

THE SUPREME COURT OF THE REPUBLIC OF HUNGARY
as Second Instance Court

Pf. IX.26.770/2000/21

Martha Nierenberg (15 Middle Patent Road, Armonk, New York 10504 U.S.A.) as the plaintiff, represented by dr. Tamás Varga (Budapest VI, Szív u. 33.) – in whose interest the Italian residents Angela Maria Herzog (Rome, Lungorevere Flaminio 16) and Julia Alice Herzog (Rome, via Torre Spizzichina Casale 7), represented by dr. András Perjési, intervened – initiated a lawsuit for the return of assets against the **Museum of Fine Arts** (1146 Budapest, Dózsa György út 41.), represented by dr. Tibor Soós, as the first degree defendant, the **National Gallery of Hungary** (1014 Budapest, Dísz tér 17.), represented by dr. Eleonora Hernadi, as the second degree defendant, and the Treasury Assets Department (1054 Budapest, Zoltán u. 16.) acting on behalf of the **State of Hungary**, represented by dr. József A. Kovács, as the third degree defendant. The Metropolitan Court rendered judgment no. 15.P.27.693/1999/44 in the case on October 20, 2000, which the defendants appealed and the plaintiff filed a related appeal. The Supreme Court held an appeal hearing on November 29, 2002, where it entered the following

R u l i n g :

The Supreme Court vacates the judgment of the first instance court and orders the first instance court to hold a new proceeding and render a new judgment in the matter.

The defendants' appeal fee, which is not payable due to their special status is set at HUF 750,000, while the plaintiff's second instance court fee is set at HUF 8,000,000, and the defendants' second instance court fee is set at HUF 3,000,000 each, and the intervening parties' at HUF 500,000.

This ruling shall not be appealed

R e a s o n i n g :

In its judgment the first instance court obligated the 1st degree defendant to return to the plaintiff the following paintings:

Follower of Anthonis van Dyck – Portrait of Princess Marguerite of Lorraine (Painting No. 1),
Lucas Cranach the Elder – The Annunciation to Joachim Among the Shepherds (Painting No. 2)
Barthel (Bartholomaus) Bruyn the Elder – Portrait of Petrus von Clapis Jurist, Mayor (Painting No. 3)
Alonso Cano – Portrait of Don Balthasar Carlos, Infant Prince (Painting No. 4)
Gustave Courbet – Winter View of the Lake Neuchatel with the Chateau Nyon (Painting No. 5)
El Greco – Holy Family (Painting No. 11)
Pierfrancesco Fiorentino – Mary with Child (Painting No. 12)

The first instance court obligated the 2nd degree defendant to return to the plaintiff the following paintings:

Károly Brocky - Sleeping Bacchante (Painting No. 6)
Mihály Munkácsy – In the Studio (Painting No. 7)
Mihály Munkácsy – La Visite (The Afternoon Visit) (Painting No. 9)

The court obligated the 3rd degree defendant to accept the judgment and dismissed the complaint beyond the above.

The court obligated the 1st and 3rd degree defendants to pay jointly to the plaintiff the sum of HUF 7,500,000, and the 2nd and 3rd degree defendants to pay jointly to the plaintiff the sum of HUF 350,000 as legal fees. The court obligated the defendants to jointly pay to the intervening party legal fees in the amount of HUF 30,000.

According to the legal reasoning of the judgment, the plaintiff has legal capacity in the lawsuit. The lack of the court's jurisdiction cannot be deduced from Article 6 (3) of the 1973 Hungarian-American Treaty on the settlement of assets. The court established its jurisdiction on the basis of Sections 1 and 8 of Act LXVI of 1997 and Section 7 (1) of the Civil Code, and dismissed the defendants' allegation that the plaintiff had missed the deadline for claiming compensation stipulated in the Compensation Acts, which leads to a loss of rights. The first instance court referred both in the case of the international treaty and the compensation to the fact that the plaintiff's claim was not for compensation but for the recovery of assets.

On the basis of the evidentiary procedure, the court determined the plaintiff's title to all the paintings against the title of the other two Herzog heirs. As opposed to the records taken at the opening of the boxes, the court accepted the notes of the persons who had performed the packaging, who were aware of the identity of the owners in contrast with the officials who issued the documents, which were dated later.

In the cases of paintings 1-7 and 9, the court accepted the findings of the expert committee formed in 1996, which were included in a record and which deduced the plaintiff's title on the basis of recent research.

The second issue that the court examined in respect of the plaintiff's right to initiate the lawsuit was whether the plaintiff inherited the paintings on the basis of her predecessor's, Mrs. Alfonz Weiss' will of November 30, 1990. After interpreting the text of the will, dismissing the defendants' contrary interpretation, the court deduced that the plaintiff is the inheritor.

