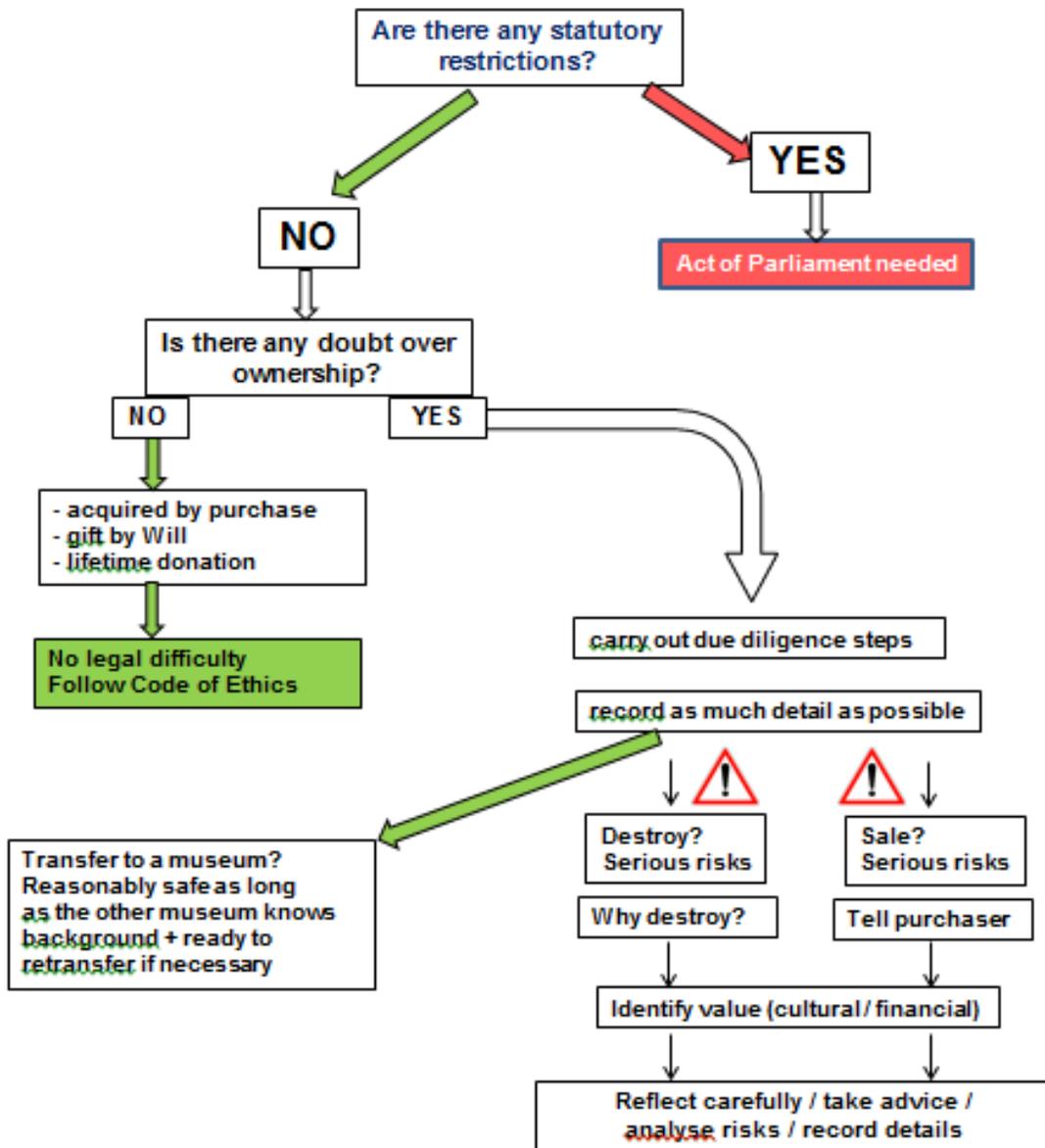


# THE LEGAL AND ETHICAL STATUS OF MUSEUM COLLECTIONS

## Curatorially Motivated Disposals



## **Curatorially Motivated Disposals**

### **Introduction**

This guidance is divided into 9 sections. The following questions will be discussed in turn:

1. Are there any restrictions imposed in the museum's governing document or by statute (including charity legislation)?
2. Is the disposal being carried out in a manner which maintains public trust?
3. How did the museum acquire the object? Do you have proof that the museum owns the object?
4. Has a benefactor stated any conditions and, if so, what is the effect of these conditions?
5. What is the position where an object is held on loan?
6. What is the position where an object on loan is not collected at the end of the loan period?
7. What should you do if there is an unexpected demand for the return of an object in the museum collections?
8. What is the position where an object has been deposited on the museum's premises or sent through the post anonymously?
9. What is the position where objects which have been in the museum's collections for many years but where there is no record regarding how they came to be acquired?

## **0.1. Good collections management**

Museums aim to “preserve and transmit knowledge, culture and history” for the benefit of past, present and future members of the public.<sup>1</sup> However, the process of review and disposal from their collections is part of good ethical practice: it enables museums to maintain and develop collections for future generations. It is accepted that:

“responsible disposal takes place as part of a museum’s long-term collections development policy and starts with a curatorial review.”<sup>2</sup>

## **0.2. Curatorially motivated disposal**

In order to uphold public trust, there is a strong presumption in favour of retaining objects within the public domain.<sup>3</sup> Museums will normally seek to dispose of objects to other museums, or other public institutions, where this is possible; accredited museums will give preference to another accredited museum.<sup>4</sup>

A curatorially motivated disposal may include:

- a sale to another museum (which might well be at less than market price in order to retain the object within the public domain) or
- a sale outside the public domain where no museum wishes to take possession of it.<sup>5</sup>

Unlike a financially motivated disposal, a primary reason for disposal is not one of raising funds.<sup>6</sup> The sale proceeds are incidental to the disposal.

## **0.3. Purposes of this guidance**

This guidance:

- Is intended to act as a supplement to the Disposal Toolkit, providing further help by including legal guidance along with ethical guidance in some problem areas in which a curatorially motivated disposal is being considered.
- is not intended to replace the need to seek advice from a lawyer where this is appropriate. It is intended to give you a legal “road map” to help you judge when advice is required and to give you an understanding in advance of the areas of law which a legal adviser might wish to discuss with you. It covers various difficult areas of law where further advice may well be needed.

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<sup>1</sup> Code of Ethics (2015), Introduction.

<sup>2</sup> Code of Ethics (2015) at [2.8]; Disposal Toolkit (2014) at page 4.

<sup>3</sup> Additional Guidance, provision 2(a); Disposal Toolkit (2014) at pages 4, 6, 7, 9, 16, 17.

<sup>4</sup> Disposal Toolkit (2014) at pages 4, 16.

<sup>5</sup> Disposal Toolkit (2014) at page 18, 19, 20, 24.

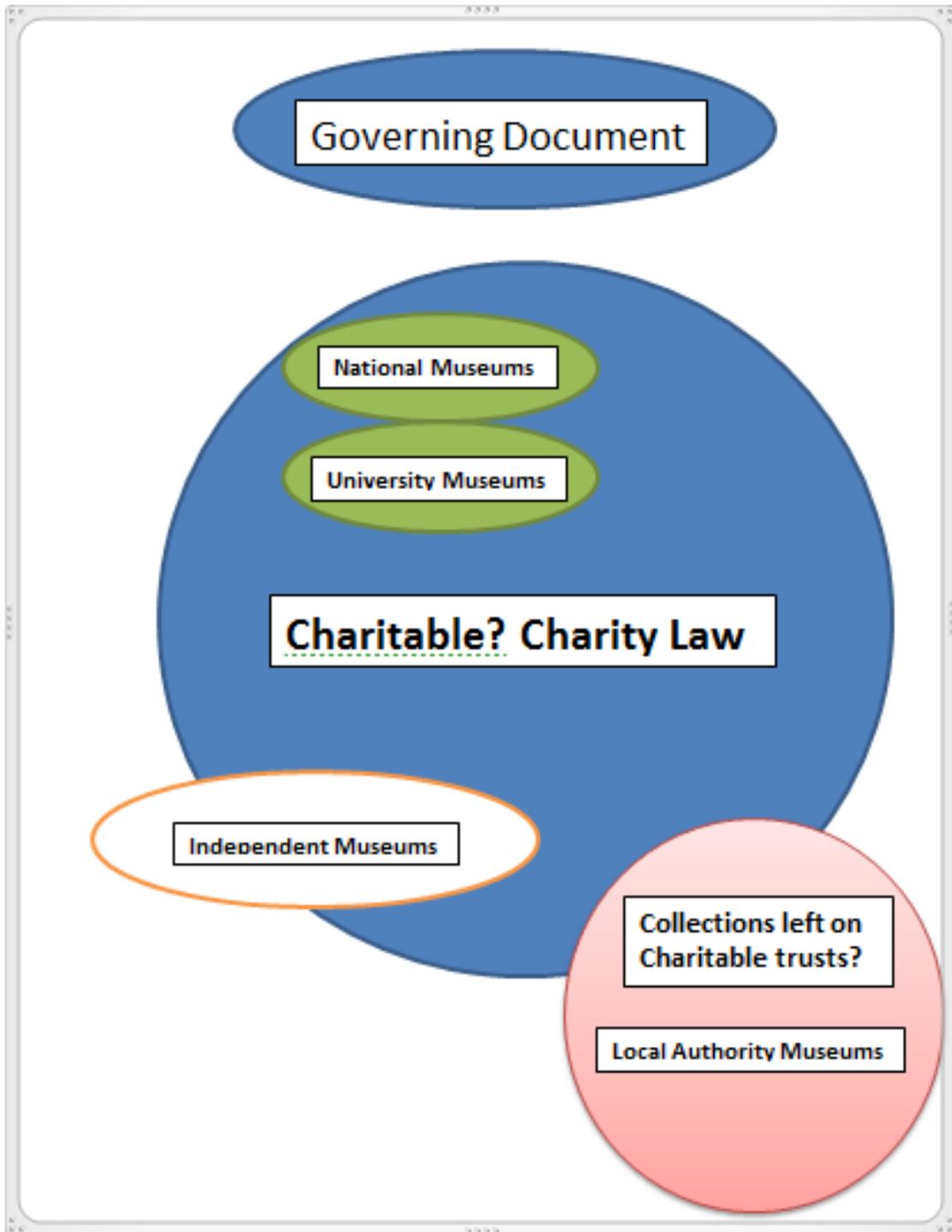
<sup>6</sup> The Glossary to the Disposal Toolkit (2014) states that a financially motivated disposal is a “sale of collections where a primary reason for disposal is to raise funds.” For guidance in relation to financially motivated sales, see “Additional Guidance on Financially Motivated Disposal,” Appendix 4 of the Disposal Toolkit.

- focuses upon management of legal risks. The aim is to reduce or eliminate any risk of a third party bringing a claim against a museum in relation to the transfer or sale of an object from its collections. The reputation of the museum must be protected at the same time in order to maintain public trust.
- will discuss situations where it is not clear that the museum has legal title (ownership). It will be explained why, in these circumstances, the risks are low when an object is transferred within the public sphere and why the risks (of serious financial and reputational costs) are high where a museum destroys an object or sells it.
- Is concerned with the law in England, Wales and Northern Ireland.<sup>7</sup>

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<sup>7</sup> The same legal principles apply to loans and trusts in England, Wales, and Northern Ireland. There are some minor differences in relation to charity law between Northern Ireland and England and Wales. But Scottish law relating to ownership of tangible objects requires separate guidance; the Scottish Law Commission has put forward suggestions for law reform which would help Scottish museums: *Report on Prescription and Title to Moveable Property* (No 228) 2012.

**1. ARE THERE ANY RESTRICTIONS IMPOSED IN THE MUSEUM'S GOVERNING DOCUMENT OR BY STATUTE?**



## 1.1. The Importance of the Governing Document

The museum's purposes will be set out in a governing document. This document could be a trust deed, constitution, a charitable incorporated organisation (CIO) constitution or a company's articles of association.<sup>8</sup>

The museum may be restricted in disposing of an object by its governing document and also by relevant legislation. Every museum is different. For example, university museums may be affected by a statute or Royal Charter establishing the university and any university regulations. A number of museums are charitable but others are not. An overview of the general law is set out below.

## 1.2. National Museums

### 1.2.1. What is a national museum?

Museums which receive government funding and are governed by public statutes are known as national museums. There are a number of statutes which apply to national museums. There are often subtle but important differences in the provisions of these statutes which reflect the mission of a museum, its particular characteristics, and its historical development. Consequently, members of the governing body (usually known as the Board of Trustees) must ensure that they are familiar with the relevant statute.

### 1.2.2. Disposal to another national museum

The statutes governing national museums create a special relationship between them in relation to disposals.<sup>9</sup> Where these museums can dispose, they are free to transfer objects from their collections, and related documents to each other by way of "sale, gift or exchange."<sup>10</sup> But not all museums are free to dispose even to another national museum: for example, the Wallace Collection Board has a duty to maintain the "Wallace

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<sup>8</sup> See The Charity Commission's Guidance: *The Essential Trustee: what you need to know, what you need to do* (2015).

<sup>9</sup> The list is to be found in the Museums and Galleries Act 1992, Sch 5, Part I (amended by SI 2000/2955): the Royal Armouries; the British Library; the British Museum; the Imperial War Museums; the Museum of London; the National Gallery; the National Galleries of Scotland; National Library of Scotland; National Maritime Museum; the National Museums and Galleries on Merseyside; National Museums of Scotland; the National Portrait Gallery; the Natural History Museum; the Science Museum; the Tate Gallery; the Victoria and Albert Museum; the Historic Buildings and Monuments Commission for England. More museums can be added: Museums and Galleries Act 1992, s 6(6). The Museums and Galleries Act 1992, Sch 5, Part II sets out a list of museums which can receive (but not give) objects from other museums: the National Library of Wales, the National Museum of Wales, the Ulster Museum, the Ulster Folk and Transport Museum, the National Museums and Galleries of Northern Ireland, the Historic Buildings and Monuments Commission for England, Historic Royal Palaces and The National Trust for Places of Historic Interest or Natural Beauty.

<sup>10</sup> Museums and Galleries Act 1992, s 6 (1)(2), Sch 5, Part 1. For a series of examples of transfers between national museums to other institutions, see Appendix 1 of the NMDC, *Too Much Stuff?* (2003).

Collection” intact; the Board therefore cannot either add or remove any items from this collection.<sup>11</sup>

### 1.2.3. *Disposal to a non-national museum*

There are restrictions where a national museum proposes to dispose to a recipient other than another national museum. There may be a complete prohibition on disposal;<sup>12</sup> but, if not, national museums will usually have a limited power to dispose by way of sale, exchange or transfer. Trustees must therefore examine their powers granted by statute with great care. For example, in relation to the British Museum, the British Museum Act 1963 states that the trustees can only sell, exchange, or transfer if:

- (a) the object is a duplicate of another such object,<sup>13</sup> or
- (b) the object appears to the Trustees to have been made not earlier than the year 1850, and substantially consists of printed matter of which a copy made by photography or a process akin to photography is held by the Trustees,
- or
- (c) in the opinion of the Trustees the object is unfit to be retained in the collections of the Museum and can be disposed of without detriment to the interests of students.<sup>14</sup>

The statutes governing the national museums contain various statements which foster public confidence. They will usually spell out that museums are expected to take care of items in their collections whilst making them accessible to the public (including those engaged in research).<sup>15</sup> They will reassure the public by saying that, even where a national museum can dispose of an object, it does not override any conditions stated by those making gifts to these museums.<sup>16</sup> Finally, there is normally a requirement that, if a museum sells an object, the proceeds of sale should be used to purchase objects to add to the collections.<sup>17</sup>

Where there is a statutory restriction on disposal, this can only be overcome by subsequent legislation which provides greater powers of disposal.<sup>18</sup>

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<sup>11</sup> Museums and Galleries Act 1992, s 4(6).

<sup>12</sup> The National Gallery cannot dispose to any museum other than a national museum: Museums and Galleries Act 1992, s 4(3), s 6.

<sup>13</sup> Even where a statute does not forbid the disposal of a duplicate, it is part of good collections management to ensure that the value of the duplicate in relation to the rest of the collection is properly understood.

<sup>14</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. See also the National Heritage Act 1983, s 6(3), s 14(3), 20(3), 27(2); the Museums and Galleries (Northern Ireland) Order 1998/261, art 5.

<sup>15</sup> See, for example, the British Museum Act 1963, s 3 and s 6(3); the National Heritage Act 1983, s 2; the Museums and Galleries Act 1992, s 2.

<sup>16</sup> Museums and Galleries Act 1992, s 6(3)(4). An exception may be made where an object has become useless because it has been damaged or become infested with pests: see for example the Museums and Galleries Act 1992, s 4(5).

<sup>17</sup> Museum and Galleries Act 1992, s 4(7); British Museum Act 1963, s 5(3); National Heritage Act 1963, ss 6(6), 14(6), 20(5).

