



Dealing in Tainted Cultural Objects –

Guidance on the Dealing in Cultural Objects
(Offences) Act 2003

Contents

Background	1
Why a new offence?	3
The new offence	3
What objects are covered?	4
Can goods cease to be tainted?	7
Who can commit the offence?	7
Is the offence retroactive?	9
Search, seizure and retention powers	9
Offences by bodies corporate	10
Territorial application	10
Further advice	11

The Dealing in Cultural Objects (Offences) Act 2003 came into force on 30th December 2003. This paper is intended to provide some basic guidance on the new offence of dealing in tainted cultural objects introduced by the Act. The new offence is likely to be of concern primarily to collectors, auctioneers and dealers in antiquities and architectural salvage rather than to fine art dealers. However, the offence is not targeted solely at those who handle cultural objects in the course of their work. It will cover any person who dishonestly deals in a tainted cultural object, including, for example, a tourist importing a cultural object acquired abroad that has been illegally excavated or removed.

The Act does not necessarily oblige dealers to take steps to ascertain provenance or to exercise due diligence to avoid committing the offence. Knowledge or belief and dishonesty must be proved by the prosecution. Rather, the Act is designed to target irresponsible trading. It will inject greater transparency into the process of acquiring and disposing of cultural objects within the art market so that clear chains of ownership can be established in the event of suspected unlawful removal or excavation. In effect, the Act does not impose further costs in terms of due diligence checks but, rather, formalises them and encourages those not complying with industry-approved standards of good practice to come on board. The Act is designed to protect small business from the illicit trade, which threatens their commercial position through unfair competition. Any increase in costs to legitimate business, therefore, is likely to be minimal.

Background

The Culture, Media and Sport Committee of the House of Commons reported on *Cultural Property: Return and Illicit Trade* in July 2000 and recommended that the criminal law be changed to include a criminal offence of trading in cultural property in designated categories from designated countries which had been stolen, illegally excavated or illegally exported from those countries. The Secretary of State for Culture, Media and Sport established the Ministerial Advisory Panel on the Illicit Trade in Cultural Objects (ITAP) in May 2000 under the Chairmanship of Professor Norman Palmer, to advise him on the recommendations of the Select Committee. ITAP had the following terms of reference:

- To consider the nature and extent of the illicit trade in art and antiquities, and the extent to which the UK is involved in this;
- To consider how most effectively, both through legislative and non-legislative means, the UK can play its part in preventing and prohibiting this illicit trade, and to advise the Government accordingly.

ITAP reported in December 2000 and made a number of recommendations. Included in its report was the recommendation that a new criminal offence be created in the following terms:

“We propose that, to the extent it is not covered by existing criminal law, it be a criminal offence dishonestly to import, deal in, or be in possession of any cultural object, knowing or believing that the object was stolen, illegally excavated, or removed from any monument or wreck contrary to local law”.

The Government accepted this recommendation and indicated that it was committed to introducing a new criminal offence of trading in illegally removed cultural objects as part of a package of measures to combat the international illicit trade in art and antiquities.

ITAP also recommended that the UK should accede to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import and Transfer of Ownership of Cultural Property. The Government accepted ITAP’s recommendation and the UK acceded to the Convention on 31st October 2002. Although no new legislation is required to implement the UNESCO Convention, it was considered that the proposed new offence would complement the UK’s treaty obligations and reinforce the Convention’s implementation in the UK (see separate DCMS guidance, pp638).

Further recommendations of ITAP were that a database of other countries’ cultural property laws and a database of stolen and illegally removed cultural property covering material of UK and overseas origin, should be established. Work

on the first database will be carried forward by UNESCO. Consultations are taking place between the DCMS, Home Office and other interested parties on the establishment of the database of stolen and illegally removed cultural property.

Why a new offence?

Although the offence of handling stolen goods contrary to s.22 of the Theft Act 1968 extends to goods that have been stolen abroad, there are a number of significant instances not covered by the handling offence. The offence does not apply to cases where an item has been illegally excavated or removed in circumstances not amounting to theft, for example, where the item has been illegally excavated or removed with the consent of the landowner or owner of the building, or where there is no legal owner of the item. Furthermore there may be cases where an item has been stolen but a prosecution for the offence of handling is not feasible, for example, where there has been a break in the chain of the transaction, or where a person receives a stolen item for his own benefit, rather than for the benefit of another person. In such cases a prosecution for the new offence may be possible.

A new offence designed specifically to combat traffic in unlawfully removed cultural objects will assist in maintaining the integrity of buildings, structures and monuments (including wrecks) world-wide by reducing the commercial incentive to those involved in the looting of such sites. It will send a strong signal that the Government is determined to put a stop to such practices.