The court did not accept the defendants' legal position that the claim had been settled by international treaty stating that the Treaty did not preclude the presentation of a claim of ownership, the same way as the Compensation Acts did not rule out such a claim either. The court further determined that the defendants did not obtain title to the paintings under any of the legal bases referenced by them and the submission of a counterclaim was not necessary on the part of the defendants to adjudicate this. On the basis of Section 9 of Law-decree 13 of 1954, the paintings were taken into the possession of the state as abandoned assets. At the time the Law-decree came into force, paintings No. 2 and 10 were not in the safekeeping of the museum. In the case of the other paintings, the state and its bodies were aware that the paintings were the property of the heirs of the Herzog collection. The court rejected the defendants' argument that specifically the 1st and 2nd degree defendants should have known the identity of the owner, as they possessed the art objects on behalf of the 3rd degree defendant. The court established that the State did not use all means available to identify the owner, in spite of the fact that the identity of the owners could be determined on the basis of archive research 45 years later. For the reasons mentioned, acquisition of title by the State was precluded by Section 1 (3) of Act XXVIII of 1948 on abandoned goods, on the basis of Section 1 (3) of decree No. 24.390/1946. M.E. In respect of the application of the latter

statute, the court pointed out that the paintings in question did not leave the country, therefore, they are not covered by the scope of the ME decree. Nor can the paintings be considered as abandoned assets on the basis of decree No. 10.490/1945. M.E. The court held that the defendants could not have obtained title to the paintings on the basis of Section 127 (2) of the original text of the Civil Code, as the plaintiff's predecessor did not waive her title. And on the basis of Section 207 (3) of the Civil Code the lodging of the claim for indemnification may not be interpreted in a wider sense such that the predecessor waived her right of ownership. The court did not establish acquisition of title on the basis of Section 169 of the Civil Code because the 3rd degree defendant's right of ownership may not be derived from being non-disposable in accordance with the original Item c) of Section 169 (1) of the Civil Code.

The court rejected acquisition of title on the basis of an official decision in the case of paintings Nos. 1, 3, 11 and 12 because the paintings in question were not the property of Mrs. István Herzog, therefore the scope of the confiscation of property could not have extended to such paintings. Decision No. 180.911/3/1950 of the City Committee of the Metropolitan Council was not submitted, therefore its content could not be known. On the basis of Section 164 (1) of the Act on Civil Procedures, the onus of proof is on the defendants for showing that they acquired ownership on the basis of this decision.

The first instance court did not establish the 3rd degree defendant's acquisition of title on the basis of the settlement under the international agreement, because neither the contracting parties, nor their citizens transferred right of ownership to the other signatory state. Article 2 (1) settled only the indemnification for the damages caused earlier by state measures to the property of the persons affected by the agreement on the settlement of claims. As a result, the 3rd degree defendant could not have obtained right of ownership by means of transfer of the paintings covered by the claim for indemnification, and even less so of the paintings not covered by the claim.

The court precluded acquisition of title through donation because the legal actions of the various publicly financed institutions (Ministry of the Interior, Ministry of Foreign Affairs, Metropolitan Art Gallery, the 1st degree defendant), due to the identical owner, meant the reorganization of state property according to Section 171 (1) of the Civil Code. Therefore, the so-called donators could not have transferred title to property. In the case of painting No. 10, the individual who was the donator, Endre Gyarmathy, was not the owner, therefore the 3rd degree defendant could not have obtained title from him on the basis of Section 117 of the Civil Code.

In relation to the defendant's acquisition of title based on adverse possession, the court established in respect of paintings nos. 1, 3, 4, 5, 6, 7, 11 and 12 that the 3rd degree defendant had a title to keep these paintings in possession (the confiscation of Mrs. Istvan Herzog's property and Decree 1600/1944 ME). On the basis of Section 445 of the bill of Civil Law it was only the bailee of the paintings. Both Section 603 of the bill of Civil Law and Section 121 (1) exclude obtaining ownership by adverse possession. In the case of paintings Nos. 2 and 9, which were "received as gifts" the defendants should have proved possession of the paintings as their own. However, the defendants did not prove the circumstances of how the 3rd degree defendant entered into possession, nor did they present any statements as to this.