<sup>18</sup> For example, the Holocaust (Return of Cultural Objects) Act 2009 gave various national museums the power to return spoliated objects from their collections to Holocaust victims and their families in accordance with the Spoliation Advisory Panel’s recommendations. However, s 2(6) adds that this new power, “does not affect any trust or condition subject to which any object is held.” In contrast, the Burrell Collection (Lending and Borrowing) (Scotland) Act 2014 does

### 1.3. Independent museums

Independent museums may have charitable purposes; if so, their powers of disposal are restricted by charity law, as discussed below.

Not all independent museums are charitable. If a museum has a main purpose which is private rather than public in nature, such as to promote the interests of a private company, it would not be charitable. This was the case as regards the Wedgwood Museum. If a museum's collections are held in trust for charitable purposes, they will be protected by charity law. But, in the case of the Wedgwood Museum, the collection was not held upon charitable trusts; this meant that the collection was part of the company's assets.<sup>19</sup>

Where an independent museum has private purposes the trustees must exercise their powers (including the power to dispose) and carry out their duties in a manner which satisfies those purposes.<sup>20</sup>

### 1.4. Charities

#### 1.4.1. Definition of a charity

A museum should register as charitable:<sup>21</sup>

- if it has an annual income over £5,000<sup>22</sup> and,
- if *all* of its main purposes are charitable, such as to advance education in general or to advance the arts, culture, heritage or science,<sup>23</sup> and
- it satisfies the public benefit test.<sup>24</sup>

National museums are charities.<sup>25</sup> In addition, museums belonging to universities will be charitable as part of the university.<sup>26</sup> Most of these museums are listed in the Charities Act 2011 as exempt charities and are therefore exempt from registration and direct regulation by the Charity Commission.<sup>27</sup>

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amend the benefactor's Will, enabling Glasgow City Council and the Burrell Trustees to lend objects overseas from the Burrell Collection.

<sup>19</sup> *Wedgwood Museum Trust Ltd* [2011] EWHC 3782, [2013] BCC 281.

<sup>20</sup> The purposes may be found in a constitution, trust deed, or articles of association.

<sup>21</sup> As regards the obligation to register, see Charities Act 2011, s 30. For practical guidance, go to the Charity Commission's website.

<sup>22</sup> Charities with an income of £5,000 or less are not required to register with the Charities Commission.

<sup>23</sup> Charities Act 2011, s 3(b)(f).

<sup>24</sup> As regards the public benefit requirement, see s 4 of the Charities Act 2011 and the guidance available on the Charity Commission's website.

<sup>25</sup> See the list set out in Charities Act 2011, s 22, Sch 3. See further, Museums and Galleries Act 1992.

<sup>26</sup> The universities themselves will be educational charitable trusts and may be exempt charities listed in the Charities Act 2011, s 22, Sch 3.

<sup>27</sup> Charities Act 2011, s 30(2). See the Charity Commission's guidance regarding exempt charities available on its web site. The guidance explains, for example, that the principal regulator for most of the national museums is the Department of Culture, Media and Sport.

The Charities Act 2011 governs charities in England and Wales; the Charities (Northern Ireland) Act 2008 governs charities in Northern Ireland and contains similar provisions to the 2011 Act.

Local authorities are not charitable bodies because their purposes include purposes which are not charitable in law, such as enforcement of planning laws.<sup>28</sup> Appendix 2 of the Disposal Toolkit notes that museums and art galleries may belong to bodies that are not charities, such as local authorities. Even so, they may hold some objects or collections on charitable trusts.<sup>29</sup> For example, local authorities may have acquired collections from charities such as literary societies which were being dissolved, or they may have received individual gifts in the past which were given for stated charitable purposes such as to advance education or to promote the arts.<sup>30</sup> However, there would need to be evidence that the local authority held these collections on charitable trusts.

#### 1.4.2. Charity law encourages good collections management

The Charity Commission (and its equivalents<sup>31</sup>) performs a regulatory role. The Commission's powers include giving advice on various matters.<sup>32</sup> The Commission prepared a Report entitled *Museums and Art Galleries*, which was published in 2002, which appears to support sensible rationalisation of collections.<sup>33</sup> The Report reminds museums that the objects in their collections must have a cultural value which will make engagement with those objects meaningful. The Report repeatedly emphasises that the collection must have merit.<sup>34</sup> Museums are counselled to avoid hoarding objects. It is stated 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>35</sup>

The Charity Commission is therefore encouraging museums to consider disposing of objects of low cultural value which are of no interest to the public or researchers. Yet it is also understood that not all objects in a museum's collections will be put on display; but if these objects are repositories of information to be engaged with by researchers now or in the future, they need to be kept in the public sphere and cared for and preserved for future generations.<sup>36</sup>

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<sup>28</sup> In *Re Endacott, Decd* [1960] Ch 232, CA, 243-244.

<sup>29</sup> See, for example, *Re Spence's Estate, Barclays Bank Ltd v Stockton-on-Tees Corporation* [1938] Ch. 96; *Re Holburne. Coates v Mackillop* (1885) 53 L.T. 212; *Re Cranstoun* [1932] 1 Ch 537.

<sup>30</sup> See, for example, *Re Whitworth Art Gallery Trusts, Manchester Whitworth Institute v Victoria University of Manchester* [1958] Ch 461.

<sup>31</sup> See the Charity Commission for Northern Ireland and the Scottish Charity Regulator (OSKR).

<sup>32</sup> Charities Act 2011, s 110; Charities (Northern Ireland) Act 2008, s 49.

<sup>33</sup> Charity Commission: *Museums and Art Galleries Report*, R10.

<sup>34</sup> *ibid*, at [7-11], [14], Annex [A.1-18], [B.15-16]. See *Re Pinion* [1965] Ch 85, CA,

<sup>35</sup> *Ibid*, at [A.27].

<sup>36</sup> For example, the NMDC mention that the Natural History Museum has 70 million specimens: see NMDC, *Too Much Stuff?* (2003) at page 5.

#### 1.4.3. *Guidance in relation to disposal*

Appendix 2 of the Disposal Toolkit provides general guidance in relation to disposal. It states, for example, that charity trustees need to know and follow the trusts, directions and conditions subject to which they hold the collection or exhibit.

All trustees are expected to exercise care in carrying out their duties as a trustee,<sup>37</sup> Charity trustees have overriding duties to act reasonably and in the interests of the charity.<sup>38</sup> This means that, in making decisions, trustees should:

- act within their powers, using the correct procedures;
- act in good faith and in the interests of the charity (managing any conflicts of interest);
- adequately inform themselves (from information that could reasonably be known at the time);
- take into account all relevant factors; disregard any irrelevant factors;
- make a decision that is within the range of reasonable decisions that a reasonable trustee body could make.<sup>39</sup>

If the trustees have taken steps to adequately inform themselves and found no evidence of a restriction, they can assume that there are none. If their decision was later challenged, it would have to be by reference to the circumstances that could reasonably have been known at the time the decision was made. It follows that it is important for trustees to keep records of their decision-making.

#### 1.4.4. *Returning a gift to the donor*

If trustees decide to deaccession and dispose of some objects from their collections as part of a process of good collections management, they should make every effort to transfer the object to another charitable museum, giving preference to an accredited museum.

As the collection is held for charitable purposes, any proceeds of sale must be used for these purposes, such as conserving and repairing the remaining exhibits or acquiring new objects for the collections. Charity trustees cannot ordinarily return items to donors.

However, a museum may be able to return an object where it has little financial or cultural value and where it has great sentimental value to the donor. One example would be medals. If no other museum wanted these objects, it could damage the museum's reputation to auction them to the highest bidder. The trustees must act reasonably and within the trusts and powers conferred by the charity's governing document; even so, the trustees may be able to justify returning these objects to donors on the basis that this course of action is in the best interests of the museum.<sup>40</sup>

If the position seems uncertain, such as where the value of an object is difficult to determine, charity trustees can seek assistance or authorisation from the Charity Commission. There are different legal powers which the Commission can use,

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<sup>37</sup> Trustee Act 2000, s 1, Sch 1.

<sup>38</sup> See the Charity Commission's guidance: *Essential Trustee; what you need to know, what you need to do* (2015).

<sup>39</sup> See the Charity Commission's guidance: *It's Your Decision: Charity Trustees and Decision Making* (2013).

<sup>40</sup> Discussed in more detail at page 17 and Appendix 2 of the Disposal Toolkit.

depending on the circumstances. For example, permission may be given to return the object in accordance with section 105 of the Charities Act 2011, where it is “expedient in the interests of the charity.”<sup>41</sup> “Expedient” means that there must be an advantage to the museum in doing so.<sup>42</sup> One such advantage would be in protecting the museum’s reputation.<sup>43</sup> The Commission should be informed of any plans by the donor (or his family) to establish a charitable trust or company which will take possession of the items being returned.

In order to preserve public trust, museums should always record essential points arising from their discussions to dispose. This is particularly important where there is a desire to return low value items to the original donor.

#### 1.4.5. *Sale at an less than market value*

The trustees of the museum will ordinarily seek the best price for the item in order to benefit the museum’s remaining collection. Trustees must act reasonably and within the trusts and powers conferred by the charity’s governing document; even so, they can sell at less than the market value where:

- this course of action can be justified as in furtherance of the museum’s own objects and it is in the museum’s best interests;
- the trustees are satisfied that the object will remain in the public domain and will be accessible to the public; and
- any restrictions which may have been placed on the object when it was originally given continue once the sale has been completed, or any restrictions the selling charity put on the use of the item are met.<sup>44</sup>

Where trustees are uncertain on some matter, such as in relation to the size of the discount being requested, they are best advised to seek authorisation for the sale from the Charity Commission.<sup>45</sup>

## 1.5. Local authority museums

### 1.5.1. *Establishment of museums*

A large number of museums were established from the nineteenth century onwards by local authorities. The Museums of Art Act of 1845 enabled certain local authorities in

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<sup>41</sup> In relation to Northern Ireland, the equivalent provision is Charities (Northern Ireland) Act 2008, s 46.

<sup>42</sup> See the Charity Commission’s guidance on *ex gratia* payments available on its website.

<sup>43</sup> In a similar vein, the Charity Commission or the Attorney General can authorise *ex gratia* payments of money from charitable funds where there is a moral obligation to do so: Charities Act 2011, s 106 (formerly Charities Act 1993, s 27); *Re Snowden* [1970] Ch 700. In relation to Northern Ireland, see Charities (Northern Ireland) Act 2008, s 47.

<sup>44</sup> Disposal Toolkit (2014), Appendix 4, at [2.3.3].

<sup>45</sup> For example, the Royal Academy of Arts sought authorisation from the Charity Commission (under the statutory predecessor to section 105 of the Charities Act 2011) in 1962 because it wished to sell its Leonardo Da Vinci cartoon at less than market value in order to keep this important work of art within the public domain. £800,000 was raised by public appeal and the cartoon joined the collections in the National Gallery.

England and Wales to establish museums. The legislation which followed gave more local authorities the power to establish museums. The current law can be found in the Public Libraries and Museums Act 1964, which provides local authorities<sup>46</sup> with the power to maintain museums and art galleries and to transfer a museum and its collections to another local authority.<sup>47</sup> Where a local authority has established a museum or proposes to do so, the 1964 Act also empowers local authorities to establish a fund for the purchase of items for its collections.<sup>48</sup> If an item is subsequently sold, the proceeds of sale may be paid into the fund and used for future acquisitions.<sup>49</sup> Unlike the legislation governing the national museums, the 1964 Act is not imperative in tone and it does not impose any duty upon local authorities to run museums.<sup>50</sup>

#### *1.5.2. Power to accept gifts, and to purchase and dispose*

The Local Government Act 1972 provides very general powers to support other legislation, including the Public Libraries and Museums Act 1964. When gifts are made, the local authority has power to accept any type of gift, and to care for the property, under the powers given by section 139 of the 1972 Act. According to section 139, acceptance, holding and administering gifts can also be justified where it is 'for the benefit of the inhabitants' of the local area. Section 111(1) gives local authorities wide powers to do anything, including purchasing and disposing of property, which will help them carry out their functions.

#### *1.5.3. Restrictions on disposal*

Local authorities may not be free to dispose of collections for various reasons. For example, there may be objects which have been deposited by way of an informal loan which cannot be sold (to be discussed in the following pages). There may be minor local acts which apply and restrict the power to dispose.<sup>51</sup>

Local authorities may hold property on "special trusts" for charitable purposes, such as where a local learned society has donated its collections. The fact that various local

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<sup>46</sup> This does not include town, parish and community councils; a few of these councils do provide museums under the powers conferred by the Local Government Act 1972 ("LGA 1972"), s 137. See the Audit Commission's Local Government Report, *The Road to Wigan Pier – Managing Local Authority Museums and Art Galleries* (1991) No 3 London, HMSO at page 12.

<sup>47</sup> Public Library and Museums Act 1964 ("PLMA 1964"), s 12(2). There is no need for the local authority to obtain the permission of the Secretary of State or, in relation to Wales, the Welsh ministers: LGA 1972, s 208(1).

<sup>48</sup> PLMA 1964, s 15, as amended by the LGA 1972, s 208(3)(g).

<sup>49</sup> PLMA, Sch 2 at [3].

<sup>50</sup> PLMA 1964, s 12(1), as amended by the LGA 1972, s 272(1), Sch 30. Even so, if there is a decision to close a museum, a check will need to be made that the Literary and Scientific Institutions Act 1854 has no application. According to s 4, if the land and buildings cease to be used for the purpose of a library or a museum which is open to the public, they will revert to the original donor. If the land and buildings are sold this may (depending upon the wording of the gift) trigger the provisions of this statute. If this occurs, the local authority or other governing body may need to hold the proceeds of sale on trust for the donor and those entitled on his/her death.

<sup>51</sup> For example, s 149 of the Greater Manchester Act 1981 restricts disposal within 21 years of the date of acceptance of a gift, if disposal would conflict with the conditions attached to the gift and consent to the disposal by the donor (or personal representatives or trustees) is not obtained. A similar provision can be found in the County of Lancashire Act 1984, s 58 (with a stated period of 35 years).

authorities in England and Wales hold property on charitable trusts is expressly recognised by the Local Government Act 1972.<sup>52</sup> Charity law would therefore apply in relation to these special trusts. It was not until 1960, when the Court of Appeal decided the case of *Re Endacott*,<sup>53</sup> that it became clear beyond doubt that local authorities were not charitable bodies. It is therefore not surprising that, in earlier times, local authorities accepted objects on trust with the understanding that they were to be held for charitable purposes. Appendix 2 of the Disposal Toolkit notes that local authorities and other non-charitable bodies “often hold charitable exhibits and collections that have been acquired in the past with the intention that they be held separately on trust” for charitable purposes.

There may be other legal considerations which affect the decision to dispose and which may assist in ensuring that collections are retained within the public sphere. Recent legislation and informal guidance have encouraged local authorities to work to improve the social, economic and environmental well-being of local communities.<sup>54</sup> Local authorities have been encouraged to consider transferring land and buildings at less than market value to community and voluntary sector groups in order to further these purposes.<sup>55</sup> Under such a “community asset transfer” scheme, a local authority should inform local communities of any proposed sale and should give the communities time to put forward a bid. For example, Torridge District Council transferred the collections of the North Devon Maritime Museum, together with the building in which they were housed, to an independent trust under this scheme. Paragraph 2.3.3 of Appendix 4 of the revised Disposal Toolkit therefore states:

Local authority museums may consider transfers at less than market value to other museums. For example, a substantial discount in the market value can be offered when land and buildings, as well as the museum collection, are being transferred under a community asset transfer to further local, social, economic and environmental wellbeing, in accordance with the Localism Act 2011.

Local authority museums will need to consider whether the disposal of any item adversely impacts upon those groups with protected characteristics under the Equality Act 2010. Retention of the item in the public domain could mitigate any adverse impact.