The new offence

With effect from 30th December 2003 it is an offence for any person dishonestly to deal in a cultural object that is tainted, knowing or believing that the object is tainted. Any person found guilty of the offence is liable on conviction in the Crown Court to imprisonment for up to seven years and/or an unlimited fine and on conviction in the Magistrates Court to a maximum of six months imprisonment and/or a fine up to £5,000.

What objects are covered?

The offence covers 'tainted cultural objects. A cultural object is defined as **an object of historical, architectural or archaeological interest**'. The definition does not include items of purely artistic interest. In practice the Act is concerned with objects which had formed part of a building, or are removed from a monument, or excavated contrary to heritage legislation.

A cultural object is **tainted** if after 30th December 2003:

- the cultural object has been excavated;
- it has been removed from a building or structure of historical, architectural or archaeological interest where the object has at any time formed part of the building or structure; or
- it has been removed from a monument of such interest;

and

such excavation or removal constituted a **criminal offence** at the time of such excavation or removal.

It is immaterial whether the excavation or removal took place in the United Kingdom or elsewhere or whether the offence is committed under the law of any part of the United Kingdom or under the law of any other country or territory.

The expression '**monument**' is defined as follows:

- any work, cave or excavation;
- any site comprising the remains of any building or structure or of any work cave or excavation;
- any site comprising the remains of any vehicle, vessel, aircraft or other moveable structure, or part of any such thing.

It is immaterial whether the building or structure is above or below the surface of the land or the site is above or below water.

In the case of cultural objects that have been excavated, it does not matter whether the object has been excavated from a known archaeological site or elsewhere. The object will be tainted if such excavation constituted an offence at the time it was done.

As regards a building or structure, an object will only become tainted if it has at any time formed part of the building or structure, has been removed from such building or structure and such removal constituted an offence at the time it was done. This means that the illegal detachment or amputation of structural, architectural or ornamental elements of a building will be tainted, but not chairs and tables or works of art hung in a building. However, where a structural, architectural or ornamental element of a building has become detached, for example through natural causes and is lying on the ground, it will be tainted if its removal constituted an offence.

The definition of 'monument' covers a range of sites of historical, architectural or archaeological interest. A work, for example, may include surface traces or contours of structural remains, such as a prehistoric hill-fort, a burial cairn, field system or a deserted medieval village; an excavation may refer to any site under archaeological investigation, including areas containing such artefact-rich deposits as votive offerings, cemeteries and graves, production sites, battlefields or encampments. It also covers moveable objects such as the remains of vehicles, vessels or aircraft, whether above or below water. Thus a wreck on the seabed would be included.

It should be noted that the illegal excavation or removal could take place within or outside the UK. Given that the legislation of each country will differ as to which offences are capable of rendering an object tainted, the Act does not identify particular provisions where the removal or excavation would constitute an offence. It is sufficient that the excavation or removal constitutes an offence (however defined) under the law of the UK or of some other country. English regulatory provisions which make excavation or removal unlawful are:

- removing part of a vessel or objects from a vessel in a restricted area (section 1(3) Protection of Wrecks Act 1973);
- works affecting a scheduled monument (section 2, Ancient Monuments and Archaeological Areas Act 1979 (AMAAA));
- destroying or damaging a protected monument (section 28 AMAAA);
- operations in an area of archaeological importance (section 35 AMAAA);
- removal of an object discovered with a metal detector in a protected place (section 42(3) AMAAA);
- removal of remains of military vessels or aircraft (section 2, Protection of Military Remains Act 1986);
- demolition or alteration of a listed building (section 9, Planning (Listed Buildings and Conservation Areas) Act 1990);
- removal of part of a wreck (section 246(3) Merchant Shipping Act 1995).

So, for example, illegal removal of an object from a listed building in the UK, or illegal removal from a monument in China could trigger the offence. However, offences wholly unrelated to the process of excavation or removal – such as a breach of foreign export laws, a breach of local VAT regulations or health and safety legislation, an assault on an archaeologist or damage to excavation equipment – would not taint the object. The tainting of the object is triggered by the excavation of the object or its removal from a building structure or monument. Thus offences such as theft or criminal damage would also taint the object if the theft or criminal damage occurred when it was removed or excavated. Where the theft occurred at a later stage, for example, by failing to report Treasure to the Coroner (and so stealing from the crown or a franchisee) it may be difficult to show that the theft occurred when the object was excavated rather than later when the holder decided not to report it. In such cases it may be preferable to prosecute for the offences of theft or handling stolen goods.

In addition, it will not matter whose law has been contravened, provided an offence has been committed. This provision is particularly relevant to wrecks in international waters. If a cultural object is removed from a wreck in international waters off Egypt, for example, such removal may not be an offence under the criminal law of Egypt. If, however, the removal is an offence under the UK criminal law, or under the law of any other country asserting jurisdiction over the wreck, e.g. the country whose flag the wreck was flying, a contravention of that law will be sufficient to trigger the offence.

