

The case of Cassirer v. Thyssen-Bornemisza Foundation Collection in the U.S.



9 January 2024. The Ninth District Court of Appeals has issued a decision which confirms that, as already declared in the sentence of the District Court in 2019, in accordance with the conflict of law rule of the State of California, the law applicable to this case is the Spanish one, in accordance with which, and as had already been established during this legal process, the Foundation is the legitimate owner of the painting. This sentence in favour of the Foundation brings this lengthy judicial dispute to an end.

In the sentence of 2019 and following a complete court case on the central issue of the matter, the District Court confirmed that, according to Spanish law - the national law it understood to be applicable to the central issue of the case, in conformance with the conflict of law rule of both the State of California and of common federal law - the Foundation is the owner of the painting. Subsequently, the Court of Appeals confirmed the decision of the District Court on the basis that in conformance with the federal conflict of law rule, Spanish law is the applicable one. The Supreme Court instructed the Court of Appeals to determine whether Spanish law would also have been applicable according to the California conflict of law rule, as the District Judge had considered. It is this issue that has now been resolved by the Court of Appeals and which results in the confirmation of the District Court's decision and the affirmation that the Fundación Colección Thyssen-Bornemisza [Thyssen-Bornemisza Foundation Collection] is the owner of the painting.

Throughout this legal process it was demonstrated that in 1958 the German government paid the plaintiffs' predecessor, Lily Cassirer, her requested compensation (the then fair market value of the painting) to compensate her for her loss. Thereafter, no further claims to the painting were pursued for more than 40 years.

In 1993, the Foundation, after conducting a thorough review of Baron Heinrich Thyssen-Bornemisza's art collection, which had been internationally exhibited for years, acquired the collection (which included the painting) for public display in Madrid. The District Court also recognized that the Baron acquired the painting from a reputable gallery in 1976 - for its then-fair market value - and showed the painting in numerous international exhibitions and publications. The District Court's finding that the Foundation is the owner under Spanish law was unanimously affirmed by the U.S. Court of Appeals for the Ninth Circuit.

In the case held on 4 December 2019 in Los Angeles the plaintiffs focused their argument on an attempt to demonstrate that at the time of the painting's acquisition in 1976 the late Baron Hans Heinrich Thyssen-Bornemisza knew of the work's illicit past. However, it has been fully established that the Baron bought the painting for a fair market price at the reputable Stephen Hann gallery in New York, where it was on public display, and with the aim of exhibiting it in public, as he did for some years before he sold it to the Foundation. All this is conclusive proof that the Baron had no knowledge whatsoever of the painting's illicit origin.

It has also been demonstrated that the painting had previously belonged, among other owners, to two Second World War veterans decorated by the U.S. Government, one of them a

prominent member of the Jewish community, and to another prestigious collector. At no point during that period was any claim made on the work.

All the witnesses and experts called by the defence, with the additional support of numerous documents of the period, catalogues of the Baron's collection and international exhibition catalogues in which the painting was included, revealed that there were no indications of bad faith in the acquisition of the painting by the Baron nor in its subsequent purchase by the Fundación Colección Thyssen-Bornemisza. In addition, both the Spanish Ministry of Justice and the Ministry of Culture and Sport presented reports throughout the proceedings that supported the Foundation's legitimate ownership.

Chronology of the facts

1939: Lilly Cassirer Neubauer sold the painting for below its market value to Jakob Scheidwimmer, an art dealer and a member of the Nazi party, in order to obtain a visa to escape from Germany and avoid a concentration camp. The painting was subsequently acquired by Julius Sulzbacher, from whom it was then seized by the Gestapo.

1950: Lilly Cassirer Neubauer brought a court case in Germany to recover the painting, the whereabouts of which she did not know.

1951: The painting was acquired at the Frank Perls gallery in Beverly Hills (USA) by the American collector Sydney Brody.

1952: Frank Perls was commissioned by Sydney Brody to place the painting on sale at the Knoedler gallery in New York (USA). That same year the painting was purchased in that gallery by Sydney Schoenberg, a prominent collector from Missouri (USA).

1958: Lilly Cassirer Neubauer reached an agreement with the German government, with the art dealer Jakob Scheidwimmer and with Julius Sulzbacher, through which she accepted compensation of 120,000 German Marks from the Federal German government, an amount agreed to correspond to the market value of the work at that time. She gave 14,000 Marks of that compensation to Sulzbacher's heir. This agreement brought all claims among the parties to an end. From that date onwards, neither Lilly Cassirer Neubauer nor her heirs made any further attempts to locate or recover the painting.

1976: Baron Thyssen-Bornemisza acquired the painting from another respected gallery, the Stephen Hahn Gallery in New York. Over the following years the work was exhibited as part of the Thyssen-Bornemisza Collection in Lugano (Switzerland) and until 1990 was included in widely-publicised temporary exhibitions in seven countries (Australia, Japan, the UK, Germany, France, Italy and Spain). The Collection was widely publicised and was the subject of much interest and numerous publications. At no point were the Baron's title to the painting nor his good faith in its acquisition called into question.