With regard to painting No. 10, the first instance court established that the 1st degree

defendant entered into its possession on the basis of an invalid donation contract thought to be valid. After the notice of the plaintiff's predecessor, the requirement of undisturbed possession was also fulfilled. The court did not accept the plaintiff's reference to treacherous acquisition, as at the time of the donation, the 3rd degree defendant did not have any information that the donator, Endre Gyarmathy, was not the owner. The court did not accept the plaintiff's reasoning regarding the abeyance of adverse possession, as the plaintiff's predecessor lived abroad and did not have to fear any repercussions. It is a proven fact at the same time that the plaintiff's predecessor acted in the interest of the acknowledgement of her title, therefore she could have done so in respect of painting no. 10 as well. On the basis of its reasons, the court determined that the 3rd degree defendant obtained the right of ownership of painting No. 10 by adverse possession on April 1, 1976. The first instance court dismissed this part of the claim. At the same time, in the court's view, the legal basis for the possession of paintings Nos. 1, 3, 11 and 12 ceased by the repealing of decree no. 1600/1944. M.E, whereas the title of possession of paintings Nos. 4, 5, 6 and 7 ceased after the judgment declaring confiscation, which did not extend to these paintings, became binding. Therefore, the 1st and 2nd degree defendants keep these paintings in their responsible safe custody and are obligated to issue them to their owner entitled to their possession. Paintings Nos. 2 and 9 are kept by the 1st and 2nd degree defendants without having any title to do so. The court therefore obligated the 1st and 2nd degree defendants to issue the paintings to the plaintiff on the basis of Section 193 (1) of the Civil Code, while the 3rd degree defendant must accept the legal action in view of Section 175 of the Civil Code and the provisions of the Act on State Finances.

The defendants appealed the appealable parts of the first instance court judgment, while the plaintiff filed a related appeal against the parts of the judgment dismissing its claim. The defendants requested that the claim be dismissed in its entirety, while the plaintiff requested that it be upheld.

Defendants objected to the fact that the first instance court dealt with the plaintiff's claim despite the plaintiff's lack of a right to file a claim, it ignored acquisition of title by the Hungarian State without providing an appropriate reason (in spite of the conduct of the plaintiff's predecessor and the Hungarian-American Agreement) and ignored that the conditions for adverse possession by the state had been fulfilled.

Defendants stated that the American-Hungarian Agreement had become part of Hungarian law and it not only settled compensation but property claims. The other government is entitled to act in the subject of the claims, inter alia, to preclude double settlement. The scope of the Compensation Act extended to paintings 2, 4, 5, 6 and 7 due to the fact that Act XXVIII of 1948 and Law-Decree 13 of 1954 are listed in Schedule 2 of the Act, therefore, their request for the termination of the action was also well grounded.

In relation to the plaintiff's right to file the action, referring to the results of recent research, the defendants stated that there is insufficient proof of the division of the Herzog collection after the death of Lipot Herzog and his wife, or the legal actions of the heirs. The data presented in the lawsuit also show that the ownership statuses were not clear. The memorandum prepared on the basis of the preliminary expert discussions of March 27, 1997, cannot be interpreted in an extended manner such that the state's representative acknowledged the plaintiff's title. Defendants maintained their position on the interpretation of Elizabeth Herzog's will, stating that presumably the testator did not detail the art in her will in light of the compensation received on the basis of the Agreement.

Defendants disputed the judgment's position relating to the statutory provisions regarding taking of property by the state. It was not the state's role to find the owners of abandoned

goods. Lacking a request for the giving out of the property, there was a disputable presumption on considering abandoned goods as ownerless goods. Also, the act's reference to war conditions, cannot be interpreted narrowly to the actual location of combat. Defendants disputed the judgment's reference to the bill of Civil Law on the basis of Sections 75 (1) and Section 5 (1) of the original Civil Code. They claimed that Elizabeth Herzog waived her ownership by accepting indemnification. She did not file a compensation claim either regarding the art, therefore, pursuant to Section 127 (2) of the original Civil Code, nothing prevented the taking of these paintings into state property.

Defendants also maintained their position that on the basis of Sections 169 (1) c) and 173 (2) of the Civil Code, by entering the paintings on the inventory, state ownership was confirmed. If the state still did not acquire title, the withdrawal of the title of the plaintiff's predecessor can be established in any event, in relation to which Constitutional Court decision 16/1993 (III.12.) held that it is only grounds for compensation.

With regard to the interpretation of the Hungarian-American international treaty the defendants emphasized that Article 2 of the treaty provided that the claims of the US and its citizens had been settled and paid. The Government of the United States accepted in the name of its citizens the monetary compensation paid in a lump sum by Hungary instead of the performance of Articles 26 and 27 of the Paris Peace Treaty. During this settlement, the signatory states tried to find a global solution and they named the claims removed from the scope of the agreement in light of this. Article 6 (1) of the Agreement provided the full discharge of the Hungarian party, also in respect of claims not notified. The defendant's interpretation is supported by the document of the Financial Institute Center, submitted as Exhibit A/20, which the first instance court ignored as evidence without justification.