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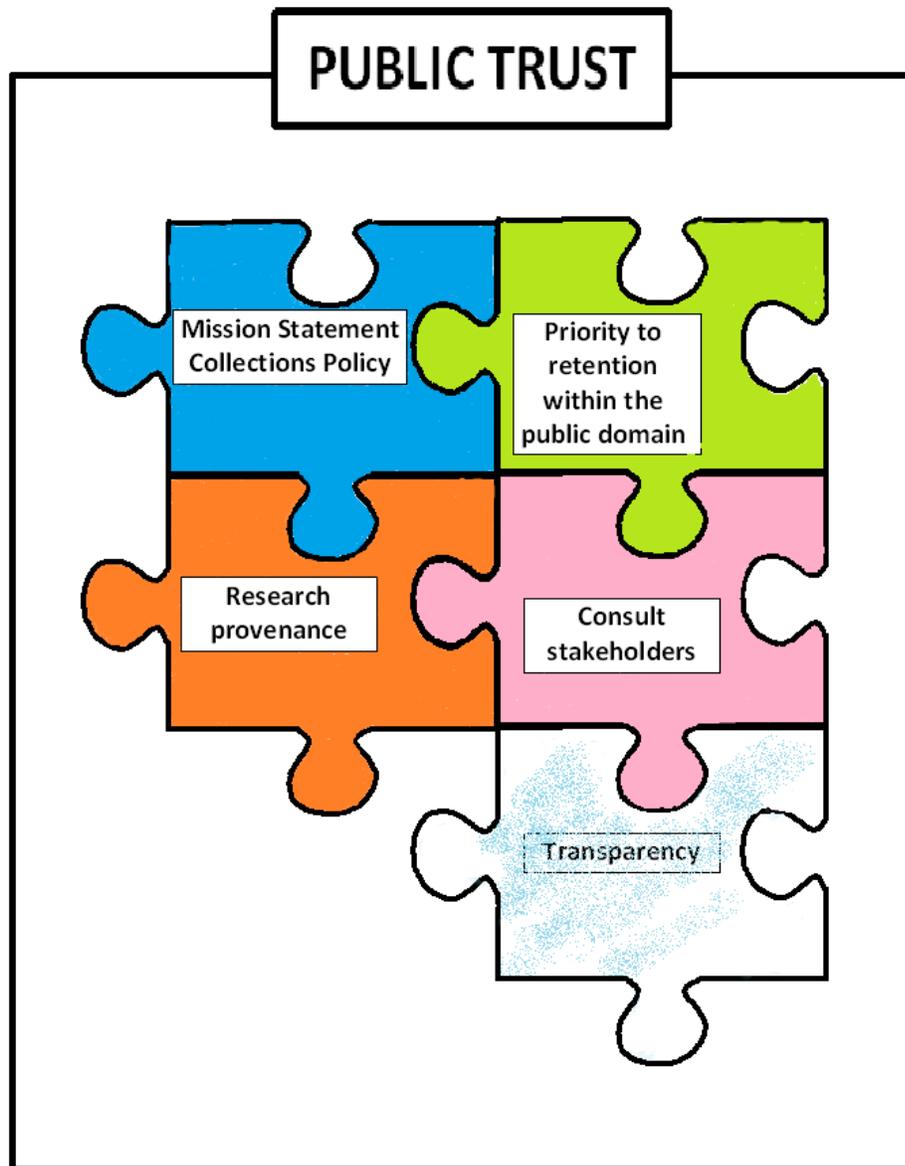
<sup>52</sup> LGA 1972, ss 210 and 211.

<sup>53</sup> In *Re Endacott, Decd* [1960] Ch 232, CA

<sup>54</sup> Local Government Act 2000, sec. 2. See further the Public Services (Social Value) Act 2012, sec. 1(3),

<sup>55</sup> See the Localism Act 2011; Circular 06/03: Local Government Act 1972 General Disposal Consent (England) 2003; The Disposal of Heritage Assets: Guidance note for government departments and non-departmental public bodies at <http://www.english-heritage.org.uk/publications/disposal-heritage-assets/guidance-disposals-final-jun-10.pdf>

2. Is the disposal being carried out in a manner which maintains public trust?



## 2.1. Code of Ethics

It is essential that museums are conscious of the key principles to be found in the Code of Ethics in order to make sound ethical judgments in relation to disposal.<sup>56</sup>

In order to maintain public trust, museums should:

- bear in mind that their aim is to engage the public in using the collections for learning, inspiration and enjoyment;<sup>57</sup>
- view their collections as cultural, scientific or historic assets, not financial assets;<sup>58</sup>
- refuse to dispose of an object for financial reasons except in exceptional circumstances;<sup>59</sup>
- act as stewards to maintain and develop collections for current and future generations;<sup>60</sup>
- give priority to keeping objects within the public domain in order to maintain public confidence in museums;<sup>61</sup>
- ensure transparency;<sup>62</sup> depending upon the circumstances, this may involve consulting with others, such as donors, researchers, local communities, source communities, partner organisations, sponsors and funders;
- carry out any disposal openly in accordance with clear and generally accepted procedures which conform with the museum's Collections Development Policy;<sup>63</sup>

Museums are expected to follow the spirit as well as the letter of a Code of Ethics.<sup>64</sup> A Code will not answer every ethical question which a museum may need to deal with, but its general principles will nevertheless assist in arriving at the right ethical conclusion. For example, what is the position where an object is being disposed of and a number of museums express an interest in acquiring it? Although there is no direct answer to this issue in the Code, there is guidance to the effect that the collections should be used for learning, inspiration and enjoyment; consequently, a disposing museum may wish to consider which museum would be best able to use the object to engage members of the public.

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<sup>56</sup> Code of Ethics (2015) Introduction, page 1.

<sup>57</sup> Code of Ethics (2015) Public Engagement and Benefit, at page 6.

<sup>58</sup> Code of Ethics (2015) Stewardship of Collections, at pages 7,13.

<sup>59</sup> Code of Ethics (2015) Stewardship of Collections at [2.9].

<sup>60</sup> Code of Ethics (2015) Stewardship of Collections at pages 7, 13.

<sup>61</sup> Additional Guidance, provision 2(a) Protecting and Cultivating Collections; Disposal Toolkit (2014) at pages 4, 6, 7, 9, 16, 17. See also the Code of Ethics (2015), Individual and Institutional Integrity, pages 7,17: "Museums must act in the public interest in all areas of work."

<sup>62</sup> Code of Ethics (2015) at [2.8].

<sup>63</sup> Code of Ethics (2015) at [2.8]. "Generally accepted procedures" are set out in the Disposal Toolkit.

<sup>64</sup> Code of Ethics (2015) at page 1.

## **2.2. Researching provenance**

Museums are transparently accountable to the public they serve. Consequently, a museum must take care in carrying out a disposal. This is particularly important where no documentation exists in relation to its acquisition. Where there is doubt in relation to its provenance, every effort should be made to learn more about it in order to be seen to be acting in the public interest. It is particularly important to safeguard the reputation of the museum and uphold public trust.

## **2.3. Researching provenance: objects from abroad**

If an object appears to be from another country, reviewing any evidence relating to its provenance is particularly important. If, upon review, there is a possibility that an object has been smuggled into Britain many years ago, a museum should only transfer it within the public sphere in order to maintain public trust. The receiving museum should be informed of any concerns over its provenance so that it is forewarned in case, for example, a claim from the government of the source country is later made for its return.

## **2.4. Advice, consultation and upholding the public trust**

Taking advice may help the museum to understand the object better. It may also help in the disposal process. Consultation is particularly useful where a collection presents unusual problems. For example, housing the variety of archaeological material collected over the last century has posed significant problems for a number of museums in recent years. If archaeological objects of little cultural or educational value need to be disposed of, it may be the case that no other museum is willing to take them. The appropriate way forward will depend upon the circumstances. It is therefore useful to seek advice from museums which have faced similar dilemmas.<sup>65</sup>

Where consultation is desired, the Government recommends that the time allowed should be “proportionate and realistic to allow stakeholders sufficient time to provide a considered response.”<sup>66</sup> Although consultation is not a legal requirement, it is interesting to note that the guidance offered by the law is that consultation should take place when any proposals are at a formative stage; those consulted should be provided with sufficient information to engage in the process; and the results of the consultation should be conscientiously taken into account in arriving at any decision.<sup>67</sup>

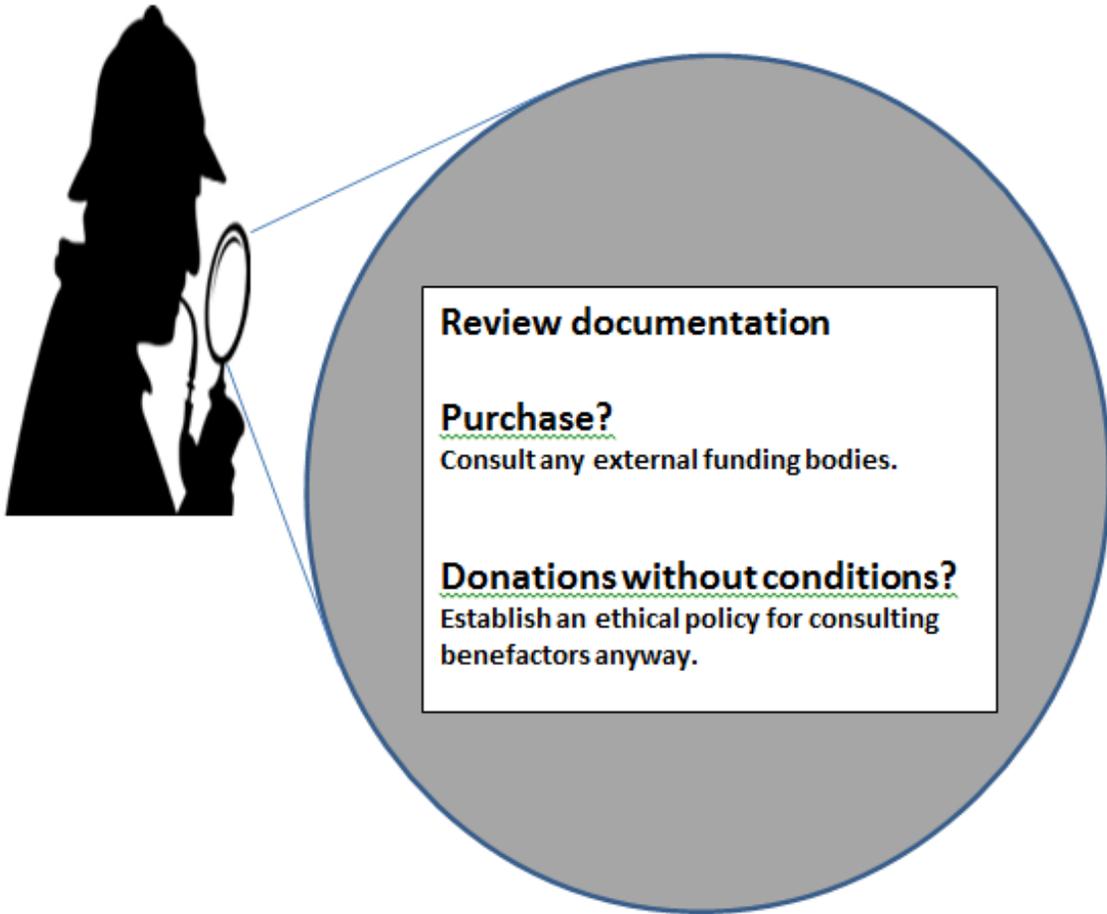
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<sup>65</sup> Rationalisation of archaeological material is a complex issue with a range of views: see the survey by R Edwards, *Archaeological Archives & Museums 2012* (Society of Museum Archaeologists, 2013); <http://www.socmusarch.org.uk/docs/Archaeological-archives-and-museums-2012.pdf>

<sup>66</sup> *Consultation Principles* (Cabinet Office, 2012), available at <https://www.gov.uk/government/publications/consultation-principles-guidance>

<sup>67</sup> *R v Brent LBC, exp Gunning* (1985) 84 LGR 168, 189; *R (Moseley) v Haringey LBC* (2014) UK SC 56, [2014] 1 WLR 3947 at [25].

### 3. How Did You Acquire the Object?



### 3.1. Review documentation

If a museum owns an object, it is free in law to dispose of it as appropriate (subject to any statutory restrictions, as discussed earlier). It is sensible to check the evidence surrounding its acquisition. In relation to the law, the Disposal Toolkit states:

Review the documentation of the item to ensure that the museum has legal title to remove it, and that there are no conditions attached that would prevent the museum from following this course of action.

### 3.2. Purchase

The Disposal Toolkit reminds museums that:

If the item was acquired with the assistance of external funds contact funding bodies to discuss any planned course of action.

It is good ethical practice to notify the funding body. Furthermore, there may be a legal obligation to do so and, if an object is sold, there may be an obligation to repay the value of the funding obtained.

### 3.3. Gifts

Gifts may be made during a person's lifetime or by Will. If the testator left an identified object or objects (or a sum of money) to a museum in a Will, it is referred to as a *bequest*. Alternatively, the testator may have left his *residue* to the museum, which will consist of all of the remaining property after particular debts have been paid and bequests have been distributed. In either case, whether there is a gift during someone's lifetime or by Will then, unless there are any conditions set out, the museum will clearly have the powers of an owner (but subject to the general law, such as charity law).

Even if there are no legal restrictions, the Code of Ethics directs museums to consider the interests of those who gave items.<sup>68</sup> The Disposal Toolkit encourages museums to have an ethical policy in relation to contacting benefactors where a disposal is contemplated. This policy could include:

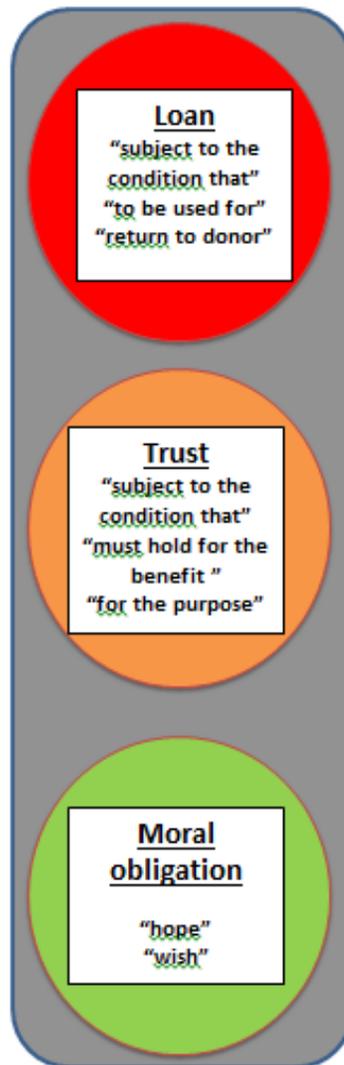
- a realistic and pragmatic time limit after which benefactors will not be contacted. For example it may be agreed that only those donors who have given items in the past 20 years will be contacted.
- an agreement only to write to the last known address of a donor (and not to undertake work to obtain a new address if a donor has moved);
- a statement relating to the period of time which will be given for donors to respond to information relating to a proposed disposal.

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<sup>68</sup> Code of Ethics (2015), at [1.2].

4. Has a benefactor stated any conditions and, if so, what is the effect of these conditions?

Interpret any conditions



#### **4.1. Introduction**

The collections of many museums have been built through gifts from the public. The donors may well have included conditions in making their gifts. Typical conditions (which can include a combination of conditions) are that the object (or collection) must be:

- retained forever;
- kept on permanent display;
- kept together with other objects given by the benefactor as “distinct and entire.”<sup>69</sup>

#### **4.2. Ethical constraints**

In order to uphold public trust, museums should consider the views of their donors in making a decision to dispose.<sup>70</sup> However, as discussed earlier, review and responsible disposal are part of good collections management. Consequently, the donor’s wishes may need to be reconsidered in the light of changed circumstances and the public interest. Where there are no ethical difficulties, it becomes important to consider whether there are any legal constraints. The relevant legal principles are discussed below.

#### **4.3. Deciding whether a condition creates a legal obligation or not**

##### *4.3.1. General approach to interpretation*

There are various possible legal interpretations of conditions (such as a condition that the object must be on permanent display) contained in a will or gift. These interpretations include:

- 1) the condition was not intended to create a legal obligation: it merely indicates the motive of the donor and explains why the gift was made;
- 2) the condition is legally binding and it is clear that the object was transferred on trust;
- 3) the condition is legally binding and it is clear that the object was transferred on loan for an indefinite period and this loan will be brought to an end if the condition is not complied with.

The courts will consider whether the words used are forceful; if they are, this will suggest that a loan or trust was intended.

##### *4.3.2. Transfer by Will*

If the words are in a Will, the courts will look at the whole document in deciding how the condition should be interpreted. The court is concerned to find the intention of the testator and will consider the natural and ordinary meaning of the words used, the overall purpose of the Will, any other provisions in the Will, the facts known or assumed by the testator when the document was signed and witnessed, and common sense.<sup>71</sup>

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<sup>69</sup> In relation to the National Gallery, Tate Gallery and National Portrait Gallery, the Museums and Galleries Act 1992, s 5(3), overrides this condition and provides that the object/collection can be lent after 50 years have elapsed from the date of the donation.

<sup>70</sup> Disposal Toolkit (2014) pages 11, 31.

<sup>71</sup> *Marley v Rawlings* [2014] UKSC 2; [2015] AC 129 at [19-20].

It is sensible to obtain the advice of a legal expert on the precise phrases used by the benefactor. However, the general approach is as follows:

- If a person uses words such as “I desire,” “I wish,” or “I hope,” these words will not usually be seen as forceful; instead they may explain why the benefactor made the gift. In these circumstances, the condition may be viewed as indicating a moral obligation and the museum is viewed as the owner in law.<sup>72</sup>
- In contrast, a phrase such as “on condition that” or “shall be used for” may be sufficiently forceful to suggest that a legal obligation has been created which must be carried out; this is particularly so where there is an added statement to the effect that the object must be returned to the donor if the condition is not carried out.<sup>73</sup> If it appears that a legal obligation was intended, then it is then important to work out whether a loan or a trust was intended.

