

**In the Name of the Republic of Hungary**

The Metropolitan Court of Appeals has entered the following judgment with respect to the appeals against the decision of the Metropolitan Court, ruling no. 4.P.20.389/2003/35, dated November 16, 2005, by the plaintiff under serial numbers 37 and 38 and by the first, second and third dependants under file no. 36 in the lawsuit for the recovery of personal property by Martha Nierenberg, née Márta Alice Weiss (15 Middle Patent Road, Armonk, NY 10504, USA) as the plaintiff, represented by Attorney Dr. Tamás Varga (Budapest VI, Szív u. 33.I/5) against the Museum of Fine Arts (1146 Budapest, Dózsa György út 41.), as the first defendant, represented by Attorney Dr. B. Tibor Soós (1094 Budapest, Berzenczey u. 4-6), the Hungarian National Gallery (1014 Budapest, Dísz tér 17.), as the second defendant, represented by Attorney Dr. Eleonóra Hernádi (1097 Budapest, Soroksári út 138.), the Hungarian State, as the third defendant, represented by by Attorney Dr. József A. Kovács (1097 Budapest, Soroksári út 138.) and the Hungarian State Holding Company (1133 Budapest, Pozsonyi út 56), John de Csepel (40 Cathlow Drive, Riverside, Connecticut 06878, USA), as the fourth defendant and Péter Herzog (1011 Budapest, Hunyadi János u. 5. fszt 3) as the fifth defendant, both represented by Dr. Anna Solt (1024 Budapest, Ady Endre u. 24), Stefan Gabriel Herzog (Altersheim Waldfrieden der Stadt Zürich, Waldfriedenstrasse 21, 8330 Pfaffikon ZH, Switzerland), as the sixth defendant, represented by Wolfgang Hüsler (Löwenstrasse 54, 8001 Zürich, Switzerland), Angela Maria Herzog (Lungotevere Flaminio, No. 16, Rome, Italy), as the seventh defendant and Julia Alice Herzog (via di Torre Spizzichina Casale No.7, Rome, Italy) as the eighth defendant:

**J u d g m e n t :**

The Metropolitan Court of Appeals overrules the judgment of the Trial Court in part as follows: it dismisses the plaintiff's claim in its entirety.

The Court orders the plaintiff to pay within 15 days to the first and second defendants each HUF10,500,000 (Ten million five hundred thousand Forints), and to the third defendant HUF10,717,300 (Ten million seven hundred and seventeen thousand and three hundred Forints) for their total legal expenses incurred at the first and second instance level, as well as HUF24,000 (Twenty-four thousand Forints) to the fourth and fifth defendants jointly and HUF24,000 (Twenty-four thousand Forints) to the seventh and eighth defendants jointly for legal expenses incurred at the second instance level.

It orders the plaintiff to pay to the State HUF900,000 (Nine hundred thousand Forints) as unpaid appellate fees upon notification.

This judgment cannot be appealed.

**R e a s o n i n g :**

On retrial, citing ownership rights under title of inheritance from her mother, the plaintiff asked the Court in her petition, extended to the fourth through eighth defendants, to order the first defendant to return to her paintings Nos. 1, 2, 3, 4, 5, 10, 11 and 12, the second defendant to return to her paintings Nos. 6, 7 and 9, and to compel the third through eighth defendants to consent to such return.

The first through third defendants petitioned for the dismissal of the claim. They disputed the defendant's standing because the art works in question were not owned by the plaintiff's legal predecessor, the late Erzsébet Herzog, since the third defendant had acquired ownership rights to them. In their final argument they cited the acquisition of ownership rights to paintings Nos. 1, 2, 3, 5, 11 and 12 primarily based on laws and government decrees, secondarily on the taking possession of unclaimed property, and thirdly on adverse possession. The third defendant based the acquisition of ownership rights for paintings Nos. 4, 6, 7, 9 and 10 primarily on appropriation of unclaimed property and secondarily on adverse possession.