During the examination of adverse possession, section 603 of the bill of Civil Law was not applicable in accordance with the referenced Section of the Civil Code. On the basis of the confiscation of Mrs. Istvan Herzog's property and its enforcement by official procedure, the 1st degree defendant was entitled to take the property on its inventory and it was definitely grounds for its possession as the owner. Pursuant to the laws on abandoned goods and unknown owners and the Civil Code provision regarding property taken onto state inventory, there was a statutory basis for ownership by the state. This legal basis was confirmed by the execution of the 1973 Agreement and gave grounds for inclusion on the main inventory even in the case of those paintings where this had not taken place earlier. The above are applicable to the title to the so-called donated paintings as well. The donator state organs possessed painting no. 2 as an abandoned good which was state property, i.e. as their own, even if their title was invalid or deficient.

The plaintiff's reasoning against the part of the judgment rejecting the claim with regard to painting was that the 1st degree defendant did not possess the painting as its own as the catalogues show that it indicated next to the exhibited painting that it belonged to the Herzog collection. It continued to claim that the 1st degree defendant had obtained the painting treacherously, as it did not examine title to the painting with the due care expectable of a museum when it entered possession. It had to have been aware that the owner was not the donator, Endre Gyarmathy. The treacherous nature of the acquisition became clear after the lawyer of the plaintiff's predecessor addressed a notice to the 1st degree defendant for the acknowledgement of the invalidity of the donation. It maintained its position that pursuant to Section 123 of the Civil Code, adverse possession had been in abeyance because she could not

have enforced her claim for fear of the sanctions of the dictatorship. (Section 163 (3) of the Act on Civil Procedures). In plaintiff's view, adverse possession was in abeyance between August 20, 1949 and June 25, 1990. Since the plaintiff notified the 3rd degree defendant in writing in April 1996 for the return of the paintings, adverse possession was interrupted, therefore the ten years required for adverse possession had not passed.

The plaintiff's counter petition on appeal in respect of the defendants' appeal was aimed at upholding the first instance court judgment. In plaintiff's view the first instance court interpreted the material effect of the international agreement correctly and determined correctly that the court had jurisdiction to judge the plaintiff's claim. By concluding the bilateral international agreement, the Hungarian State could not have been relieved of its obligations under a multilateral agreement (the Paris Peace Treaty). Plaintiff's claim does not fall under the scope of the Hungarian compensation acts and it did not file such a claim. Plaintiff alleged that it had received 37% of the market value of the paintings as indemnification from the Government of the United States. Plaintiff filed the records of the Hungarian-American negotiations of July 17, 1966 to prove that its art collection had not been nationalized in Hungary. Plaintiff repeatedly stated that her predecessor did not waive her ownership by filing a claim for compensation with the American Government. The 1949 US Act on the Settlement of Foreign Claims does not divest the claimant from a right to demand restitution of her property from the foreign state.

The primary request of the defendants' counterclaim against the related appeal was that the related appeal be dismissed on the basis of Section 244 (3) of the Act on Civil Procedures. Their substantive statement was that out of respect for the work and significant collection of Mor Lipot Herzog, it was museum practice to indicate in the case of certain payments that they were "from the collection of Mor Lipot Herzog", which refers to origin and not ownership. However, they never placed such information next to painting no. 10. To refute the plaintiff's allegations regarding treacherous acquisition, defendants filed the illustrated brochure entitled "Notices of the Museum of Fine Arts" dated 1964, in which the 1st degree defendant provided information (including illustrations) of the museum's growth. The documents filed as Exhibits A/29 and A/30 also prove that the Herzog heirs donated or sold art that belonged to the collection both before and after World War 2. According to the statement in Exhibit A/34, the donator received the painting from a person who had been entrusted with it by the plaintiff's predecessor. As a result, the 1st degree defendant cannot even be accused of acting in bad faith. Defendants disputed the length of the term of abeyance, especially in light of the fact that at the time her claim for ownership was rejected on March 31, 1966, she did not have any live relatives in Hungary.

In accordance with their final position in the second instance court proceeding, the defendants requested the dismissal of the claim on the grounds that plaintiff lacks the right to initiate an action. They did not maintain their position regarding the lack of jurisdiction. They stated that the international agreement discussed in the lawsuit did not create or withdraw any ownership rights, but the plaintiff's right to submit a claim is precluded by Article 6 (3) of the Hungarian-American Agreement on the Settlement of Claims.

The intervening parties requested the partial reversal of the first instance court judgment in accordance with the plaintiff's related appeal and, in contrast with defendants' appeal, they request that the first instance court judgment be upheld.

When adjudicating the appeal and the related appeal, the Supreme Court started out by examining the permissibility of filing an action and specifically, the obstacles to such action referenced by the defendants.