1993: The Spanish State agreed the purchase of the Thyssen-Bornemisza Collection, which came about through a contract signed on 21 June 1993 between the Fundación Colección Thyssen-Bornemisza and Favorita Trustees Limited, the legitimate owner of the work and with full rights to transfer ownership. This transaction was carried out after due diligence investigations regarding the legitimacy of the seller's title to sell the Collection. This due diligence process did not reveal any irregularity in the seller's title. The acquisition by the Foundation in virtue of that contract is thus fully valid, effective

and incontestable in conformance with Spanish law, which is the law applicable to the sale and purchase transaction.

2002: Forty-four years after the compensation agreement between Lilly Cassirer Neubauer and the German government, twenty-six years after the acquisition of the painting by the Baron and nine years after its acquisition by the Foundation, the Cassirer family made its first claim for its return. The Foundation rejected that claim.

2005: Claude Cassirer brought a legal action in California.

2010: Claude Cassirer died aged 89. His children David and Ana continued with the suit, supported by the United Jewish Federation (of San Diego County).

2012 (June): The Court of the Central District of California rejected the claim made in 2005 by the Cassirer family against the Spanish State and the Fundación Colección Thyssen-Bornemisza due to the prescription of the action.

2014 (July): The Court of Appeals of California revoked the decision of the District Court and returned the case to it. The Court of Appeal's decision was based on a procedural issue and did not prejudge the central issue of the case.

2015 (June): The District Court issued its ruling on the principal issue of the case, rejecting the claim as it considered that in all cases the Foundation would have acquired the painting through usucaption, in accordance with Spanish law. Claude Cassirer's heirs lodged an appeal with the United States Court of Appeals for the Ninth Circuit.

The Jewish Community in Madrid and the Federation of Jewish Communities in Spain entered the case as interested parties. At this point the plaintiffs first introduced the argument that if the Baron did not have the valid title to sell (which he did, in the Foundation's opinion), the Foundation could not have acquired title through usucaption if it is understood, on the basis of article 1956 of the Spanish Civil Code, that in the acquisition of the painting in 1993 the Foundation could be considered an accomplice or accessory to a crime against property. In the Foundation's opinion this argument was not sustainable as neither the Baron nor the Foundation had ever been accused, and far less found guilty, of such a crime.

2017 (July): The Court of Appeals overturned the sentence, and without prejudging the essential basis of the issue, ordered the District Judge to re-examine the case to determine if there were reasons for considering the Foundation an accomplice or accessory to a crime against property. For the Court of Appeals, the law applicable to the acquisition of the painting by the Foundation is the Spanish law, and according to the Spanish Civil Code the Foundation would own the painting in any case, even if the Baron had not been the legitimate title-holder to it when he sold it, for reasons of usucaption (ownership in good faith and with good title for three years or for six years without those requisites), except in the case that the Foundation were considered to be an accomplice or accessory to the above-mentioned crime.

(September): The Fundación Thyssen-Bornemisza formally requested a reconsideration of the decision of July of the Court of Appeals for the Ninth Circuit and the Spanish State entered the case as *amicus curiae* (a third party not involved in the litigation) in order to support the Foundation. The Kingdom of Spain also appeared as *amicus curiae* in order to explain on the basis of a report by the Solicitor General's Office that the interpretation of the Spanish Civil Code argued by the Cassirer family

was unsustainable as article 1956 of the Civil Code is not applicable in the absence of a sentence that declares there to have been a crime.

(December): The Court of Appeals turned down the request for a reconsideration.

2018 (April): Supported by the Solicitor General's Office, the Fundación Colección Thyssen-Bornemisza presented the case before the United States Supreme Court.

(May): The Supreme Court declined jurisdiction.

(December): The case was held before the District Judge.

2019 (April): Judge John Walter handed down his judgment on the case with regard to all the allegations and evidence offered. He entirely dismissed the plaintiffs' complaint and declared the Foundation to have legitimate ownership of the painting.

(December): The Judge John F. Walter dismissed the case brought by the Cassirer family and confirmed that the Fundación Colección Thyssen-Bornemisza is, in accordance with Spanish law, the rightful owner of the painting. The Court considered that neither Baron Thyssen-Bornemisza nor the Foundation were aware at the moment of acquiring the painting that it had been stolen or that there was any risk or probability that it had been, and rejected the allegation on the plaintiffs' part that the Foundation be considered an "accessory" to a crime against property.

2020 (August): The Court of Appeals unanimously rejected the plaintiffs' arguments and ruled that the Fundación Colección Thyssen-Bornemisza is the legitimate owner of the painting by Camille Pissarro. The sentence confirms that the law applicable to the core issue of the case is the Spanish one, as already declared by the District Judge (albeit limiting himself to the application of the conflict of law rule of common federal law, without assessing whether the result would have been the same when applying the Californian conflict of law rule).

2022 (January): The Supreme Court instructed the Court of Appeals to confirm whether, with the application of the conflict of law rule of the State of California, it would also consider that the law applicable to the core issue of the case is the Spanish one (as it had concluded was the case in accordance with the federal conflict of law rule).

2024 (January): The Court of Appeals has confirmed that, in accordance with the conflict of law rule of the State of California, the law applicable to the core issue of the case is the Spanish one, and in consequence that the Foundation is the legitimate owner of the painting.

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