#### 4.3.3. *Transfer during the benefactor’s lifetime*

Where possession is transferred during the benefactor’s lifetime, courts will look at all the evidence, including any letters or other documents which s/he may have written,<sup>74</sup> and any statements by witnesses to decide whether a gift was intended. Courts may also find it useful, in deciding whether there was a gift or loan, to consider the later conduct of the museum and benefactor after the object was transferred. Courts will assess the evidence to judge the extent to which it is reliable. Courts will take account of:

- statements made by the benefactor or museum employees to a reliable third party which indicate that the benefactor intended a gift or loan (at the point of transfer and at any later date).
- the benefactor’s acquiescence in, or failure to take obvious steps to dispute, any conduct or statements by the museum which showed that it assumed that a gift had been made. For example, if a museum spent considerable sums of money restoring an object and the benefactor was aware of this, it would be one factor which could help to suggest that a gift to the museum, rather than a loan, had been intended.<sup>75</sup>
- the conduct of the benefactor or museum which clearly indicated their understanding of whether there was a gift or loan. For example, if the museum has an acquisitions policy of not agreeing to loans, this policy would suggest that it has received an object as a gift and not as a loan.<sup>76</sup>
- a denial of ownership by the museum.<sup>77</sup>

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<sup>72</sup> *Lambe v Eames* [1871] 6 Ch App 597; *Re Adams and the Kensington Vestry* [1884] 27 Ch D 394, CA; *Re Diggles* [1888] 39 Ch D 253. CA.

<sup>73</sup> A clause suggesting that the object must be returned if the condition is not satisfied may well suggest a loan was intended; for further discussion, see [4.5.]

<sup>74</sup> In *Hrabalek v Hrabalek* [2015] EWHC 1456, an e-mail was seen as particularly reliable evidence.

<sup>75</sup> *Re Escot Church* [1979] Fam 125, Cons Ct.

<sup>76</sup> *Troughear v Council of the City of York* (the York Castle Museum case) (9 January 1995, unrep), Case No YO402314, York County Court, discussed in N Palmer (ed) *Palmer on Bailment* (3<sup>rd</sup> ed, Sweet and Maxwell, 2009), [3-014, 3-023].

<sup>77</sup> See *Palmer on Bailment* (2009) at [3-014]; *Day v Harris* [2013] EWCA Civ 191, [2014] Ch 211, CA, at [70]. Discussion of suggested due diligence steps which could be taken where there is uncertainty in relation to ownership can be found at [9.2.] of this guidance.

#### 4.4. A condition which creates a trust: distinguishing between private and charitable purposes

##### 4.4.1. A condition which creates a trust

Trusts create legal obligations. Where objects are held on trust, the governing body of the museum is not free in law to deal with the objects as it might wish: instead, the objects on trust must be held for the stated purposes. For example, the benefactor might say that an object should only be accepted by the museum if it is agreed that it will be kept on display in the museum. This statement could create a trust even where it is said informally: unless the trust includes land, there is no requirement that the trust must be evidenced in writing.

The courts may conclude that, even though a purpose was stated as a “condition,” a trust was intended.<sup>78</sup> For example, in *Re Spence's Estate*,<sup>79</sup> Mr. Spence's left his collection of arms and antiques to a local authority “subject to the condition that” the local authority kept the collection in a room in a public hall and that the collection was open for inspection by the public. It was decided that the collection was held on trust.

##### 4.4.2. Trusts for charitable purposes are valid

If a trust has been created, it is also necessary to decide whether the purposes are charitable or not. If the benefactor states purposes which are vague, the courts will look at the words used very carefully to decide whether the purposes benefit the public in a way which the law recognises as charitable. For example, any purpose which is concerned with political campaigning would not be charitable. Well established charitable purposes for museums include educational purposes and purposes to advance the arts, culture, heritage or science.<sup>80</sup> In contrast, a trust for “benevolent purposes” failed because the money could be spent on non-charitable purposes, which might still be seen as “benevolent.”<sup>81</sup> Equally, the phrase “public purposes” has been seen as too wide and vague in certain contexts.<sup>82</sup> However, the courts consider all the relevant facts and the whole of the Will. In *Re Spence's Estate*,<sup>83</sup> discussed in the previous paragraph, it was decided that the collection of arms and antiques had been left for educational purposes and that this was a charitable gift. Mr. Spence had also left money for the building of a public hall which the local authority could use for “public purposes,” and which would house his collection of arms and antiques. The court decided that the purpose was a charitable one: the public hall was intended to benefit the local community.

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<sup>78</sup> *Re Frame* [1939] Ch 700.

<sup>79</sup> *Re Spence's Estate, Barclays Bank Ltd v Stockton-on-Tees Corporation* [1938] Ch. 96.

<sup>80</sup> Charities Act 2011, s 3(b)(f).

<sup>81</sup> *Morice v Bishop of Durham* 32 E.R. 656; (1804) 9 Ves. Jr. 399; *Chichester Diocesan Fund and Board of Finance v Simpson* [1944] AC 341, HL.

<sup>82</sup> *Blair v Duncan* [1902] AC 37, HL; *Houston v Burns* [1918] AC 337, HL.

<sup>83</sup> *Re Spence's Estate, Barclays Bank Ltd v Stockton-on-Tees Corporation* [1938] Ch. 96.

#### 4.4.3. A trust which has private purposes will often fail

Where the purposes stated by the benefactor are private (non-charitable) ones, such as to promote the interests of a company or a family, the trust may fail and the museum may receive nothing.

In general, a trust for private purposes may fail for one or more of three reasons. Firstly, there may be no beneficiaries to enforce the trust (whereas the Attorney General can enforce a charitable trust). Secondly, the purposes may be too vague, such as “benevolent” or “useful” or “worthy” purposes (whereas the Charity Commission will always be ready to clarify vague purposes which are clearly charitable). Thirdly, a private trust cannot go on forever,<sup>84</sup> whereas a charitable trust can do so.

An example of a case where a benefactor left money to a local authority for private purposes is *Re Endacott*.<sup>85</sup> Here, the testator (Endacott) gave a large sum of money to a local authority in his Will, “for the purpose of providing some *useful memorial to myself*.” The Court of Appeal considered whether the testator had intended an outright gift to the local authority so that these extra words only imposed a moral obligation upon the local authority. However, it was decided that the extra words were intended to create a trust, imposing a legal obligation upon the local authority to build a “useful memorial.” The court looked at the legislation governing local authorities and decided that local authorities do not automatically hold money or other property given to them on charitable trusts. The court then considered the testator’s words and decided that they were too uncertain to create a trust for charitable purposes. It was decided that this was a trust for a private purpose which failed because it was too uncertain and there were no trust beneficiaries to enforce it. The local authority therefore did not receive any money (which went to the next of kin instead). *Re Endacott* illustrates that there are serious risks associated with gifts subject to conditions. This is particularly true where a gift is made to a local authority where the benefactor may assume that the local authority is a charity, when in law this is not the case.

Where there are plans to sell an object, any conditions imposed when it was received should be subjected to strict scrutiny because it must be clear that the selling museum owns the object. From a risk management perspective, a proposed sale may upset the benefactor or his or her descendants and they may challenge the sale if it is unclear whether the gift was made for charitable purposes or not. In contrast, if an object is being transferred from one museum to another, the conditions under which an object was first given are unlikely to come under any strict examination because the object will continue to be housed in a museum and will be available to the public as the benefactor originally intended.

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<sup>84</sup> There are rules against perpetuity which apply to private trusts. The rule against inalienability prevents capital being tied up forever. A separate rule, the rule against remoteness of vesting, prevents beneficial ownership being kept in suspense for hundreds of years; see footnote 87.

<sup>85</sup> *In Re Endacott, Decd.* [1960] Ch. 232, CA.

#### **4.5. A condition which suggests a loan**

If the owner has suggested, whether orally or in writing, that the object must be returned once it has ceased to be used for exhibition purposes, this condition will suggest that a loan was made. Any statement that the object must be returned, or that the benefactor can recover it, may – depending upon the other evidence - suggest a loan.

If there is a loan, the museum cannot deal freely with the object because it is not the owner of the object but merely has possession. For example, in the Australian case of *Myer Stores Ltd v Jovanovic*,<sup>86</sup> the claimant photographer supplied three sets of photographs to the defendant “to be used ... for display/exhibition purposes.” The contract contained clauses which showed that the claimant photographer retained control over the sets of photographs. It stated that the photographs were not to be reproduced, sold or disposed of without the agreement of the claimant and that, when they were no longer required for display, the defendant should donate one set to a museum and consult with the claimant photographer in relation to the other two sets. The court decided that this was a loan because of these extra requirements relating to disposal. The defendant was therefore obliged to pay financial compensation because he had failed to return the photographs to the claimant after he had finished displaying them.

#### **4.6. Conditions which attempt to prevent a museum from transferring, exchanging, selling, or otherwise disposing of an object**

##### *4.6.1. Further interpretations*

The legal position is complicated where it is stated that, as a condition of accepting the gift, it must be kept forever and must not be transferred, exchanged or sold. The obvious interpretations include, as discussed above, that a trust or loan was intended.

However, all the evidence must be scrutinised carefully because there are other possible legal interpretations of this type of condition:

- 1) It is a gift with a “condition subsequent.” In this situation, a gift of an object is transferred to the museum *unless and until* the museum attempts to sell the property; at this point, the gift comes to an end and the object is transferred as to a named person (which may be the benefactor or his or her descendants). However, this condition is not necessarily enforceable: if it is designed to go on forever, it is likely to contravene the law against perpetuities.<sup>87</sup> If it does, the

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<sup>86</sup> [2004] VSC 478, Sup. Ct. Victoria.

<sup>87</sup> For all gifts made before 15 July 1964, the common law applied and this type of condition would fail because there was a risk that the condition might take effect outside the perpetuity period. If a gift was made after 15 July 1964 but before 6 April 2010, the Perpetuities and Accumulations Act 1964 applied and the condition would be valid under the “wait and see” principle for the perpetuity period. A similar principle of “wait and see” can be found in the Perpetuities and Accumulations Act 2009, s 7(3)(4), which applies to gifts in Wills created after 5

condition fails but the gift remains valid and the museum is free to deal with the object.

- 2) It is a “conditional gift” barring *any* type of dealing with the property. In this situation, the court may decide that this type of condition cannot have legal force because, if it is was enforceable, it could not be reconciled with the idea of a gift (as a gift should provide full ownership rights).<sup>88</sup>

#### 4.6.2. *The Sekhemka statue and Northampton B.C.*

The law is complex and the facts may not be straightforward. For example, in 2014, Northampton Borough Council sold the Sekhemka statue by public auction. It was assumed that the statue was part of a collection transferred to the Council by the third Marquis of Northampton in accordance with a document executed in 1880 entitled “Deed of Gift.”<sup>89</sup>

At first glance, it might be thought that Northampton B.C. received the statue by way of a gift and was therefore the owner because:

- the title of the Deed stated “Deed of Gift;”
- the Deed of Gift began by saying that the third Marquis “doth give and grant” the collection.

However, the Deed continued by stating that the collection was given “Upon condition that the following covenant is observed”:

... to exhibit the same collection freely to the public at all proper and reasonable times ... and with proper and appropriate conveniences for inspection and with due precautions guards and securities for the care and safety thereof and so that the said collection ... may be accessible for the purpose of study and at no time to dispose of any part of the Collections and will be liable pecuniarily for the loss of any specimen if such loss arises from non-observance of proper and usual precautions ...

In default whereof ... the said collection shall revert and be restored to the Marquis his heirs or assigns in as good condition as it was received or be disposed of as he or they may direct. And in default of such restoration, the Marquis his heirs or assigns shall be at liberty peaceably to enter the museum ...

And to take away and remove the same ...”

It could therefore be argued by Lord Northampton’s lawyers that this was a loan of the statue and that this loan came to an end once the statue ceased to be exhibited and cared for. If it was a loan which had come to an end, Lord Northampton would have been entitled to the statue.

This would not have been the end of the legal argument. It could have been confidently argued by Northampton B.C.’s lawyers that this was a gift subject to a “condition subsequent.” In other words, they could say that deed suggested that the Marquis intended that the gift would come to an end - at any point in the future - when the statue ceased to be exhibited and cared for. This would mean that this condition had no effect

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April 2010 and gifts in other instruments taking effect after 5 April 2010. For the application of the 2009 Act to conditions precedent and subsequent, see s 1(3) and(4).

<sup>88</sup> *Re Dugdale* [1888] Ch D 176; *Re Rosher* (1884) LR 26 Ch D 801.

<sup>89</sup> A copy of the Deed of Gift can be found on the Museum Association’s website.

<http://www.museumsassociation.org/museums-journal/news/20052013-northampton-faces-legal-challenge-over-egyptian-collections-sekhemka-marquess-northampton>

because, as it was designed to continue forever, it contravened the law against perpetuities.<sup>90</sup> If a dispute had been taken to court and this argument had been accepted, then Northampton B.C. would own the statue outright.

Conflicting claims to the statue would give rise to difficult legal issues. It is not surprising that Northampton B.C. decided to settle any possible legal dispute by agreeing to transfer a substantial share of the proceeds of sale to Lord Northampton.

#### 4.7. Charitable museums: additional considerations

##### 4.7.1. *The application of charity law*

A gift may have been made to:

- a museum which is a charity, or
- a body which is not charitable (such as a local authority) on trust for charitable purposes.

In either of these situations, charity law will apply.

Charity law makes it difficult to sell objects where:

- objects are given to a charitable museum with the proviso that they be kept on display; or,
- where one of the museum's principal purposes is to display collections to the public, as there will be a presumption that the object was given for this purpose.<sup>91</sup>

In either of these circumstances, the museum would need to seek authorisation from the Charity Commission prior to any sale.<sup>92</sup>

It is in this context that it was observed in the *Cottesloe Report* that,

“When a work of art is given to a museum or gallery for general exhibition, the public thereby acquires rights in the object concerned and these rights cannot be set aside. The authorities of the museum or gallery are not the owners of such an object in the ordinary sense of the word: they are merely responsible, under the authority of the Courts, for carrying out the intentions of the donor.”<sup>93</sup>

##### 4.7.2. *The cy-près doctrine*

If the museum wishes to dispose of an object in its collections where there is a condition that it must be displayed in the museum for the benefit of the public forever, it may need to modify its purposes. A museum should contact the Charity Commission for advice in relation to whether a *cy-près* scheme is needed. This would be necessary where the

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<sup>90</sup> As the deed was made in 1880, the common law would have applied and this type of condition would have failed as there was a risk that it would take effect outside the perpetuity period.

<sup>91</sup> *Cottesloe Report*. 1964. *The Report of the Committee of Enquiry into the Sale of Works of Public Bodies*, at [31].

<sup>92</sup> Charities Act 2011, s 105.

<sup>93</sup> *Cottesloe Report*. 1964. *The Report of the Committee of Enquiry into the Sale of Works of Public Bodies*, at [30].

object was so special that it could be seen as central to the museum's purposes so that its disposal would affect the mission of the museum.<sup>94</sup>

The current law can be found in Part 6 of the Charities Act 2011 (and Part 6 of the Charities (Northern Ireland) Act 2008), which allows the Commission to alter the "original purposes" of a gift. Section 62 of the Charities Act 2011 sets out various situations in which the Commission would be prepared to act. Among the grounds on which the charitable purposes may be reorganised are where:

"the original purposes, in whole or in part ...cannot be carried out, or not according to the directions given and to the spirit of the gift"<sup>95</sup>

or,

"the original purposes, in whole or in part, have, since they were laid down ... ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the appropriate considerations."<sup>96</sup>

A condition attached to a gift of a cultural object will be part of the "original purposes" if it is part of the fundamental purpose of the trust. The Commissioners will attempt to find a solution which is "as near as possible" ("*cy-près*") to the benefactor's original intention.<sup>97</sup> For example, a curatorially motivated disposal to another museum or art gallery with similar purposes is likely to be close to the benefactor's original intention.

The Commission will look at the facts carefully when an application is made. The Charity Commission will need to be provided with relevant information regarding disposal. This would include an explanation in relation to the museum's collecting policy, the fact that the object is not being engaged with, and why disposal is in the best interests of the museum and will not have a negative impact upon its reputation. For example, an application to the Commission by trustees who wished to sell a culturally significant historic house and its contents because of financial problems was refused. The Commission considered that the trustees had not explored every option for generating funds, which would enable them to arrange longer opening hours and facilities to draw in the public.<sup>98</sup>

The court also has inherent powers to approve a *cy-près* scheme. For example, a scheme can be approved which involves a change in the governing body (such as a transfer of a museum from charity trustees to a university) if it is in the interests of the museum to do so.<sup>99</sup> However, if a condition is stated in a statute, neither the Charity Commission nor the court can override it. Any change to an existing statute can only be made by passing further legislation.<sup>100</sup>

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<sup>94</sup> This point was made by Dillon L.J. in *Oldham Borough Council v Attorney General* [1993] Ch 210, at 222.

<sup>95</sup> Charities Act 2011, s 62(1)(a)(ii); Charities (Northern Ireland) Act 2008, s 26(a)(ii).

<sup>96</sup> Charities Act 2011, s 62(1)(e)(iii); Charities (Northern Ireland) Act 2008, s 26(e)(iii)..