According to the statement of claim (Section 121 (1) c) of the Act on Civil Procedures), the plaintiff, as owner, requested the return of paintings from the defendants. It did not expressly mention Section 115 of the Civil Code as the basis of its claim. However, it is clear from the contents of the statement of claim, that it based its claim for the return of the paintings on its ownership deduced from the reasons outlined in the statement of claim; in a negative approach, on the fact that the state did not obtain title to the paintings as a result of the discriminative racial laws introduced in 1944, or thereafter. This means that the plaintiff initiated an action for *rei vindicatio* against the defendants who were in possession of the paintings. Plaintiff requested that the 1st and 2nd degree defendants cease their unlawful possession of the paintings and that she be replaced in possession of the paintings (claim for replacement).

Upon review of the contents of the statement of claim, the Supreme Court did not find any circumstances giving grounds for the rejection of the claim without issuing a summons on the basis of the compensation-related legislation and international settlement referenced by the defendants.

In Article 27 (1) of the 1947 Paris Peace Treaty promulgated with Act XVIII of 1947, the Hungarian State agreed to restore any goods confiscated, impounded or seized after September 1, 1939 on grounds of ethnic origin or religion, or if such restoration is not possible, to grant compensation. The provisions of the Paris Peace Treaty obviously served as the basis of any settlement through international agreements on the reparation of violated rights and interests, as well as for the compensation acts.

Thereafter we had to examine whether Agreement on the Settlement of Claims concluded on March 6, 1973 between the Governments of the Hungarian People's Republic and the United States of America (the "Agreement") does not create a procedural obstacle to the adjudication of the plaintiff's claim for return of assets, and whether the excluding provision of Section 2 of Law-Decree 13/1979 on International Private Law is applicable here. However, these questions can only be answered in the context of the statements of claim, after it becomes clear on the basis of the proceedings conducted that taking of property by the state occurred and in a manner that gives rise to the application of the Agreement (Article 2 thereof). In the second instance court proceedings, the defendants no longer disputed that the Agreement did not withdraw property from the owner, nor did it create ownership for the state. At the same time, they maintained their defense that as a result of the Agreement the plaintiff may not file a claim for ownership against the Hungarian State, while its other claims (for indemnification) were fulfilled under the Agreement.

In light of the statements of claim and the framework of the defenses presented against it, the Supreme Court agreed with the legal position of the first instance court, whereby the plaintiff could turn to the court (Section 7 (1) of the Civil Code) requesting that it determine that the Hungarian State had not acquired title to the property and the determination of its own ownership. The Supreme Court also agreed with the plaintiff's position that the Hungarian court has jurisdiction, which is exclusive, to adjudicate this matter on the basis of Section 55 (1) d) of the law decree on private international law, which is applicable in this case (as Act CX of 2000 on Private International Law entered into force after the lawsuit was started). (For

reasons to be outlined later in relation to the plaintiff's capacity in the lawsuit, the exclusive jurisdiction reason may arise on the basis of Section 55 (1) c)).

In respect of the permissibility to file an action, the Supreme Court bore in mind that the plaintiff may have a claim for indemnification or compensation as an obligation under law if the state's acquisition of the property is proven.

The Supreme Court notes that the plaintiff did not file a claim for compensation. At the same time, performance of the state's obligations under the Article 27 (1) of the Paris Peace Treaty may only arise in theory in relation to paintings 5, 6, 7, and 9. These paintings were not removed from the control of the state organs after they were returned from Szentgotthard in 1945. On the basis of the evidence provided, it can be established that the other paintings being claimed were returned to their owners, or the representatives thereof, after their return.

The legal position of the State and its organs regarding the Agreement, which the defendants have embraced in this action as well, is different from the position of the first instance court, which handled the action as a classic *rei vindicatio* by the owner. The Supreme Court shared the legal position of the first instance court, emphasizing that it did not find it proven beyond doubt that the plaintiff's claim for ownership, which does not expire pursuant to Section 115 (1) of the Civil Code, against the state is obstructed or precluded for legal reasons.

The defendants substantive defense against the plaintiff's claim was that the plaintiff's title to the paintings had ceased, as the 3rd degree defendant gained ownership of the property on several legal grounds (*exceptio posterioris dominii*). The defendants' defense is closely related to the above reasoning in that the compensation provisions, which were invoked as an obstacle to the action, can only be considered in the adjudication of the case if the 3rd degree defendant provably obtained title to the paintings under one of the legal bases listed by it and created a final, irreparable situation accordingly.

At the same time, the defendants' defense also disputed the plaintiff being the owner of the paintings and whether she therefore had capacity in the lawsuit.

The first instance court brought an unfounded decision on this issue requiring primary adjudication, and its decision violates significant procedural rules.

On the basis of the referenced sections of the Civil Code, it is clear that only a person who is no doubt the owner of the property can claim the return of such property, and who proves such ownership in respect of every single painting to be returned.

On the basis of the data provided in the lawsuit, there are serious doubts as to the plaintiff's capacity in the lawsuit. On the basis of the evidence provided, it can be determined that after the death of the art collector, Mor Lipot Herzog and his wife, their three children, the plaintiff's mother, Elizabeth Herzog, Istvan Herzog and Andras Herzog inherited the very valuable art collection. The court has no appreciable information as to the division of the estate (will, probate decision).