Finally, it should be noted that there is no age threshold for cultural objects, nor for building or monuments from which such objects may be removed. Thus a cultural object that was part of an Art Deco building and illegally removed, or a cultural object removed from the remains of a World War II aircraft, would be covered by the offence.

Can goods cease to be tainted?

There is no mechanism in the Act for objects to cease to be tainted, even if they have been returned to the owner or relevant state authorities (unlike the express provision in section 24(3) of the Theft Act 1968 for stolen goods which have been returned). However, subsequent dealing in an object which has been returned to a legitimate owner is unlikely to be dishonest.

Who can commit the offence?

A person commits an offence if he dishonestly deals in a cultural object that is tainted, knowing or believing that it is tainted. 'Person' includes a body corporate.

A person deals in an object if he:

- acquires, disposes of, imports or exports it;
- agrees with another to do so; or
- makes arrangements for another person to do so, or makes arrangements for another person to agree with a third person to do so.

In relation to agreeing or arranging to do an act, it is immaterial whether the act is agreed or arranged to take place in the United Kingdom or elsewhere. Although many agreements regarding dishonest dealing in an object will be covered by the law of conspiracy, this provision will ensure that any person who makes an agreement or arrangements for a tainted object to be acquired abroad will be guilty of an offence, provided the agreement or arrangement is made in the UK. It should be noted that agreements or arrangements made over the Internet with persons trading in tainted cultural objects may also be caught by this provision.

To be convicted of the offence a person needs to act '**dishonestly**'. The question of whether a defendant acted 'dishonestly' would depend on the normal test for dishonesty in theft cases, namely, whether the person's actions were dishonest according to the ordinary standards of reasonable and honest people and, if so, whether that person realised that his actions were, according to those standards, dishonest. Thus an auction house that accepted an object for the sole purpose of giving a valuation, or a restorer for the purposes of effecting restoration, would not be acting dishonestly by returning the object even though they had come to believe that the object was tainted. Of course, if the auction house or restorer were subsequently to deal in the object by, e.g. by putting it up for sale, or arranging for it to be put up for sale, then an offence might well be committed.

To be convicted of an offence a person also needs to **know or believe** that an object is **tainted**. (However, it will not be necessary to prove that the person knew or believed that the object was a cultural object.) The burden of proving knowledge or belief that an object is tainted rests with the prosecution and such proof must be beyond all reasonable doubt. This means that a mere failure by the accused to carry out adequate checks on the provenance of an object will not constitute knowledge or belief. However, knowledge or belief can be inferred from the circumstances surrounding the transaction. For this purpose evidence could be adduced with regard to the following matters:

- the identity, period, nature, condition and general history of the object;
- the identity of any previous possessor;

- the consideration (if any) given for it;
- the existence and content (or otherwise) of any document indicating any transaction relating to the object;
- the legality (or otherwise) of any relevant export of the object;
- the existence and content (or otherwise) of any relevant export documentation.

Once the proposed database of stolen and illegally removed cultural objects is established a failure to consult that database, or any alternative due-diligence service, would be a further evidential factor in determining whether the accused knew or believed that an object was tainted. Also relevant would be the degree of expertise of the accused and the knowledge of the trade by the accused. Thus a dealer specialising in the buying and selling of objects of the same kind as the object in question could be expected to have greater knowledge that an object might be tainted than a British tourist importing an object purchased in a local flea market.

Is the offence retroactive?

No – the offence will only apply to persons dealing in tainted objects after 30th December 2003 **and** where the object has been excavated or illegally removed after that date. However, where the circumstances of an excavation or removal amounted to theft under local law then the accused could still be liable for prosecution for the offence of handling stolen goods, irrespective of the date of excavation or removal.

Search and seizure powers

Although the Act does not impose an import or export restriction on tainted cultural objects, section 4 provides HM Customs and Excise with necessary powers of enforcement where an offence involves the importation or exportation of a tainted cultural object. These include search and seizure powers under the Police and Criminal Evidence Act 1984.

Offences by bodies corporate

Where an offence is committed by a body corporate and a director, manager, secretary or similar officer, or a person purporting to act in such capacity, is proved to have consented or connived at or caused by neglect the commission of the offence, that person is guilty of the offence as well as the body corporate. Where the affairs of a body corporate are managed by its members then the acts or defaults of a member will be treated as if he were a director.

Territorial application

The Act applies to England, Wales and Northern Ireland. It does not apply to Scotland because the criminal law is a devolved matter. However, it is likely that the Scottish Parliament will be enacting parallel legislation in the near future.

Further advice

For advice on dealing in tainted cultural objects contact:

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Copies of this guidance, together with the Act and Explanatory Notes, can be downloaded from the Cultural Property page on the DCMS website:

http://www.culture.gov.uk/cultural_property/illicit_trade.htm



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