<sup>97</sup> Charities Act 2011, s 67; Charities (Northern Ireland) Act 2008, s 29.

<sup>98</sup> *Re Sir Edward Heath Charitable Trust* [2012] WTLR 1469.

<sup>99</sup> *Re Whitworth Art Gallery Trusts, Manchester Whitworth Institute v Victoria University of Manchester* [1958] Ch 461, 467.

<sup>100</sup> As occurred in relation to the return of property misappropriated during the Holocaust period: Holocaust (Return of Cultural Objects) Act 2009.

#### 4.7.3. Permanent endowment

Charitable museums may have “permanent endowment.” This phrase refers to property where there is a restriction on how it is used so that, for example, capital cannot be used as income.<sup>101</sup> Charities can exist forever and permanent endowment is property (whether an object or a capital sum of money) which was transferred with the intention that it would be kept forever too. Thus, if a person has given an object to a charitable museum subject to the condition that it is held “forever” or “in perpetuity” then the Charity Commission are likely to consider this gift to be part of the permanent endowment of the museum.<sup>102</sup> This means that the object cannot be sold to provide extra income for the charity.

The Charities Act 2011 relaxes the restrictions on permanent endowment. It enables trustees of a charity to resolve to dispose of property if they are satisfied that this will further the purposes of the charity. However, the trustees must then obtain the agreement of the Charity Commission.<sup>103</sup> An exception is made in relation to small charities which can resolve to transfer permanent endowment and other property to other charities with similar purposes without obtaining the approval of the Commission.<sup>104</sup> This area of law is complex.<sup>105</sup> The Charity Commission advises all charities to obtain legal advice if they wish to dispose of permanent endowment.<sup>106</sup>

#### 4.8. Risk management and disposal within the public sphere

The Code of Ethics encourages museums to give priority to disposal to other museums or public bodies. The legal and financial risks are minimised where an object, which is subject to a condition that it must be kept on public display, is transferred to another museum on the understanding that the receiving museum will deal with any possible claim in the future by, for example, a past benefactor. From an ethical perspective, a transfer made to another museum in an open and transparent manner is satisfactory: the transferring and receiving museums are staying true to the owner’s wishes by keeping the object in the public sphere to be used and enjoyed.

In contrast, the risks are substantial where the object is destroyed, or sold or given away to private individuals. If the benefactor can show that there was a loan, s/he is entitled to financial compensation. There is a significant risk of reputational damage as well.

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<sup>101</sup> Charities Act 2011, s 353(3).

<sup>102</sup> See the Charity Commission Operational Guidance, OG545-1 *Identifying and Spending Permanent Endowment* (December 2012) para. D1.3; available at the Commission’s website.

<sup>103</sup> Charities Act 2011, s 282. In relation to special trusts, see s 289.

<sup>104</sup> Charities Act 2011, s 281. In relation to special trusts, see s 288. Small charities are those with an income of less than £1,000 or where the endowment is worth less than £10,000; these figures are subject to alteration by the Minister: Charities Act 2011, s 285.

<sup>105</sup> The Law Commission has recommended that the law should be made simpler in Chapter 9 of *Technical Issues in Charity Law* (Consultation Paper No 220), available at [http://lawcommission.justice.gov.uk/docs/cp220\\_charities\\_technical.pdf](http://lawcommission.justice.gov.uk/docs/cp220_charities_technical.pdf)

<sup>106</sup> See the Charity Commission’s guidance, *Permanent Endowment: rules for charities*, available at the Commission’s website.

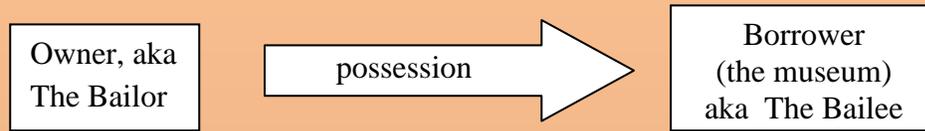
Consequently, a museum which plans to destroy or sell an object which originally had been transferred subject to conditions should seek expert legal advice.

A careful record should be kept in relation to any disposal as part of good collections management. This record may be useful if a museum needs to defend itself where a person claims that s/he is the true owner of the object in question. If, unknown to the museum, it does not own the object but has transferred, sold or destroyed it, it may be liable in converting it. However, the true owner has only six years within which to sue for conversion before his or her title to the object is extinguished.<sup>107</sup>

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<sup>107</sup> Limitation Act 1980, s 2; *The London Borough of Tower Hamlets v The London Borough of Bromley* [2015] EWHC 1954 (Ch). For discussion, see [9.4.3] of this guidance.

## 5. What is the Position Where an Object is Held on Loan?



### ***Best practice?***

- Loan in writing
- Fixed period of time
- Agree responsibilities

### ***Risks?***

- An oral loan of which no-one is aware
- For an indefinite period

### ***Liability?***

- Failure to take care
- Disposal (conversion of property)

### ***Keep records to show***

- The object's condition /value;
- facts to show proper care has been taken of the object;
- where destruction is seen as necessary, an explanation of why this action needs to be taken.

### ***Minimising risks?***

Transfer to or exchange with another museum

## 5.1. What is a loan?

An owner who lends an object remains the owner and retains legal title. The borrowing museum has a right to possess the object with the consent of the owner. Consequently, subject to what has been accepted in any loan agreement, a museum cannot deal freely with an object which is on loan.

It is worth noting the legal terminology which a lawyer may use if you seek legal advice. In law, the owner is called a “*bailor*” and the borrower (the museum) is called a “*bailee*.” The relationship between them is called a “*bailment*.”

## 5.2. Fixed term loans, loans for an indefinite period, permanent loans

- Fixed term loan.  
This is a loan for a stated period of time which will come to an end at the expiration of that period unless the loan is renewed.
- Loan for an indefinite period.  
This type of loan will continue until the lender or borrower chooses to bring the loan to an end. For example, the lender may notify the museum of his/her intention to take the object back. However, the loan would also be brought to an end where the museum treats the object as its own by, for example, selling it; the museum would be committing a wrong (conversion) in this situation and the owner may sue the museum for compensation.<sup>108</sup>
- A “permanent loan.”  
This phrase may be used in a vague manner.<sup>109</sup> If there is anything in writing, the precise wording will need to be analysed. The benefactor may have intended a gift. However, the phrase can refer to a loan subject to conditions.<sup>110</sup> If it is a loan, it will continue until it is brought to an end by non-compliance with a stated condition. A typical condition might be that the loan will end when the museum ceases to exhibit the object on loan.

Museums will usually arrange short term loans nowadays in order to obtain maximum flexibility in relation to engagement and care of their collections. However, in the past, loans for an indefinite period were common.

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<sup>108</sup> See paragraph [5.6] of this guidance for discussion of the law of conversion.

<sup>109</sup> The testator’s words may be so unclear that it is impossible to work out what was intended and the gift may fail, as in *Roderick Charles Fenwick Owen v Evelyn Sybil Monica Fenwick* (1985) WL 1167716, CA.

<sup>110</sup> Although there is no precise legal definition, the phrase was used in the sense of a loan in the following cases: *University of London v Prag* [2014] EWHC 3564; *Re St Lawrence, Wootton* [2014] 3 WLR 984, at [57]; *Re St Michael and All Angels, Withyham* [2011] PTSR 1446; *De Balkany v Christie Manson and Woods Ltd* (11 January 1995, unrep); *JD, Applicant v DD, Respondent* [1997] 3 IR 64; *Re St Bartholomew’s, Aldbrough* [1990] 3 All ER 440.

### 5.3. Written agreements

Whenever a loan is contemplated, a written agreement should be made. It provides clear evidence of a loan. Furthermore, it is an opportunity for each side to reflect upon their expectations. This means that the loan agreement should deal with issues such as the duration of the loan, termination of the loan, collection of the loan objects, the consequences where objects are not collected, their care during the loan period, and responsibility for insuring the objects. The Collections Trust's Object Entry Form is particularly useful because, whilst acting as a receipt, it has provisions to help the museum deal with issues such as disposal of uncollected loans.

### 5.4. Oral (informal) agreements

Loans do not need to be in writing to be enforceable. Oral agreements have been made in the past. For example, members of a "Friends" group supporting the museum might lend some of their own prized cultural items without insisting upon formal documentation. However, there is a danger that, if an oral agreement to lend is made, the recipient may come to assume that a gift had been intended. In this situation, the owner will need to show evidence that a loan was agreed. In the context of a legal action to recover the object, the owner could provide evidence that, for example, s/he paid for any work needed to restore it; alternatively, the owner could seek witnesses to support his or her version of events.

Oral agreements present particular risks to a museum because, over a period of time, the fact that there was a loan rather than a gift can be forgotten. Risk management in this situation is discussed later in this guidance.

### 5.5. Taking care of loan objects

#### 5.5.1. Taking care

In law, the borrowing museum is expected to take reasonable care of any object on loan and to return it at the end of the loan period.<sup>111</sup> This duty of care is subject to modification by a statement ("exemption clause") in the loan agreement which limits the museum's duty of care. Some of the risks associated with a lack of care are that the object may deteriorate whilst in the possession of the museum, or that it may be destroyed by an employee, or that it may be stolen.

The question of whether the museum has taken reasonable care will depend upon the circumstances.<sup>112</sup> For example, the lender cannot complain about expected wear and

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<sup>111</sup> If local authorities are in possession of objects belonging to others, they may owe a duty of care: *Kalitsi v Hammersmith LBC*, 28 February 1980, CA (destruction of tenant's property), *Mitchell v Ealing LBC* [1979] QB 1 (theft).

<sup>112</sup> *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694, CA; *Sutcliffe v Chief Constable of West Yorkshire* (1996) RTR 86, CA.

tear.<sup>113</sup> Guidance provided by *Smarter Loans* sensibly suggests that borrowers and lenders should always work together to reduce risks and set the standard of care.<sup>114</sup> Appendix 1 of *Smarter Loans* sets out sources of guidance for managing risk. Helpful guidance is provided at the UK Registrars' website.<sup>115</sup>

#### 5.5.2. *Consequences of a failure to take care*

If the object on loan is lost, damaged or destroyed, the museum would be obliged to compensate the lender if the museum could not show that it took care of the object.<sup>116</sup> But a borrowing museum can avoid liability if it can show that the loss was caused without its fault.<sup>117</sup> For example, the museum is not responsible for loss or damage caused by a stranger, such as where the object is stolen, provided that it has taken proper security measures.<sup>118</sup> If there was a dispute, the courts may consider the *Accreditation Standard* which directs museums to obtain expert security advice for stored and exhibited collections at least every five years, and earlier if needed.<sup>119</sup>

### 5.6. Loss where the museum is unaware that the object is on loan

#### 5.6.1. *Action in conversion*

It may happen that a loan object is transferred, exchanged, sold or destroyed by employees who are unaware that the object is on loan. In this situation, the lender may bring an action in conversion. This legal action is ancient in origin but has been set out in a modern statute called the Torts (Interference with Goods) Act 1977. The claimant must establish that:

- the defendant has treated the object as if s/he owned it;
- the defendant's conduct was deliberate, not accidental;
- the defendant's conduct meant that the owner was excluded from the use and possession of the object.<sup>120</sup>

Whilst the object was on loan, there would be no conversion because the museum possessed the object with the consent of the owner. All would have appeared to be well. However, if the owner makes it clear that s/he wants the object back and the museum

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<sup>113</sup> *Blakemore v Bristol and Exeter Rly Co* (1858) 8 E & B 1035, 1051, 120 ER 385, 391.

<sup>114</sup> *Smarter Loans*, Museums Association: Effective Collections (2012) Managing Risk, Principles 8 and 9. Available at: <http://www.museumsassociation.org/collections/smarter-loans>

<sup>115</sup> See the Standard Facilities Report prepared by the UK Registrars Group <http://www.ukregistrarsgroup.org/resources/publications/>

<sup>116</sup> See Torts (Interference with Goods) Act 1977, s 2(2), which provides an action where the possessor has wrongfully allowed the objects in his or her care to be lost or destroyed. See *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694; *Port Swettenham Authority v TW Wu and Co (M) Sdn. Bhd* [1979] AC 580, PC; *Travers & Sons Ltd v Cooper* [1915] 1 K.B. 73, CA.

<sup>117</sup> *Houghland v R R Low (Luxury Coaches) Limited* [1962] 1 QB 694, CA, at 698; *Helga Henriette Schwarzschild v Harrods Ltd* [2008] EWHC 521 at [24].

<sup>118</sup> *Coggs v Bernard* (1703) 2 Ld Raym 909 913, 92 ER 107, 110; *Nelson v Macintosh* (1816) 1 Stark 237, 171 ER 458; *Giblin v McMullen* (1867-69) LR 2 PC 317, PC.

<sup>119</sup> *Accreditation Scheme for Museums and Galleries in the United Kingdom: Accreditation Standard* at para 2.8 (October, 2011).

<sup>120</sup> See *Kuwait Airways Corp v Iraqi Airways Co (No 6)* [2002] UKHL 19, [2002] 2 AC 883 at [39].

refuses or is unable to return it, this can be seen in law as a situation where the museum is treating the object as a thing which it owns to the exclusion of the true owner: this would be a conversion of the object. The owner may sue for the return of the object or financial compensation and has six years within which to do so.<sup>121</sup> It is no defence that the museum acted in good faith (such as where employees had not realised that the object was on loan).<sup>122</sup>

#### 5.6.2. *Liability in conversion where the object has been sold*

If a museum sells a loan object to a private purchaser, the consequences can be severe. The owner can sue the borrowing museum,<sup>123</sup> or the purchaser,<sup>124</sup> to obtain compensation. If the object has been resold, the owner's choice is even greater; s/he can sue the museum, or the first purchaser, or any sub-purchaser. The owner may well prefer to sue a sub-purchaser who is in possession of the object in order to obtain the return of the object itself. In this situation, the sub-purchaser would sue his or her seller for the purchase price (plus any foreseeable consequential loss) on the basis that the seller is in breach of contract because s/he did not convey a good legal title to the loan object.<sup>125</sup> The risk of damage to the museum's reputation is high.

### 5.7. Compensation: the importance of keeping records

#### 5.7.1. *Assessing financial compensation*

Lawyers refer to financial compensation as "damages." If an object has been destroyed, the damages awarded are intended to reflect the loss suffered. This could be, for example, the object's current market value. Where the value is rising, the court may decide that the figure which would most fairly compensate the owner is the value at the date of judgment.<sup>126</sup> However, where the object is unique, the courts may have great difficulty in ascertaining its market value; in this situation, the court will carefully examine the facts to work out what would provide just compensation.<sup>127</sup> For example, the value for which an item was insured would be relevant. The burden of proving the value of an object is placed upon the owner.<sup>128</sup> There ought to be sufficient evidence to arrive at a decision but, where there is no evidence of its true worth, the court may presume the highest possible value.<sup>129</sup>

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<sup>121</sup> Limitation Act 1980, ss 2, 3.

<sup>122</sup> *Hollins v Fowler* (1874-5) LR 7 HL 757, HL; *Union Transport Finance Ltd v British Car Auctions Ltd* [1978]; *R H Willis & Son v British Car Auctions Ltd* [1978] 1 WLR 438.

<sup>123</sup> Torts (Interference with Goods) Act 1977, s 3. See *Wilkinson v Verity* (1871) LR 6 CP 206, 211.

<sup>124</sup> *Cooper v Willomatt* (1845) 1 C.B. 672; 135 ER 706.

<sup>125</sup> See Sale of Goods Act 1979, s 12, Consumer Rights Act 2015, s 17.

<sup>126</sup> *Ofir Scheps v Fine Art Logistic Limited* [2007] EWHC 541; *Trafigura Beheer BV v Mediterranean Shipping* [2007] EWCA Civ 794, [2007] 2 Lloyd's Rep. 622, CA. See further, *Kuwait Airways Corp v Iraqi Airways Co* [2002] 2 AC 883, HL.

<sup>127</sup> *Voaden v Champion* [2002] EWCA Civ 89; [2002] 1 Lloyd's Rep 623, CA.

<sup>128</sup> *Da Rocha-Afodu v Mortgage Express Ltd* [2014] EWCA Civ 454, CA Civ at [17].

<sup>129</sup> *Dominium Mosaics & Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 24, CA.

### 5.7.2. *The importance of keeping records*

A museum may need to pay compensation:

- Where it has failed to take care of objects in the collection (see [5.5.] above);
- Where it has treated objects in its collection as if it owned them (see [5.6.] above).

Normally, a museum will return the object at the end of the loan period. However, proper records of objects should be kept so that, if a loan object was disposed of by mistake, the museum has information to assist in dealing with the owner.

Records should include:

- its true condition (including photographs) and, if possible, estimated value;
- facts which help to demonstrate that the museum has taken proper care of the object;
- where an object has been destroyed by employees who were unaware that the object was on loan, details of why destruction was seen as necessary by these employees (such as where it presented a serious health hazard);
- the date of disposal.<sup>130</sup>

## 5.8. **Minimising risks: a transfer to or exchange with another museum**

As stated, a museum is not free to deal with objects on loan: it is expected to take care of the object and return it at the end of the loan period. An owner can sue the borrowing museum in conversion if the loan object has been exchanged or sold.<sup>131</sup> The owner can also sue the recipient.