In the statement of claim, the plaintiff made a statement regarding the ownership status after the inheritance, of the art objects identified in Hungary. This statement is, however, obviously not complete and serious doubts arose in the lawsuit as to its veracity. For example, the statement of claim indicated that painting no. 11 was part of Andras Herzog's inheritance, while later the plaintiff claimed that it was the owner and extended its claim to include this

painting (as well as painting no. 12). Andras Herzog's heirs, who intervened into the lawsuit on the side of the plaintiff, claim to be owners of painting nos. 2, 3, 4, 5, 11 and 12 (intervening party's filing, doc. no. 33). The possibility that Istvan Herzog was the owner of certain paintings also arose. The plaintiff's predecessor herself only claimed compensation for 1/3 of painting no. 12.

The first instance court deliberated the evidence presented to it regarding the ownership of the three heirs and determined that the plaintiff's predecessor, as opposed to the other two heirs, was the owner of all of the paintings being claimed.

The Supreme Court decided that the findings of the first instance court regarding the judge's deliberation on the plaintiff's right to file the claim, and the result thereof, as well as the substantive decision based on these, are not suitable for a substantive review. In the case of the enforcement of a claim for ownership, judicial practice requires the participation in the action of all the owners and any persons with any interest attached to the claim. As ownership can only be established within the personal scope of the lawsuit, i.e. in relation to the persons who are parties to the action, the involvement of the heirs of Andras Herzog as intervening parties did not enable the court to examine the issue of ownership in the relationship between them and the plaintiff, to deliberate the related evidence and to determine the ownership of the plaintiff's predecessor based on inheritance.

There is no data as to the heirs of Istvan Herzog. No doubt, in the preliminary discussions with the expert committee appointed by the Minister of Culture, which preceded the lawsuit, the plaintiff acted also on behalf of the legal successors – unknown to the court – of Istvan Herzog. However, this representation obviously did not apply to the representation of these legal successors in the lawsuit, but even such an assumption does not replace the involvement of the owner in the action.

The Supreme Court did not attach much weight to the plaintiff's reference to the fact that in the above preliminary proceeding the representatives of the State did not question the plaintiff's ownership of the paintings. The expert committee was appointed to research the Herzog collection and prepare a possible settlement with the state. When performing this task the identity of the actual owners, the Herzog heirs was irrelevant to the committee. The plaintiff herself acted on behalf of the "Family" and the identity and any personal claim for ownership of the heirs of Andras Herzog was not mentioned.

The Supreme Court does not dispute that the plaintiff's capacity in the lawsuit partially exists. However, she should have credibly proved this fact in respect of each painting being claimed. The first instance court committed a grave procedural error when examining the plaintiff's capacity in the lawsuit by determining the plaintiff's ownership right in favor of the other heirs on the basis of the deliberation of the available documentary evidence, which was contradictory.

For the above reasons, the Supreme Court did not agree with the interpretation by the first instance court of the will of Mrs. Alfonz Weiss nee Elizabeth Herzog, dated November 30, 1990, as a result of which the first instance court deduced the plaintiff's title and ruled out any inheritance by the other heirs. The plaintiff should have at least credibly proven that the other legal successors of Mrs. Alfonz Weiss interpret the will similarly to the first instance court or that they assigned their claims to the plaintiff.

The above listed reasons in themselves serve as grounds for vacating the first instance court judgment under Section 252 (2) and (3) of the Act on Civil Procedures. In the repeated proceeding the plaintiff must prove her active capacity in the lawsuit in respect of all the paintings being claimed. Ordering the first instance court to hold a repeated proceeding will also allow the other two branches of the family to get involved in the action or for the plaintiff to extend her claim to them as well.

The Supreme Court holds that the first instance court's substantive decision regarding the acquisition of title by the 3rd degree defendant also lacks basis for several reasons.

In the case of paintings 1, 3, 11 and 12 the defendants mentioned, and proved with documents, that the paintings were confiscated in the criminal proceeding against Mrs. Istvan Herzog and the 3rd degree defendant obtained title through an official decision. The first instance court rejected the defendant's acquisition of ownership basically on the basis that the paintings were not owned by Mrs. Istvan Herzog; therefore the confiscation of property applied on the basis of decision no. B.XI.4.070/1949/17 of the Budapest Criminal Court, upheld by the Supreme Court could not have extended to these paintings. The first instance court held against the defendants the fact that they could not find the Budapest City Council decision enforcing the court judgment.

