Waverley Adrift

Richard Crewdson*

Anyone sailing in the international waters of the Art World is likely from time to time to come across an ancient steamship, its hull and superstructure streaked with rust, and its speed limited to the best that its ancient machinery can achieve. Dimly perceivable on the bow will be the name, "Waverley," and below the bridge, the emblem of Her Majesty's Government. The hull can be seen to have been frequently patched, and now there is a new patch visible with the name "Ridley" stamped on it. Whether the new patch will be any better than the earlier work in keeping the inside of the ship watertight remains to be seen.

Although it flies the British flag, "Waverley" is a privateer. It was launched as a warship in 1939 and has kept itself free of any parliamentary control ever since, and yet it carries within its decaying decks the whole UK art export control system.[1]

There is no reason why the old vessel should not be sent to the shipbreakers, to be replaced by a nice new piece of statutory machinery, but for some reason this has never happened, which makes it very difficult for any proper public debate to take place when repairs are needed. True, the Department of National Heritage is happy to issue Consultation Papers, but only the Department sees and hears the replies. Is this really "consultation" in the fullest sense?

The latest consultation process was initiated in 1996 with a view to resolving the problems created by the so-called "Ridley Rules."[2] These were a last-ditch remedy introduced by the late Nicholas Ridley in 1990 when he was Minister for Trade and Industry, to solve "The Three Graces" crisis; the government did not have the money to buy the Canova statuary group to forestall an export, and the British public was indifferent as to whether it was swept offshore or not.[3] For the first time, a private buyer was allowed to make an offer to keep the export-stopped object in the UK. There was of course an immediate outcry. The whole object of the Waverley system was to preserve important works of art for the nation, not for wealthy individuals. It depended on public funding and would break down without it.

The storm created by Ridley has meant that the good ship "Waverley" has sailed in rough waters ever since 1990, and the conclu-

* Member of the Editorial Board, London.

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sion of the consultation period and the issue of new guidelines on 3rd March 1997 will not necessarily calm the sea. These new guidelines provide that if a private offer is received from a private source in respect of an export-stopped artwork, and this offer is accompanied by a signed undertaking "with a public institution" (undefined) that the offeror will:

(i) guarantee reasonable public access to the object
(ii) provide satisfactory conservation conditions; and
(iii) not sell the object for a specified period[4]

Ministers will effectively treat such an offer as if it was just as valid as an offer from a Museum or Gallery. If therefore the owner turns the offer down, he or she will for the foreseeable future be denied an export licence altogether.

There are two criticisms to be made of this bit of repair-work (and they would have been made, if the normal legislative procedure had been followed, both in parliament and in the media). The first is that the conditions are so vague. What is "reasonable public access"? Once a month? Once a year? Every alternate Thursday afternoon? How does one enforce the "satisfactory conservation conditions"? And what is the "specified period" after which new owners can go through the sale for export process themselves? It is hard to feel confident that this ambiguous formula will keep the Waverley flag flying.

The second problem is one which was recognised in the Consultation Paper, but which those responsible for the new regulations have refused to address. Paragraph 14 of the paper reads as follows:

> It is also possible that where an object likely to satisfy the Waverley criteria was publicly auctioned, a potential purchaser might choose not to compete at auction (to avoid forcing up the auction price), but would attempt to purchase at the export referral stage. This approach would carry significant risk . . . . Nevertheless, there is a slim possibility that a private purchaser might try this approach, in which case the loser would be the original vendor who would not achieve the best market price.[5]

Might this not be a simplistic view? There is a strong probability that in these situations vendors *will* be prejudiced, destroying another of the Waverley principles (that a seller must not lose financially by reason of an export stop). This would be particularly likely if potential buyers were to develop a system, which would be illegal in the auction room, but uncontrollable outside it, to buy on a cartel basis, with the long-term objective of sharing export profit, but paying lip-service in the meantime to the public access and conservation conditions. If this does occur, then it really is time to stop tinkering with the old ship and to introduce new legislation.

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No change has been made to the control of works more than 50 years old by living artists, but as this does not apply to sales by the artist or family, the decision to keep the control is unlikely to be controversial. Ironically, the case which led to a review of this decision was based on false information; the painting by Lucian Freud entitled "The Painter's Room" had been misdated by one year when the application for an export licence was requested. The application was unnecessary, because the painting was actually 49 years old at the time.[6]

The only other change in the new Guidelines concerns the exclusion of dealer's commissions in sales to connected parties, a minor change of little consequence.

Notes

1 The Export of Works of Art, etc. Report of a Committee appointed by the Chancellor of the Exchequer, London 1952. *See* Clare Maurice & Richard Turnor, *The Export Licencing Rules in the United Kingdom and the Waverley Criteria*, 1 INT'L J. CULT. PROP. 273–95 (1992).

2 Department of National Heritage Consultation Paper – Private Offers Policy (known as the "Ridley Rules") (May 1966).

3 *See* Sara E. Bush, *The Protection of British Heritage: Woburn Abbey and The Three Graces*, 5 INT'L J. CULT. PROP. 269–90 (1996).

4 Export Licencing of Cultural Goods. Issue 1: Department of National Heritage 13 (3rd March 1997).

5 *Supra* note 2, at 4.

6 *See* Martin Bailey, *Private buyers of export-stopped works must allow access to them*, 69 THE ART NEWSPAPER, Apr. 1997, at 7.

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