If museum employees, forgetting that the object was on loan, have transferred it to another museum as part of a curatorially motivated disposal, the legal and reputational repercussions should be relatively minor. The receiving museum should be willing to return the object to the owner once the facts are clear. In the meantime, it has been caring for the object and making it available to be engaged with by the public, which is presumably what the lender wanted. There should be little incentive for anyone to bring a legal action in these circumstances.

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<sup>130</sup> The owner has 6 years from the date of the conversion within which to sue: Limitation Act 1980, s 2; *The London Borough of Tower Hamlets v The London Borough of Bromley* [2015] EWHC 1954 (Ch). For discussion, see [9.4.3] of this guidance.

<sup>131</sup> Torts (Interference with Goods) Act 1977, s 2(2); *Kuwait Airways Corp v Iraqi Airways Co* [2002] 2 AC 883; *Wilkinson v Verity* (1871) LR 6 CP 206, 211.

## 6. Failure to Collect an Object on Loan

The end of the loan

Contact the lender to discuss its return.

Delay?

Take reasonable care of the uncollected object.

Disposal?

Right and reasonable in the circumstances?

Agent of necessity where there is an emergency?

Statutory power of sale, serving the appropriate legal notices?

Minimised risk: transfer to another museum

Greater risk: destruction or sale

Keep Records

- the loan agreement;
- description of the object (including its size);
- the object's cultural and financial value;
- the efforts made to contact the owner;
- any communications with the owner?
- the length of time the object remained uncollected;
- the reason(s) why it was destroyed/sold.



### **6.1. Termination of the loan**

A loan agreement will end where:

- the loan is stated to be for a period of time (such as three years) with an obligation imposed upon the lender to collect the object on loan at the end of the period. The museum will be able to treat the loan contract as having come to an end at the expiration of that period.
- the loan is for an indefinite period of time and either the lender or the borrower has brought the loan agreement to an end, such as where the lender asks for the return of the loan object.

### **6.2. Termination of the loan agreement**

The Disposal Toolkit states,

“If the item in question is on loan, contact the lender to discuss its return.”

In many cases, the ending of the loan agreement will cause no difficulties: the museum will contact the lender who will collect the object on loan.<sup>132</sup>

In order to minimise any risks, museums are best advised to have written loan agreements and to accept loans only for a stated period of time. Loan agreements should anticipate possible problems such as where the lender cannot be found or where the lender fails to collect the object. For example, in the loan agreement, the lender could agree that, if s/he fails to collect the object within four months of the expiration of the loan, the museum’s governing body will have the right to dispose of the object as it thinks fit. In these circumstances, the museum would need to comply with the agreement and wait for four months. During this period, the museum should continue in its efforts to make contact with the lender. It might be advisable to wait for a reasonable period of time after the four month period from an ethical perspective; however, eventually the governing body would have the freedom, both legally and ethically, to deal with the object(s) in question.

### **6.3. Duty of care**

If the lender delays collection of the object after the expiration of the loan period, the museum becomes an “involuntary bailee.” This legal phrase recognises the fact that the museum is in possession of an unwanted object.

Despite the fact that the loan has come to an end and the museum has asked the lender to collect the object, it still has a duty to take care of the loan object. Subject to what is stated in the loan agreement, the museum is expected to take reasonable care, and the standard will vary according to the circumstances. The standard of care will be lower

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<sup>132</sup> The museum is under no duty to enquire whether the lender is the true owner of the item provided it acts in good faith and does not receive any information of another’s claim: *Marcq v Christie Manson & Woods Ltd* [2004] QB 286, CA.

than when the object was on loan but, even so, the museum would be obliged to compensate the owner if the object is damaged or destroyed due to gross negligence on its part.<sup>133</sup> Although, from an ethical perspective, a museum would continue to look after the object carefully until it is collected, this lower standard of care at law may be relevant where the museum has put the object into a locked storage facility which does not have the same elaborate security arrangements as the museum itself.<sup>134</sup>

## 6.4. Uncollected loans

### 6.4.1. *Object abandoned many years before?*

If the identity of the original owner is unknown, and the museum cannot find any more information after extensive enquiries, and the object has been in the possession of the museum for some years and is of little financial value, it may be possible to infer that the object has been deliberately abandoned. If an object has clearly been abandoned, the museum is free to deal with it. But possession for many years is not enough by itself to suggest abandonment. It is rarely the case that someone deliberately abandons an object. For example, it will not have been abandoned if the owner has merely forgotten about it. This area of law is discussed at paragraph [8.1.].

### 6.4.2. *Uncollected loans where the lender cannot be found?*

If the lender does not recover the lent object at the end of the loan period, the museum should take steps to contact him/her by, for example, writing to the lender at the last known address. However, where this does not yield a result, a museum is not entitled to dispose of an object where the only reasons for doing so is that its continued storage has become inconvenient and it is temporarily unable to obtain instructions from the lender.

A museum may therefore wish to consider:

- the ordinary law permitting disposal where it is “right and reasonable” to do so, discussed at [6.5.] below;
- the statutory power of sale discussed at [6.6.] below;
- agency of necessity, discussed at [6.7.] below.

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<sup>133</sup> *Marcus v Official Solicitor* (1997)73 P & CR D46, CA; *JJA SA v Avon Tyres Ltd* (Unreported, 23 February 2000); *Pedrick v Morning Star Motors Ltd* (14 February 1979, CA, unrep); *Taylor v Diamond* [2012] EWHC 2900; *Davis v Henry Birks & Sons Ltd* (1983) 142 DLR (3d) 356. See *Palmer on Bailment* (2009) at page 709.

<sup>134</sup> *Pedrick v Morning Star Motors Ltd* (14 February 1979, CA, unrep).

## 6.5. Doing what is “right and reasonable” in the circumstances

### 6.5.1. *The loan must be brought to an end*

If there is a written loan agreement, the lender and the possessor (the museum) must comply with it. Consequently, if the loan agreement calls for a notice to be served and for a time period to elapse before disposal of an object, the possessor (the museum) is expected to follow what has been agreed.

An informal loan agreement for an indefinite period presents significant problems. Every effort must be made to contact the owner in order to bring the loan agreement to an end so that the owner is under an obligation to collect the object.

### 6.5.2. *Disposal*

Once the loan has come to an end, the lender will be in breach of the loan agreement in failing to collect the object. A museum will eventually be entitled to dispose of it.<sup>135</sup> Even so, a museum is expected to do what is “right and reasonable” in the circumstances before disposing of the object.<sup>136</sup> For example, a possessor (the museum) may be treated as having acted reasonably where it has given the owner (the lender) many warnings before finally disposing of the owner’s goods.<sup>137</sup> It is therefore a matter of making every effort to contact the lender to discuss disposal and to wait for a reasonable period of time to pass.<sup>138</sup>

The court must be convinced that, looking at all the facts, the museum has done what is “right and reasonable” in the particular circumstances.<sup>139</sup> The law provides relatively little guidance on what conduct is reasonable because there are so many types of situation where a person ends up unwillingly in possession of an object (which could be a landlord or storage company, for example) which it has no wish to possess.<sup>140</sup>

### 6.5.3. *Keeping records*

If there is a dispute, a court will consider whether the museum has acted reasonably in the circumstances and will look at:

- what was originally agreed at the time of the loan;
- the efforts made to contact the owner;

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<sup>135</sup> *Jones v Gospel & White* (1988) 76 P & CR D 43, CA.

<sup>136</sup> *Scotland v Solomon* [2002] EWHC 1886; *Elvin & Powell Ltd v Plummer Roddis Ltd* [1933] Solicitors Journal 48.

<sup>137</sup> *Campbell v Redstone Mortgages Ltd* [2014] EWHC 3081; *Da Rocha-Afodu v Mortgage Express Ltd* [2014] EWCA Civ 454, [2014] 2 P & CR D25 (mortgagee disposing of goods after repossessing a property).

<sup>138</sup> *Da Rocha-Afodu v Mortgage Express Ltd* [2014] EWCA Civ 454, at [44-46].

<sup>139</sup> *Campbell v Redstone Mortgages Ltd* [2014] EWHC 3081, CA Civ.; *Da Rocha-Afodu v Mortgage Express Ltd* [2014] EWCA Civ 454, [2014] 2 P & CR D25; *Mputu-Mayele v London Borough of Redbridge Council* (2012) EWCA Civ 213, CA; *Elvin & Powell Ltd v Plummer Roddis Ltd* [1933] Solicitors Journal 48; *Scotland v Solomon* [2002] EWHC 1886. The court will describe the museum as an “involuntary bailee” in these circumstances.

<sup>140</sup> *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694, CA, 698; *Da Rocha-Afodu v Mortgage Express Ltd* [2014] EWCA Civ 454 at [50].

- any arrangements made as a result of that contact for the owner to collect his or her property;
- the length of time which the possessor (the museum) kept the object whilst attempting to contact the owner, or to press the owner to collect his or her loan objects.

All of these factors above will help the court decide whether the museum has done what is “right and reasonable” in the particular circumstances.<sup>141</sup> It is therefore important to take photographs, and record other details before disposal.

It is suggested that it would also be sensible to record evidence of:

- a description of the object (including its size);
- the estimated cultural and financial value of the object;
- the ease with which it could be stored;
- any risks which the object may pose (such as health and safety risks).

For example, a museum might reasonably be expected to keep a manuscript (taking up little storage space and perhaps of great value) for a considerable period of time whilst an effort is made to find the owner.

## **6.6. Statutory power of sale (loans made after 1 January 1978)**

### *6.6.1. Availability of the procedure*

Where a lender has been unwilling to collect his property or where s/he cannot be contacted, a museum could take advantage of a statutory procedure which offers protection to those selling uncollected goods. The procedure is set out in sections 12 and 13 of the Torts (Interference with Goods) Act 1977.<sup>142</sup> Using this procedure, although the museum does not have legal title to the object, a purchaser will obtain legal title.

The procedure is available to a museum where:

- the object on loan was transferred after 1 January 1978;
- the museum still has possession of the object;
- the museum wishes to dispose of the object by sale;
- the original loan agreement does not exclude this procedure.

### *6.6.2. Termination of loan agreement*

In order to use the statutory procedure, the loan agreement must have come to an end so that it can be said that the lender has failed to collect the object as s/he promised to do. This will be the case where the loan agreement is for a specified period of time and there is a clause in the agreement that the lender must arrange for the object to be

<sup>141</sup> *Campbell v Redstone Mortgages Ltd* [2014] EWHC 3081, CA Civ.; *Da Rocha-Afodu v Mortgage Express Ltd* [2014] EWCA Civ 454, [2014] 2 P & CR D25; *Elvin & Powell Ltd v Plummer Roddis Ltd* [1933] Solicitors Journal 48;; *Mputu-Mayele v London Borough of Redbridge Council* (2012) EWCA Civ 213, CA.

<sup>142</sup> Applying in England, Wales and Northern Ireland. For further discussion, see *Palmer on Bailment* (2009) at [13-054].

collected at the end of the period. What if the loan agreement is for an indefinite period? In this situation, the museum will need to bring the loan agreement to an end in accordance with the statutory procedure by giving a written notice (in addition to the one(s) set out below) by delivery or by post, or left at the owner's proper address, stating that the loan agreement is at an end and that the owner is obliged to collect the object.<sup>143</sup>

### 6.6.3. *Complex notice procedure*

The museum must give a written notice by delivery or by post, or left at the owner's proper address, which includes the name and address of the museum, details of the cultural object to be returned and its location, together with a statement that it should be collected.<sup>144</sup>

If the museum does not hear from the owner then, after a reasonable length of time has passed, it can send an additional notice by recorded delivery providing the same information as in the prior notice, but adding that, if the goods remain uncollected, the object in question will be sold after a stated date.<sup>145</sup>

### 6.6.4. *Court authorisation*

Instead of using the notice procedure, a museum could choose instead to apply to the court for an order directing sale.<sup>146</sup> However, this route may not be popular because it may mean that certain information, such as the state of the museum's records in relation to loans, is made publicly available.

### 6.6.5. *Summary*

These provisions in the 1977 Act seem to be aimed at landlords and commercial lenders. They are confined to sales and the seller is required to carry out the "best method of sale reasonably available in the circumstances." The seller must hold the proceeds of sale, less any costs associated with the sale, for the benefit of the lender.<sup>147</sup> These requirements are fair in the sense that the lender will not be able to recover his property from the purchaser but can at least obtain the sale proceeds. However, museums will not ordinarily find this procedure helpful: it does not apply to free transfer to another museum which is the ethical norm. Furthermore, the uncollected object may not be easily sellable. The serving of formal notices is a complicating factor. If a museum wishes to take advantage of this procedure, it is best to consult a lawyer.

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<sup>143</sup> Torts (Interference with Goods) Act 1977, s 12(2), Sch I, Part I. It is suggested in *Palmer on Bailment* (2009) [13-055] that, as Sch 1 of the 1977 Act uses the phrase "given to the bailor," the notice must actually be received and that "mere proof of posting would be insufficient."

<sup>144</sup> Torts (Interference with Goods) Act 1977, Sch 1, Part I. It is suggested that the museum can be seen as a custodian, falling within Sch I, para 4(1) of the 1977 Act.

<sup>145</sup> Torts (Interference with Goods) Act 1977, s12(3), Sch I, Part II.

<sup>146</sup> Torts (Interference with Goods) Act 1977, s13.

<sup>147</sup> Torts (Interference with Goods) Act 1977, s12(5).

## 6.7. Defence of agency of necessity

Where a museum has disposed of an object and the true owner is seeking compensation, can the museum argue that it had acted as an “agent of necessity”?

The doctrine of “agency of necessity” can be used as a defence where:

- there is an emergency;
- it is reasonable to dispose of the property, taking account of the interests of the owner and of the possessor;<sup>148</sup>
- the possessor (the museum in this situation) acted in good faith;<sup>149</sup>
- the possessor (museum) cannot find the owner, or cannot obtain instructions (such as where the owner refuses to communicate).<sup>150</sup>

One obstacle is that the museum would need to show that there was an emergency in the sense of a real necessity to dispose of the object. In *Sachs v Miklos*,<sup>151</sup> the claimant failed to collect his furniture and the defendant, after making efforts to contact the claimant, sold the furniture. It was decided that the defendant was not an agent of necessity because there was no emergency. A museum would find it very difficult to point to an emergency unless, for example, an uncollected item was posing a serious safety hazard which was not covered by insurance.

The scope of this defence is uncertain. Typical cases involve a master of a ship needing to dispose of a cargo or someone taking care of animals in an emergency.<sup>152</sup> It is easier for a museum to rely upon the law in [6.5.] above which is more straightforward in requiring the museum to do what is “right and reasonable” once the stated loan period has come to an end.

## 6.8. Enhanced risk: destruction or sale

Where an object, which had been on loan, is either sold or destroyed, the risks are high:

- if the object has been destroyed, the owner may sue for compensation.<sup>153</sup> If compensation is payable, it will reflect the object’s current market value (see [5.7.] of this guidance).

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<sup>148</sup> *Springer v Great Western Rly Co* [1921] 1 KB 257, CA; *Sims & Co v Midland Rly Co* [1913] 1 KB 103;

<sup>149</sup> *Prager v Blatspiel, Stamp and Heacock Ltd* [1924] 1 KB 566.

<sup>150</sup> This could include a situation where the owner refuses to respond and where time is running out: *Laurence George Ridyard v Kenneth Roberts and David Roberts* (16 May 1980, unrep) WL 612950, CA. But this defence cannot be used where the possessor does not bother to contact the owner even though it was possible to do so: *Springer v Great Western Rly Co* [1921] 1 KB 257, CA.

<sup>151</sup> [1948] 2 KB 23, CA.

<sup>152</sup> *Laurence George Ridyard v Kenneth Roberts and David Roberts* (16 May 1980, unrep), CA. *Sachs v Miklos* [1948] 2 KB 23, CA, at 35.

<sup>153</sup> *AVX Ltd v EGM Solders* (*The Times*, July 7 1982).

- if the object has been sold, the owner may sue either the museum or the purchaser in conversion. The owner may prefer to sue the purchaser in order to obtain the return of the object; if so, the purchaser will sue the museum to recover the price on the basis that s/he has not received the legal title to the object.<sup>154</sup>
- there is a risk of damage to the museum's reputation. A museum should exercise the utmost caution in dealing with objects which have a high cultural value. This is particularly so where the object originates from a country overseas.

### **6.9. Minimising risks: transfer to another museum**

Provision 2.1. of the Additional Guidance to the Code of Ethics 2015 states that, in developing sustainable collections, it may be beneficial to transfer objects to other museums provided that they are retained within the public sphere. Where an uncollected loan is transferred to another museum (revealing the provenance in doing so), the risks are minimised. If the transferring museum has made every effort to contact the owner beforehand, it may be able to rely upon the defence that it has done what is "right and reasonable" in the circumstances. Even if the transfer is viewed as a conversion of the object, if the receiving museum is willing to return the object to the owner, there should be no financial loss and one might hope that the owner would have no reason to complain.