In contrast with the above, judgment no. B.XI.4.070/1949/17 of the Budapest Criminal Court dated August 23, 1950 contains that in 1944, Istvan Herzog donated 15 valuable paintings to his wife, Ilona Kiss, who thereby became the owner of such paintings. As the enforcement of the confiscation of property ordered by the criminal court, the art objects of Mrs. Istvan Herzog safeguarded in the Museum of Fine Arts, including the four paintings in this lawsuit, were taken as property by the Budapest Council Enforcement Committee and "given free of charge into the ownership of the museum" (Exhibits A/9, A/40 and A/38). The 1st degree defendant took the paintings on the main inventory as the confiscated art of Mrs. Istvan Herzog (Exhibit A/8). On the basis of the above documents and the inventory numbers, it can be deduced that the official enforcement of the property was performed in relation to the four paintings that are the subject of this action. Against the public documents, pursuant to Section 195 (3) of the Act on Civil Procedures, the onus of proof of the contrary lay on the plaintiff. The note on record no. 515/1950, which was filed as Exhibit A/9 ("W.A. no") was created under circumstances unknown to date, and its legal effect of preventing state ownership is doubtful also in light of the referenced public documents. The evidence filed to date, which were accepted as the basis for the first instance court's judgment could serve as grounds for determining that the confiscation of property did not occur lawfully. For reasons to be outlined later, Exhibits A/20 and A/21 could also have served as the basis for deliberation in terms of judging whether the state acquired title, but the first instance court ignored these documents.

At the same time, the Supreme Court agrees with the first instance court's legal conclusion, whereby the defendants did not prove beyond doubt that the paintings being claimed became state property by virtue of statute. No doubt, the laws between 1945-54 favored acquisition of title by the state in respect of all tangible and real property which could be classified as abandoned goods under the laws applicable at the time. This phase of the legislation was closed by Law Decree 13/1954 amending Law Decree 13/1949. Section 9 (1) of the Law Decree provides that upon its entry into force the objects within the museum's custody whose owners are unknown or left abroad without permission, were to become state property under

the Law Decree. Paragraph (2) provides that the art defined in Paragraph (1) must be taken on the museums' inventory. Section 11 of the Law Decree states that the owner shall be considered to be the upkeeper or manager of the museum collection, or the possessor of the object or the representative of the owner.

The first instance court interpreted the above laws under current day rules and deduced that acquisition of title by the state could not have occurred on the basis of these laws. Its line of thought is primarily suitable, however, for determining that if the state still did acquire title, it does not stand the statutory test of the application of the law today. In spite of the above, the Supreme Court agrees with the legal consequences drawn by the first instance court for the following reasons:

A note in the museum's inventory regarding the mode of acquisition obviously does not create ownership, but it can serve as the basis for the museum's possession of an object. In the given case, the inventories of the 1st and 2nd degree defendants do not indicate the year when the Law Decree entered into force for any of the paintings. The records indicate earlier and later acquisitions (coming into possession). The text part of the inventory does not refer to the statutory basis for the acquisition of property in the case of any of the paintings either. It has been proven during the lawsuit that paintings 2, 9 and 10 were not even in museum custody during the period in question.

The Supreme Court accepted the exchange of documents during the preparation, and following the conclusion of the Agreement as proof of the position supporting the first instance court. According to Exhibits A/19, A/20 and A/21, which are correspondence between the Financial Institute Center, the 1st degree defendant and the Ministry of Culture, the 1st degree defendant and bodies acting on behalf of the Hungarian State were also not aware of the ownership status of the paintings in question. In his memorandum of December 11, 1973, the Minister of Culture informed the 1st degree defendant that the paintings that used to belong to the Weiss family of Csepel have become Hungarian state property by virtue of the Agreement. Hence, if not done so earlier, the art originating from them can be included on the museum's main inventory (Exhibit A/21)

The above statements show that the state and the state organs entering into contact with the paintings did not consider the ownership statuses of the paintings as settled until that time and did not claim that the paintings had become state property by virtue of Law Decree 13/1954.

The Supreme Court also reviewed whether decision Hung 2079 of the Foreign Claims Settlement Committee of the United States determining the compensation for the plaintiff counts as foreign decision that can be acknowledged for the purposes of this lawsuit. Section 70 (1) of Law Decree 13/1979 on International Private Law, the decisions of foreign courts or other authorities must be acknowledged in which the Hungarian court or other authority does not have exclusive jurisdiction. The decision of a foreign court or other authority in a case where a Hungarian court or other authority has exclusive jurisdiction shall only be acknowledged in the cases defined in the Law Decree (Section 70 (2)). Lacking the conditions stipulated in the Law-Decree, in this case, which belongs in the exclusive jurisdiction of the Hungarian court, the decision of the Claims Committee should not be acknowledged in the issue of whether the paintings were nationalized through Law Decree 13/1954 and that the plaintiff's predecessor therefore received indemnification.

