's financial value but also its cultural value. It is vital that cultural items are not seen only in terms of their financial worth.

The Guidelines attempt to develop ethical principles relating to seeking advice and consulting stakeholders. Consequently, museums are expected to seek advice within the museums sector and also from more than one source in the commercial sector, such as auction houses, dealers and other experts. The importance of transparency is also brought to the fore so that, in relation to consultation with either the public or stakeholders, such as researchers and, where appropriate, the donor or creator, there are minimum periods of consultation provided. This process of

<sup>91</sup> There are additional provisions designed to ensure that a museum does not sell a national treasure which falls within the Waverley criteria and which will be subject to export controls: see DCMS Guidance, *Export Controls on Objects of Cultural Interest* (November 2005). See further J Ulph and I Smith, *The Illicit Trade in Art and Antiquities: International Recovery and Criminal and Civil Liability* (Oxford, Hart Publishing, 2012) para [3.56].

<sup>92</sup> Code of Ethics, para [6.14]; Acquisition and Disposal Policy, para [12.b].

<sup>93</sup> As regards trustees, the standard of care is an objective standard, but one which also takes account of the experience and special expertise of those concerned: Trustee Act 2000, s 1, sch 1.

consultation is valuable not only because it reflects the fact that the museums serve the public interest by considering all views, but also because the possibility exists that new information will emerge during this process in relation to the items earmarked for disposal.

Having set out certain general principles relating to transfers and sales, such as the fact that responsible disposals are part of good collection management, the Guidelines provide a step-by-step process for curatorially motivated disposals and financially motivated disposals in turn. The process is intended to ensure that there are opportunities to pause and reflect. As regards financially motivated disposals in particular, the emphasis placed by the Guidelines on garnering information is intended to guarantee that if advice is sought from the Ethics Committee of the Museums Association, the Arts Council or others in relation to the ethical position, there is sufficient factual material which can be used by its members to make a judgement.

The Guidelines direct museums to take further advice and carry out more research where an item lacks a detailed history of ownership. For example, a museum should carry out checks to ensure that an item has not been stolen or illegally exported from another country some years ago. If this research is not carried out and a foreign government makes a claim to a cultural object which has been put up for auction, it will tarnish the museum's image and may even give the impression that it is indifferent to the plunder of heritage objects from vulnerable countries. Even so, the Guidelines can only suggest that 'reasonable efforts' should be made to investigate the provenance of the item. What is reasonable will depend upon the context. For example, it is known that some countries are more at risk than others, and some of these are identified on the Red List published by the ICOM.<sup>94</sup> Objects derived from countries under military occupation should also excite suspicion. If an item appears to be from a country where it is known that looting has occurred on a significant scale, every effort should be made to discover more about the provenance of an object. Practical measures can include making searches of relevant electronic databases.

If an item is being disposed of because it is suspected of being a forgery, more research should be undertaken in relation to its authenticity. This extra work may reveal that the item is genuine and therefore highly valuable.<sup>95</sup> If, after further enquiry, doubts persist over the authenticity of an item, a museum will need to disclose this to a purchaser in order to avoid liability for breach of contract.<sup>96</sup> However, more worryingly, if a forgery is sold, there is a risk that a purchaser will later dishonestly present it as genuine to buyers.<sup>97</sup> In order to avoid a situation

<sup>94</sup> The ICOM publishes on its website a 'red list' of certain cultural objects at risk from Africa (2000), Latin America (2003), Iraq (2003), Afghanistan (2006), Peru (2007), Central America and Mexico (2009) and Egypt (2012).

<sup>95</sup> See, eg, G Evans, 'Doubts over Welsh Museum's Turner Painting Finally Vanish into the Mist' *Western Mail* (1 August 2011), discussing a Turner painting, 'Off Margate', held by the Museum of Wales.

<sup>96</sup> For an extensive discussion of potential liability under the Sale of Goods Act 1979 for breaches of ss 12, 13 and 14, see J Ulph, 'Markets and Responsibilities: Forgeries and the Sale of Goods Act 1979' (2011) 3 *Journal of Business Law* 261.

<sup>97</sup> *Ibid.*, 265.

where a disposal of an item from a museum collection becomes a catalyst for later fraud, it has now been arranged that any museum can register a forgery without charge at the Art Loss Register. This Register is an international electronic database which catalogues lost and stolen works of art, antiques and other cultural items. It was created in 1991 by a private consortium of auction houses, insurers, art trade associations and the International Foundation for Art Research. It is essentially a commercial concern and charges are normally levied if an object is registered, or a search is made, which help to meet its running costs. As it is not possible to search the database before registering, this significantly reduces the risk of thieves and accessories accessing it. The Guidelines encourage museums to register items where there is doubt over their authenticity on the basis that it helps the museum community and the public in general: registration of items aids the detection of other forgeries and should also eliminate the risk of those items being presented as genuine in the future.

The Guidelines also direct museums to investigate further where the origins of an object are obscure. These are known in the art trade as 'sleepers'.<sup>98</sup> There is a possibility that further research might reveal that the item has a far greater financial or cultural value than was originally appreciated. For example, the National Gallery discovered a Botticelli in its reserve collection in 2007.<sup>99</sup> If insufficient efforts are made regarding an item's provenance, the museum could lose a great deal of money. It will be forced to adopt a cautious approach to describing the item when it is consigned for auction in order to avoid any potential liability to the purchaser. However, due to a lack of knowledge of its history and also because it will appear unwanted by the museum which is disposing of it, the item is unlikely to fetch a high price. If the item later turns out to be worth hundreds of thousands of pounds, this is money lost which could have been spent on the rest of the collection. Obviously, not all items will be hidden masterpieces and everything will depend upon the context. Research efforts should therefore be proportionate to the apparent cultural value of the item.