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<sup>154</sup> See Sale of Goods Act 1979, s 12, Consumer Rights Act 2015, s 17.

## 7. An unexpected demand for the return of the object?

### **Objects held on loan**

Can the claimant prove that s/he is the owner?

#### **Where it is unclear that the object is held on loan**

Consider and investigate a claim

Check internal records and collecting policies

The claimant must provide evidence to show:

- an identified person lent the object to the museum;
- the claimant now has the legal title.

### **7.1. Where it is known that the object is held on loan**

A museum may receive a demand for the return of an object on loan which is in its collections from someone claiming that:

- the owner of the loan object has died, and
- the claimant has inherited the object in question.

The museum should not hand over the object to the person demanding it without further enquiry. If the museum transfers the object to someone who is not entitled to it, this will be a conversion of the object.<sup>155</sup> As a result, the person who has inherited the object (perhaps another member of the same family) could sue the museum (or the recipient). The fact that the museum has acted in good faith is no defence. Apart from any financial consequences, there will be a risk of serious damage to the museum's reputation.

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<sup>155</sup> Conversion is discussed at paragraph [5.6.] of this guidance.

Yet, if a museum receives a request of this sort, the museum should not respond with a flat refusal to consider the matter. Up until this point, the museum is looking after the object on loan in accordance with what has been agreed. All has been well. However, a flat refusal by the museum could be interpreted as an assertion of ownership, exposing the museum to a claim in conversion.<sup>156</sup>

It is suggested that the person making the demand should consult a solicitor who could put forward evidence to confirm the death of the owner (lender) and evidence to demonstrate that the person claiming ownership has inherited it (such as a copy of a Will).

## **7.2. Where the claimant has not offered proof that the object was on loan**

### *7.2.1. Consider and investigate a claim*

A museum may receive a demand for the return of an object which is in its collections from someone claiming (“the claimant”) that:

- the owner only lent the object; and
- the owner has died, and
- the claimant has inherited the object in question.

A museum is best advised to respond by saying that a reasonable period of time is needed to investigate ownership further.<sup>157</sup> A museum is entitled to make enquiries in order to protect itself in this way:<sup>158</sup> it reduces the risk of other people unexpectedly asserting ownership. This approach accords with ethical guidance as well: museums act as stewards of their collections. Further research may reveal the true position.

The museum should investigate whether the object was transferred on loan. Checks should be made of accession records and other documents, such as old minute books. Even if there is evidence that the object was originally transferred on loan, the museum should bear in mind the possibility that a gift might have been made at a later date. Consequently, there should be a search made of records not only at the time when the object was transferred to the museum, but also more recent records as well.

Where there is no loan agreement, the museum’s acquisitions policy is relevant. For example, the claimant might say that the object had been lent 20 years ago: if it can be shown that the museum’s acquisitions policy for the last 30 years was only to accept gifts, and never to accept loans, the acquisitions policy would be good evidence that the object was transferred as a gift.<sup>159</sup>

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<sup>156</sup> *Kuwait Airways Corp v Iraqi Airways Co* [2002] 2 AC 883 at [42]. See further, *Howard E Perry Ltd v British Railways Board* [1980] 1 WLR 1375, CA; *Marcq v Christie Manson & Woods Ltd* [2004] QB 286, CA; *Tavoulareas v Lau* [2007] EWCA Civ 474.

<sup>157</sup> *Clayton v Le Roy* [1911] 2 KB 1031, CA.

<sup>158</sup> *Spencer v S Franses Ltd* [2011] EWHC 1269.

<sup>159</sup> *Troughear v Council of the City of York* (the York Castle Museum case) (9 January 1995, unrep), Case No YO402314, York County Court; discussed in *Palmer on Bailment* (2009) at [3-023].

### *7.2.2. The claimant must provide evidence that s/he is entitled to the object*

The museum will have possession of the item. In law, unless someone can prove that he/she has the legal title, the museum may also have the legal title (as a possessory title gives rise to a presumption of a legal title).

The claimant should produce evidence to show that:

- an identified person lent the object to the museum (which could be the claimant);
- the claimant has the legal title.

What sort of evidence would the claimant need?

- The claimant must provide evidence relating to the original transfer. For example, a copy of a letter or document which makes it clear that there was a loan. If the case came to court, the court would consider other evidence such as witness statements.
- The claimant must demonstrate that, if a loan existed, s/he is the legal owner. For example, if the claimant states that s/he inherited the object, his or her solicitor could provide a copy of the Will of the person who transferred it, together with a covering letter confirming that this person has died and left his or her property to the claimant.

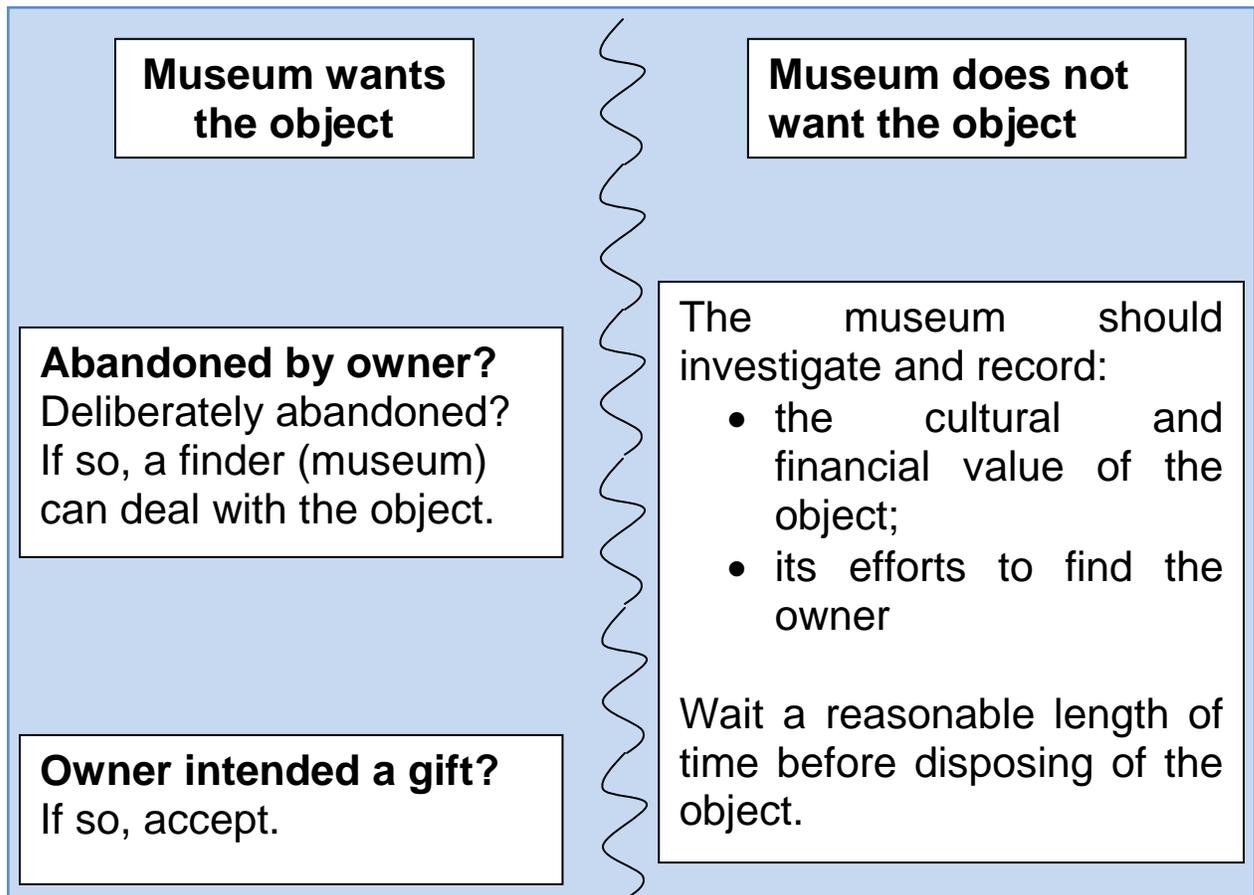
In the event that the claimant can produce relevant evidence of a loan, the museum needs to study the evidence and to take legal advice itself.

### *7.2.3. Where the evidence supplied by the claimant is not conclusive*

The museum will face legal and reputational risks if it transfers the object to a claimant who is unable to prove that s/he is entitled to it, because there is a risk that the true owner may subsequently step forward and claim it.

If the museum is charitable, the museum might be in breach of charity law if it hands over an item to a private individual without clear evidence that this item was only supplied on loan and that the museum is legally obliged to return the item. Even if the museum is not a charity, the governing body might be seen as *not* acting in the museum's best interests if they transfer the object without proof that it had been accepted on loan.

## 8. Anonymously deposited items left in the museum or sent through the post



### 8.1. Did the owner intend to abandon the object? A rare situation

If someone abandons an object, a finder can treat the object as his/her own.<sup>160</sup> Thus, if someone abandons an object in a museum, the museum can keep it, transfer it or, if appropriate, destroy it.<sup>161</sup>

<sup>160</sup> *Palmer on Bailment* (2009) at [26-030].

<sup>161</sup> *Robot Arenas Ltd v Waterfield* [2010] EWHC 115.

However, it is only in rare cases that the law accepts that the object has been abandoned. In law, the owner has not abandoned an object where s/he has forgotten where s/he put it.<sup>162</sup> The museum would need to show, on the balance of probabilities, that the previous owner intended to give up all legal rights in the object and did not care who took possession and control of it. The museum would need to find evidence not only of an intention by the original owner to give up his or her rights to the object but also some physical act by the owner to show that s/he was disposing of it.<sup>163</sup>

Thus, if a glove is left behind in a museum, it cannot be seen as having been abandoned because the owner might still be continuing to look for it. In contrast, a thing would be abandoned if the owner stated “I do not care what happens to it. I do not want it.”<sup>164</sup> Where an object has been anonymously deposited in a museum, although it might be possible to argue that the object has been abandoned, it is surely far more likely that the owner intended to make a gift of it.

## **8.2. Did the owner intend a gift?**

### *8.2.1. Gifts can be made informally*

An owner can make a gift of an object during his or her lifetime in various ways:

- s/he can execute a deed of gift;
- declare himself or herself a trustee;
- deliver the object and demonstrate an intention to make a gift of it.<sup>165</sup>

Gifts can be made informally.<sup>166</sup> For a gift during the owner’s lifetime, it is sufficient if:

- the owner intends to make a gift,
- the museum accepts the gift, and
- there is delivery.

### *8.2.2. The owner must intend to make a gift*

Where one person unexpectedly delivers an object or objects to another person, without any prior warning, the courts will look objectively at the words or conduct to determine what the owner intended.<sup>167</sup>

The courts do not require evidence in writing (such as a note attached to the object or in a separate letter) and it is not even necessary for the person to have said that the object was a gift: the courts accept that conduct may indicate that a gift was intended. Thus, where an object has been left in the museum by an unknown person, or sent to the museum in the post without the sender’s address, it will normally be easy to infer from the facts that the original owner intended to give the object to the museum and had done

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<sup>162</sup> *Moffatt v Kazana* [1969] 2 QB 152. *Palmer on Bailment* (2009) [26-021].

<sup>163</sup> *Robot Arenas Ltd v Waterfield* [2010] EWHC 115, at [13]-[14].

<sup>164</sup> *Arrow Shipping Co Ltd v Tyne Improvement Commrs (The Crystal)* [1894] AC 508, HL, 532.

<sup>165</sup> *Thomas v Times Books* [1966] 1 WLR 911.

<sup>166</sup> *Day v Harris* [2013] EWCA Civ 191, [2014] Ch 211, CA.

<sup>167</sup> *Day v Harris* [2014] Ch 211, CA.

his best to deliver it.<sup>168</sup> For example, suppose that a 19<sup>th</sup> century gardening tool was left on the reception desk of a museum which was devoted to the history of gardening. It could be inferred (if nothing more was heard from the anonymous benefactor) that the tool was intended as a gift.

### 8.2.3. *The museum can choose whether to accept*

If a gift is intended, the museum has a choice: the governing body can decide whether they will keep the object or not. A museum is not forced to accept ownership. Until the museum decides to accept this gift, the object continues to belong to the benefactor.<sup>169</sup>

It should be noted that the process of accessioning an object has no significance in relation to the law relating to gifts. Consequently, a governing body might decide to accept an object as a gift without making any decision in relation to accessioning it.

### 8.2.4. *There must have been delivery of the object at some point in time*

The object must be delivered to the museum before a gift can be viewed as having been made.<sup>170</sup> However, if the museum is already in possession of the gifted object, this is sufficient: the owner does not need to recover the object and transfer it over to the museum again.<sup>171</sup> In other words, once the museum decides to accept the object, it will own it.

## 8.3. Carrying out due diligence checks

Museum staff should carry out an investigation in relation to any deposited object and prepare a report for the governing body to consider. Museum staff can take possession of the object (without coming to a decision whether they will accept it as a gift or not) whilst they examine the object and see if it is possible to find the owner. This gives the owner time to contact the museum if he or she has left the object by mistake (however unlikely that may be).

## 8.4. What if the museum eventually decides to accept the gift?

Until the governing body of the museum decides to accept the object, the benefactor is the owner and has the legal title. The museum is simply in possession: it has a possessory title. Once the governing body decides to accept the object as a gift then, as the benefactor intended to give the object to the museum and has delivered it, the museum obtains the legal title. The museum is subsequently free to deal with it as it wishes (but subject to the general law, such as charity law).

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<sup>168</sup> *R (Ricketts) v Basildon Magistrates' Court* [2011] 1 Cr App R 15.

<sup>169</sup> *R (Ricketts) v Basildon Magistrates' Court* [2011] 1 Cr App R 15; *Day v Harris* [2014] Ch 211, CA at [71]; *Dewar v Dewar* [1975] 1 WLR 1532.

<sup>170</sup> Delivery is essential: *Cochrane v Moore* (1890) 25 QBD 57, CA; *Re Cole* [1964] Ch 175, CA.

<sup>171</sup> *Winter v Winter* (1861) 4 LTNS 639.

The facts surrounding the acquisition of the object should be recorded so that it is clear that the museum has inferred from the facts that a gift has been made and that it has accepted the gift.

### **8.5. Rejection and disposal: the importance of due diligence steps**

There are a number of reasons why a museum might not wish to accept and accession an object, such as where it does not comply with the museum's acquisitions policy. Yet there are legal risks in disposing of an object in these circumstances, particularly if it is by destruction. For example, the supposed "benefactor" could come forward, claiming that the object had been deposited by mistake, and could demand its return or financial compensation.

What if a person makes a claim that s/he owns the object and that the museum merely had possession (because, for example, a loan was intended or because it was deposited by mistake)? Great care needs to be taken by the museum in these circumstances. If it is clear that the person does own the object and has, for example, mistakenly left it at the museum, then s/he is entitled to its return. If the museum cannot return the object because it has disposed of it, the owner can sue to obtain compensation. It was noted earlier in this guidance that, even where the museum can demonstrate that its employees acted in good faith, this is not a general defence to an owner's legal action for conversion of the object.<sup>172</sup> However, in *Robot Arenas Ltd v Waterfield*, it was decided that where an item has been deposited on another's land or buildings, the possessor (a museum in our situation) would have a defence if it disposed of the object where it did not know who owned the object and could not reasonably find out its true ownership.<sup>173</sup> But, in order to rely upon this defence, a museum must make reasonable enquiries to find the owner before assuming the object was abandoned or was an intended gift and disposing of it.<sup>174</sup>

It is suggested that the museum should take a series of due diligence steps and should record what has been done:

- the nature of the object will need to be investigated in order to ascertain how valuable it is, both in financial terms and in cultural terms.
- every effort should be made to find the owner. This may include, if it is appropriate, putting an advertisement in the local paper or placing a note on the museum's web site.
- Even if an object has a low financial value, it will still be important to make every effort where it is likely that the object will have had a personal sentimental value to its owner (such as medals or family portraits).
- If it is appropriate (such as where the object seems valuable and/or where there are suspicions about it), check an electronic database (see Glossary).

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<sup>172</sup> See paragraph [5.6.] of this guidance. It is also irrelevant that the claimant has been at fault in, for example, depositing the object at the museum, as contributory negligence is no defence: Torts (Interference with Goods) Act 1977, s 11(1)

<sup>173</sup> *Robot Arenas Ltd v Waterfield* [2010] EWHC 115, at [19]. See further, *AVX Ltd v EGM Solders* (*The Times*, July 7 1982); *Palmer on Bailment* (2009) [6-004-6-022].

<sup>174</sup> *Robot Arenas Ltd v Waterfield* [2010] EWHC 115, at [19], [90-91].

- wait a reasonable length of time before disposing of the object.