The indemnification itself cannot be disputed on the basis of the data filed. The plaintiff's statement that it only received a part of the value of the paintings during such indemnification is irrelevant for the purposes of this lawsuit on the basis of Articles 5 and 6 (1) of the Agreement.

The court in this lawsuit had to judge the issue of acquisition of property by the state within the framework of the plaintiff's claim and defendant's defense, regardless of the above.

The Supreme Court, in agreement with the first instance court could not establish that nationalization had taken place (or "other taking" as defined in Article 2 (1) of the Agreement). The Supreme Court repeatedly emphasizes that in the dogmatic sense of the law, the claim of the owner is to be considered as existing, until its ownership ceases (or is terminated due to other taking). In the given case, there was no clear evidence as to the realization of these conditions. Therefore, on the basis of the unique circumstances of the possession by the State, the Supreme Court could not draw a clear conclusion that the plaintiff's *rei vindicatorius* claim was terminated by virtue of the statutes invoked by the defendants and was replaced by the plaintiff's claim for compensation or indemnification.

It is a different question that the plaintiff's predecessor's legal acts related to claiming compensation should have been interpreted as actions of the owners disposing over the goods, which the first instance court failed to do. Beyond the formal reference of Section 207 (3) of the Civil Code, the first instance court did not give a positive explanation of how it considers the American compensation.

After the preparation and execution of the Agreement, a new legal situation was created. The first instance court did not evaluate this legal situation and merely examined the acquisition of title by the defendants in light of the legislative processes that took place until 1954.

The first instance court judgment lacks basis for two reasons.

One of the defendants' defenses against the plaintiff's claim was that the plaintiff's ownership ceased pursuant to Section 127 of the original Civil Code and that the 3rd degree defendant obtained title to the paintings through adverse possession. In relation to the defendants' invocation of Section 127 on the taking by the state of ownerless property, the court should have examined by reviewing the data of the lawsuit whether, by accepting compensation, the plaintiff's predecessor gave up her ownership of the paintings on the basis of Section 112 (1) of the Civil Code. In this respect, the court should have clarified and evaluated the political-social conditions at the time, the circumstances of the US claim, and the legal actions of the plaintiff's predecessor in Hungary, either personally or through representatives. Among the legal actions of the plaintiff's predecessor, the fact that she failed to mention the valuable paintings in her will should also have been examined. Only in light of all of these circumstances can a position be taken as to the legal issue of whether the plaintiff's predecessor gave up her ownership, thereby allowing the 3rd degree defendant to obtain title to the paintings on the basis of Section 127 of the Civil Code. It is obvious that the plaintiff does not have more rights than her predecessor. If acquisition of title by the state occurred in the life of the plaintiff's predecessor, the plaintiff does not have grounds to enforce a claim for ownership against the defendants.

In contrast with the conclusion of the first instance court on this issue, on the basis of the data outlined, it can be established that the defendants did in fact possess the goods as their own

from late 1973 onwards, as is required for adverse possession under Section 121 of the Civil Code. As a result, in contrast with the finding of the first instance court's judgment, the plaintiff must prove that acquisition of title by the state through adverse possession did not occur until 1983 (Civil Code Sections 121 (2) and 123).

The plaintiff's claim for ownership can substantively be reviewed if the plaintiff proves full capacity in respect of all of the paintings and if, in the case of paintings with disputed ownership, the other possible heirs are involved in the lawsuit.

The Supreme Court did not find any reason for questioning the first instance court's decision on painting no. 10, apart from the deficiencies in the plaintiff's capacity in the lawsuit.

In order to gain information on foreign law, the Supreme Court turned to the Ministry of Justice. The question was transferred to the Ministry of Foreign Affairs, whence the response was received.

The Supreme Court does not dispute that the Ministry of Foreign Affairs is entitled to authentically interpret the international agreements concluded by the Hungarian State on the basis of the Vienna Convention of May 23, 1969. However, it shared the plaintiff's concerns related to contacting the Ministry of Justice and the transfer of the query to the Ministry of Foreign Affairs. The Supreme Court also considered that the query was only regarding a specific relationship between the Agreement and the Paris Peace Treaty. Therefore, it ignored Attachment 1 of the document of the Ministry of Foreign Affairs and at the express request of the plaintiff, it did not include such document in the file of the case.

In line with the reasons outlined above, on the basis of Section 252 (2) and (3) of the Act on Civil Procedures, the Supreme Court vacates the judgment of the first instance court and obligates the first instance court to repeat the lawsuit in accordance with the aspects written above and to render a new judgment.

The Supreme Court has established the costs of the second instance court proceeding, which it based on the first instance court judgment, which was not disputed by the parties.

Budapest, November 29, 2002.

Judges

Dr. Zsuzsanna Bosinger

Dr. Maria Kiss

Dr. Ilona Csiky