### C. Financially Motivated Disposal

A sale is defined in the Due Diligence Guidelines as financially motivated if a primary reason for disposing is to raise funds. The Guidelines provide that, in this situation, further checks will be needed at each stage of the process so that it can be demonstrated that the sale will be in the public interest. In order to do this, more information needs to be obtained in relation to whether other museums wish to acquire the items in question and whether the items would be displayed if they were transferred to other museums. If, for example, other museums already have similar items in their collections, it would be easier to justify a sale because it may

<sup>98</sup> See Mould (n 70).

<sup>99</sup> See J Fenton, 'Things That Have Interested Me' *The Guardian* (29 September 2007), who comments that it is unlikely that the Botticelli would have survived 'an aggressive clear-out of the reserve collection'.

be evident that there is no particular advantage to the public, either now or in the future, in retaining the items in the public domain.<sup>100</sup> Museums are expected to consult extensively with the public and with museums and experts in the art trade. They are expected to contact the Museums Association informally and to seek formal advice from its Ethics Committee at a later stage (and, if the museum is accredited, the Arts Council), providing these bodies with sufficient information to allow them to respond efficiently to requests for guidance. This regulation of the dialogue which must be carried out with all stakeholders is designed to ensure that a sale is carried out in a responsible and open manner.

## XI. CONCLUSIONS

In various countries, there has been debate between those who view sales of items from collections as a necessary part of sound economic management<sup>101</sup> and those who believe that every item in a museum collection should remain in the public sector forever. The differing attitudes which exist have their roots to some extent in societal attitudes towards the role of museums and the support which they obtain from public funds. Thus, sales of items from museum collections to the highest bidder are not uncommon in the US, where a large number of the museums are private and independent non-profit organisations.<sup>102</sup>

Although a precise figure of items in museum collections is not available, it was estimated in 1999 that UK museums had 149 million objects in their possession.<sup>103</sup> The cost of storing certain objects which may have little educational value has been the impetus for reviewing this area. There is increasing recognition that continuous growth of museum collections is not financially sustainable in the long term and that if museums are to continue to bring new items into their collections, there should also be a regular review of collections so that unsuitable items may be removed.

One of the arguments put forward in this chapter is that the process of disposal should be carried out in a responsible and transparent manner because museums act as stewards of the items in their care. This means that curators and governing bodies must not view these items as if they were their own property. The decision by Bury Metropolitan Borough Council to sell the Lowry painting was objectionable because the councillors seemed to consider that they had the right to make a decision to sell according to their own ethical views. Yet the items in a museum collection are not private property and therefore members of a governing body should not apply their own personal sense of ethics.

<sup>100</sup> Code of Ethics, paras [6.9], [6.14.i]; Acquisition and Disposal Policy, para [12f].

<sup>101</sup> See P Ainslie, 'Deaccessioning as a Collections Management Tool', in S Knell (ed), *Museums and the Future of Collecting* (Aldershot, Ashgate, 2004) 235.

<sup>102</sup> See MS Brown, 'Disposal as an Essential Collections Management Tool: The Legal, Ethical and Practical Case for Deaccessioning in the United States' in Davies (n 4) 105, 106. In contrast, in France, the vast majority of collections are state property, which is inalienable under a 2002 law: the only possibility is to apply to a special scientific committee to change their status.

<sup>103</sup> S Matty (ed), *Overview of Data in the Museums, Libraries and Archives Sector* (London, Museums, Libraries and Archives Council, 2004) 44, referring to the DOMUS survey in 1998 (S Carter, B Hurst, RH Kerr, E Taylor and P Winsor, *Museum Focus. Facts and Figures on Museums in the UK*, Issue 2 (London, MGC, 1999).

I have sought to demonstrate that a fluid notion of public benefit lies at the core of what a museum should or should not do. Each museum's mission will differ from that of another museum, but will serve this notion of public benefit. Those museums which have highly flexible missions, such as those concerned with local history and its evolution up to the present day, will need to carry out their roles in a more dynamic manner because they must engage with issues such as social well-being. This ability to evolve in line with their mission makes museums sustainable in a broader sense.

As acting in a dynamic manner may well involve uncertainties, it is desirable to have some guidelines in place to manage and minimise the risks involved in relation to the sale of a cultural object by a museum. UK law currently provides guidance in relation to entitlement to property and governance issues involving administrative and fiduciary duties. It acts to provide some restraint upon those who act irresponsibly in seeking the most money in the fastest and easiest way. Should the law play a greater role in the management of collections? This chapter has sought to explain why further ethical guidelines relating to sales of items from museum collections are seen by the museum sector as a better option. Admittedly, ethical codes and guidelines suffer from a lack of strong enforcement measures, relying as they do upon group pressure. However, the strength of the new draft Due Diligence Guidelines is that they can mesh with the law but are better able to articulate ethical principles which stem from the notion of long-term public benefit, such as shared guardianship of heritage items and transparency and consultation with stakeholders. They can be revised so that they continue to reflect the views of professionals working within the museums sector. As this chapter has demonstrated, where cultural objects and issues of public benefit are concerned, ethical principles are necessary to give museums a better understanding of their mission and what they should do for the public good.