It is not possible to be precise in relation to what a court would consider to be reasonable conduct by a museum because so much must depend on the circumstances of each particular case.<sup>175</sup> It is also not possible to be precise about how long a museum must wait before disposing of the object. However, it has been suggested that the “more valuable (whether in monetary terms or as a personal item) the property might possibly be, the more ...might reasonably be required ...”<sup>176</sup> Thus, if an object is small and easy to store, such as a small box containing jewellery or medals, the museum would be expected to keep it for quite a long time, whilst continuing to try and make contact with the owner. In contrast, if the object presents a health or other risk (such as where it is infested with pests), it would be reasonable to dispose of it far more quickly.

There would normally be no need to contact the police unless, after consulting other museums, there was a suspicion that the object had been stolen or smuggled into the country. However, if a gun was deposited by an unknown person at a museum, it should be transferred to the police unless the museum has a licence to possess firearms in accordance with the Firearms Act 1968.

#### **8.6. Rejection and disposal where the donor is known**

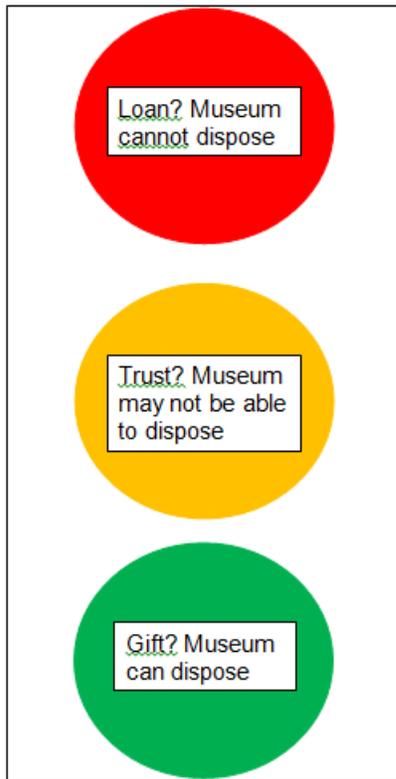
Where an object is offered to a museum and the donor is known, the risks outlined above can be avoided by having a written agreement which the donor signs. The museum is best advised to use the Collections Trust’s Object Entry Form, or a document with similar provisions, which authorises the governing body to dispose of an unwanted donation as it thinks fit, and with the donor’s consent, if it is not collected within a stated period of time.

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<sup>175</sup> *Robot Arenas Ltd v Waterfield* [2010] EWHC 115, at [21-22].

<sup>176</sup> Edelman QC (sitting as a Deputy Judge) in *Robot Arenas Ltd v Waterfield* [2010] EWHC 115, at [22].

## 9. Where there is no record in relation to how an object or collection came to be acquired



**Due diligence**  
Check the museum's records *over the years* regarding:

- Accession records
- minutes of governing body's meetings
- past collecting policies
- words of description
- care of the object and cost
- any statements in the past by the claimant regarding the object
- recollection of witnesses

**Caution:**

- If the object has a high financial value (or where, if proper research was carried out, this would be discovered to be the case);
- If it is proposed to either destroy or sell the object.

### 9.1. Gifts

If a museum is in possession of an object, it will have a possessory title. It will be presumed that the museum owns the object in question and therefore also has the legal title, unless someone can step forward and prove that the museum has the object on loan or holds it on trust.

A museum will have legal title where a gift has been made either during a benefactor's lifetime or by Will. As regards gifts made during the benefactor's lifetime, a gift of an object can be made without any formality. Even so, a museum is best advised to obtain evidence in writing.

A gift is effective where the owner:

- intends to make a gift,
- the museum accepts the gift, and
- the object is delivered.<sup>177</sup>

Delivery can be made in advance of a gift being made. A gift can therefore be made where the museum already has possession of the object on loan and the owner makes it clear that he wishes to give it to the museum.<sup>178</sup> However, the discussion must be such that the museum understands that it now holds the object in a different capacity, as owner rather than a mere borrower.<sup>179</sup>

Once a gift has been made to the museum, the benefactor cannot change his or her mind and demand its return.<sup>180</sup> The museum is the owner and is free to deal with the gift.

## 9.2. Due diligence steps

Unlike land, the UK has no register of title to cultural objects. However, if the museum has had possession of the object (regardless of whether it has been accessioned) for many years, it is presumed that it has legal title. But possession for many years does not guarantee that the museum is the owner: there is always a risk that a loan or trust exists.

A museum should take care to ascertain whether the objects belong to the museum.<sup>181</sup> The due diligence steps which are recommended below are intended to help the museum establish that it has taken care and to minimise the risks of a claim to the property being made.

Check whether:

- the object in question is an uncollected loan: if so, the museum should check whether the loan has come to an end. Where the loan has ended, the museum can do what is “right and reasonable” in the circumstances, following the due diligence steps discussed in [6.5.] above.
- the object was deposited anonymously: museums should take account of the guidance in [8.5.] above.

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<sup>177</sup> *Douglas v Douglas* (1869) 22 LT 127; *Cochrane v Moore* (1870) 25 QBD 57, CA; *Re Stoneham* [1919] 1 Ch 149; *Glaister-Carlisle v Glaister-Carlisle* (1963) 112 SJ 215; *Thomas v Times Books* [1966] 2 All ER 241; *Horsley v Phillips Fine Art Auctions Pty Ltd* (1996) 7 BPR 14,360; *Nolan v Nolan* (2003) 10 VR 626.

<sup>178</sup> *Re Stoneham* [1919] 1 Ch 149; *Thomas v Times Books* [1966] 1 WLR 911.

<sup>179</sup> *Re Cole* [1964] Ch 175, CA.

<sup>180</sup> *Re Holy Trinity, Bath* (1994 29 July, unrep) Consistory Court (Bath & Wells)

<sup>181</sup> *AVX Ltd v EGM Solders* (*The Times*, July 7 1982); *Robot Arenas Ltd v Waterfield* [2010] EWHC 115.

There are further checks which can be made. Check all of the museum's internal records to see, for example, whether there is:

- a signed Acquisition or Transfer of Title Form, or a completed Object Entry Form: this should be sufficient proof that legal title had been transferred.
- any evidence in the Accession Register. Although an entry is not proof that a gift was made, it does support this interpretation. If the entry adds any further information, such as "gift" (or "donation") this would be better evidence.
- a copy of a relevant deed of gift or Will or evidence that either document exists.
- a note made in the minutes of the meetings held by the museum's governing body (where a local authority is involved, it would include its internal records).<sup>182</sup>
- evidence relating to the museum's collecting policies over the years. For example, if there has been a policy in place for many years that objects will not be accepted on loan, this will indicate that the object was likely to have been accepted as a gift (although this will depend upon when the object was transferred).<sup>183</sup>
- a record revealing the manner in which the object has been cared for over the years. For example, if the museum has spent a substantial amount from its own funds in restoring the item or repairing it, and the claimant was aware of this fact and made no objections, this could suggest that a gift had been made.<sup>184</sup>
- a record revealing how the object has been displayed in the museum over the year. For example, if there has been a notice stating "donated by X," then X's failure to object to the notice (assuming X was aware of it) would provide evidence that a gift was intended.<sup>185</sup>
- information regarding whether the object has been sent to an exhibition in the past and, if so, any details set out in the exhibition catalogue. It should be noted that the catalogue is not proof of ownership, not least because the catalogue compiler is not in a position to know beyond doubt the identity of the owner. But, if a person comes forward now to claim ownership, s/he may need to explain why s/he did not challenge the catalogue entry at the time.

Apart from internal records, checks could be made regarding whether:

- there were any statements by the claimant in the past regarding ownership. These statements might be found, for example, in newspapers or other media

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<sup>182</sup> *Re St Mary of Charity, Faversham* [1986] Fam 143.

<sup>183</sup> *Troughear v Council of the City of York* (the York Castle Museum case) (9 January 1995, unrep), Case No YO402314, York County Court; *Palmer on Bailment* (2009) at [3-023].

<sup>184</sup> *Re Escot Church* [1979] 3 WLR 339.

<sup>185</sup> *Mac'Avoy v The Smithsonian Institute* 757 F Supp 60 (DDC 1991); *Palmer on Bailment* (2009) at [3-026].

reports.<sup>186</sup> In particular, the court will take account of any evidence that the claimant had opportunities in the past to correct false impressions relating to ownership but failed to do so.

- there is any evidence from reliable third parties that the claimant had told them that the object did not belong to her/him or which helps to identify whether there was a gift or loan.
- evidence from anyone – regardless of whether employed by the museum or not – who can recollect the circumstances surrounding the transfer.

### 9.3. Risk assessment

If, unknown to the museum, the object is held on loan or subject to a trust, it is exposed to a legal claim if it is disposed of the object. The risks of dealing with objects which have no record in relation to their acquisition are high when one or both of two factors are present:

- If the object has a high financial value (or where it is suspected that, if proper research was carried out, this would be discovered to be the case);
- If it is proposed to either destroy or sell the object.

### 9.4. Lapse of time?

#### 9.4.1. *Introduction to the Limitation Act 1980*

The Limitation Act 1980 prevents people from making claims in relation to conduct which occurred many years ago. This means that, once someone has a right to complain and is aware of this, they may be barred from suing if they delay for too long. Put simply:

- if someone negligently damaged museum property, the museum would normally have six years within which to sue for the damage caused;<sup>187</sup>
- if a promise made in a contract is broken (such as a promise to repair an object), the other party normally has six years within which to make a claim;<sup>188</sup>
- if a museum is given money or an object by mistake by executors in distributing property under a Will, those who are entitled to the property normally have 12 years within which to make a claim.<sup>189</sup>

#### 9.4.2. *The Limitation Act 1980 and indefinite loans*

If an owner has lent an object to a museum on an indefinite loan, the owner will be able to claim the object once the loan agreement has come to an end. Until that time, the

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<sup>186</sup> *Canadian Pacific Ltd v Lamont and Callbeck and Callbeck* (1983) 19 ACWS (2d) 428; Alberta CA, 12 April 1983.

<sup>187</sup> Limitation Act 1980, s 2.

<sup>188</sup> Limitation Act 1980, s 5.

<sup>189</sup> Limitation Act 1980, S 22.

museum has possession of the object with the owner's consent. This consensual relationship will continue until, for example, the owner demands the return of the object or the museum takes some action to bring the arrangement to an end. Consequently, even if the museum has had a loan object in its possession for many years, it does not own it.

#### 9.4.3. *The Limitation Act 1980: recording transfers, loans and repairs of loan objects*

What is the position where a museum gives an object to another museum, or lends it or repairs it? These are the typical actions of an owner. Where it is assumed that the museum owns the object but in fact it was transferred on loan, any of these actions could be seen as a conversion of the object.<sup>190</sup> The case involving the London Borough of Tower Hamlets (set out below) shows that the owner has six years within which to sue;<sup>191</sup> if the owner fails to do so then, after the expiration of a six year period from the date of the conversion, the museum would own the object.

In *The London Borough of Tower Hamlets v The London Borough of Bromley*,<sup>192</sup> two local authorities were involved in a dispute over the ownership of a valuable sculpture by Henry Moore. The sculpture was known as "Draped Seated Woman," which Moore sold to the London County Council in 1962. The sculpture was placed on a housing estate in what is now the London Borough of Tower Hamlets. As a consequence, Tower Hamlets assumed that it owned the sculpture and loaned it on two separate occasions to the Yorkshire Sculpture Park. It also arranged for the sculpture to be restored after it was damaged by graffiti. Bromley never raised any objections even though it was the true owner (as legal title to the sculpture had passed to Bromley after the London County Council and its successors had been dissolved). By the time Bromley decided to sue, it was too late. Tower Hamlets' original loan of the sculpture to the Yorkshire Sculpture Park was a conversion. By section 2 of the Limitation Act 1980, Bromley had only six years within which to sue from the time of this conversion.<sup>193</sup> As Bromley had failed to take any action at the right time, Tower Hamlets owned the sculpture. The decision illustrates the importance of keeping records of loans and works carried out on objects in collections: these records could prove to be invaluable if there is a dispute over ownership.

However, it should be noted that the London Borough of Tower Hamlets thought that it owned the statue when it committed these acts of conversion. In contrast, if a museum transferred or sold an object which was known to be on loan, this could be interpreted as theft and a thief never acquires good title to a stolen object.<sup>194</sup>

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<sup>190</sup> Conversion is discussed at paragraph [5.6.] of this guidance

<sup>191</sup> Limitation Act 1980, s 2. *Helga Henriette Schwarzschild v Harrods Ltd* [2008] EWHC 521.

<sup>192</sup> [2015] EWHC 1954 (Ch).

<sup>193</sup> By the Limitation Act 1980, s 3(2), an owner's legal title is extinguished after the six years have elapsed from the date of the conversion.

<sup>194</sup> Limitation Act 1980, s 4. A person who can show that s/he bought the object in good faith may acquire a good title after six years have elapsed since the date of purchase: s 4(2).

### 1.1.1. Trusts

The governing body of a museum may hold an object on trust for charitable purposes. If the governing body arranges to transfer it, sell it or destroy it, this may be a breach of trust. Anyone wishing to complain (which will be the Attorney General in relation to charitable trusts) has six years within which to do so.<sup>195</sup> However, the six year period only applies where the governing body has been open and transparent about any transfer, sale or destruction; if they are secretive, the six year period only begins when the beneficiaries discover the truth or could reasonably have been expected to do so.<sup>196</sup>

## Glossary

**Bailor:** the person with legal title (usually the lender).

**Bailee:** the person with a possessory title (usually the borrower).

**Bailment:** where one person has the legal title, but another person has possession.

**Benefactor.** This phrase has been used to indicate someone who is benefiting the museum by providing a gift or lending an object.

**Conversion.** This is a legal action which protect property rights in objects; it can be used to obtain financial compensation or the return of the object.

**Electronic databases of lost and stolen cultural property.**

There are various databases linked to the police. The Art and Antiques Unit of the Metropolitan Police operate the London Stolen Arts Database. Interpol has a stolen art database and an application can be made online.

An online search can also be made at [Lootedart.com](http://Lootedart.com)

Commercial concerns include the Art Loss Register and Art Recovery.

**Financially motivated disposal.** The Glossary of the Disposal Toolkit (2014) states that a financially motivated disposal is a “sale of collections where a primary reason for disposal is to raise funds.”

**Gift.** There needs to be evidence of an intention to make a gift, acceptance and delivery. The benefactor gives up all legal rights to the object and can no longer ask for its return.

**Lender.** In order to provide a straightforward explanation of the law, this guidance has assumed that the lender is the owner of the object.

**Loan.** The museum only has a right to possession in accordance with what was agreed; it does not own the object.

**Museum.** This phrase includes galleries and subsidiary companies of museums.

**Owner.** The phrase “owner” in this guidance means anyone with a better right to possess the object in question than anyone else.

**Trust.** The trustees are the legal owners but they are not free to deal with any property; they hold the property for the benefit of others (in the case of a museum, the beneficiaries are likely to be a local community, or the public as a whole, who may be described as the beneficiaries of the trust).

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<sup>195</sup> Limitation Act 1980, s 21(3).

<sup>196</sup> Limitation Act 1980, s 32. Moreover, the six year period does not apply if the trustee received the property or was fraudulent: Limitation Act 1980, s 21(1).

## **Guidance on disposals**

- Disposal Toolkit. Available at <http://www.museumsassociation.org/collections/disposal-toolkit>
- “Additional Guidance on Financially Motivated Disposal,” Appendix 4 of the Disposal Toolkit. Available at <http://www.museumsassociation.org/collections/disposal-toolkit>

## **Guidance by Regulators of Charities**

- Charity Commission for England and Wales: <https://www.gov.uk/government/organisations/charity-commission>
- Northern Ireland Charity Regulator: <https://www.charitycommissionni.org.uk/>
- Scottish Charity Regulator: OSKR: <http://www.oscr.org.uk/>

### Special guidance for museums:

- Museums and Art Galleries Report, R10 (Version 08/02) (2002): [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/358894/rr10text.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358894/rr10text.pdf)

### Creating a charity:

- Registering your charity: <https://www.gov.uk/how-to-register-your-charity-cc21b>
- Public benefit: <https://www.gov.uk/public-benefit-rules-for-charities>
- Exempt charities (September 2013 guidance):  
Introductory guidance: <https://www.gov.uk/government/publications/exempt-charities-cc23/exempt-charities>

### Running a charity:

- Setting up and running a charity: <https://www.gov.uk/running-charity>
- The Essential Trustee: what you need to know, what you need to do (2015): [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/451020/CC3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/451020/CC3.pdf)
- It's Your Decision: Charity Trustees and Decision Making (2013); <https://www.gov.uk/government/publications/its-your-decision-charity-trustees-and-decision-making/its-your-decision-charity-trustees-and-decision-making>

### Disposals:

- Ex gratia payments: <https://www.gov.uk/government/publications/ex-gratia-payments-by-charities-cc7>
- Charity Commission Operational Guidance, OG545-1 *Identifying and Spending Permanent Endowment* (December 2012); <http://ogs.charitycommission.gov.uk/g545a001.aspx>

### Changes to give trustees new powers or to authorise specific transactions:

- Approval of schemes: <https://www.gov.uk/government/publications/how-we-approve-changes-to-charities>

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September 2016**

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