The fourth through sixth defendants did not submit any substantive counterclaim.

During the trial, the seventh and eighth defendants abandoned their counterclaim relating to paintings Nos. 3, 4 and 7 and no longer disputed plaintiff's ownership rights any longer.

In the judgment on retrial, the trial court ordered the first defendant to transfer painting No. 11, *El Greco: Holy Family*, into the plaintiff's possession within 15 days. The rest of the plaintiff's claim was dismissed. The court ruled that the parties are responsible for paying their own legal fees.

The trial court primarily examined whether Mrs. Alfonz Weiss, née Erzsébet Herzog had in 1940 acquired title to the paintings whose return was petitioned and whether plaintiff could have acquired the paintings by inheritance from her mother.

The court found that provided the paintings were owned by Erzsébet Herzog at the time of her death in 1992, the plaintiff is the legal heir to the paintings. The court cited the reasoning in the decision of the trial court in the first trial with respect to the interpretation of the will, as well as the contents of the declaration made by the plaintiff's siblings during the main proceeding filed under 7/F/1.

The court also stated that the will of Lipót M. Herzog and his spouse attached in the second trial did not establish joint ownership of the art works among the siblings. In the court's opinion the available documents established the ownership rights of the plaintiff's legal predecessor to paintings Nos. 1, 2, 3, 7, 9, 10 and 11. With respect to painting No. 4 it found that State Security Police discovered the painting in a trunk marked Baron Alfonz Weiss II," but the director of the first defendant informed the guardian of the seventh and eighth defendants in January 1946 that the painting had passed from the ownership of András Herzog into the museum's custody. In 2000, András Herzog's descendants made a claim of title to the painting.

With respect to painting No. 5, the court found that it was discovered in the basement of the Budafok Labor Company and it passed into the custody of the Ministerial Commission (for Jewish Property) as an artwork belonging to the plaintiff's legal predecessor. According to a document prepared in May 1944, however, it was impounded in the villa of István Herzog, although the name was changed by an unknown person to "Mrs. Á. Weiss". The director of the first defendant on the other hand, mentioned the painting as the property of András Herzog. Data concerning picture No. 6 are identical with those recorded about picture No. 5 save for the addendum that in 1950 the painting passed into the first defendant's possession and permanent inventory as part of the Légrády collection. With respect to painting No. 12, besides the ownership rights of the plaintiff's legal predecessor, information referring to András Herzog's ownership rights has also emerged. Based on the information mentioned above, the court decided that the ownership rights of plaintiff's legal predecessor with respect to paintings Nos. 4, 5, 6 and 12 were not conclusively established.

Subsequently, the trial court examined whether the third defendant had acquired ownership rights on any of the grounds cited by the defendants.

It established that the plaintiff's legal predecessor held only Hungarian citizenship on the day of the Paris Peace Treaty therefore, on the basis of the Agreement on the Settlement of Claims between the Governments of the Hungarian People's Republic and the United States dated March 6, 1973, which cited Article 27 (1) of the Peace Treaty, plaintiff's legal predecessor was entitled, or could have been entitled to compensation with respect to the paintings. However, since plaintiff's legal predecessor with exclusive ownership rights to the paintings was not a party to the Agreement, neither her legal action in claims compensation in 1959 nor any other legal action by her implies that she authorized any of the parties to the Agreement to exercise her ownership rights. Furthermore, there is no reference in the Agreement to a change of ownership rights with respect to assets with respect to which a claim for compensation has been asserted. Taking the above into consideration, the trial court also further found that the third defendant could not have gained ownership rights to the paintings by appropriating unclaimed assets.

The court could not establish the third defendant's acquisition of ownership rights based on Government Decree No. 13 of 1954, which was issued to supplement Government Decree No. 13 of 1949, because plaintiff's legal predecessor left the country with official permission, paintings Nos. 2, 9 and 10 were not in custody of a museum, and, based on the documents submitted, the paintings could not be considered to have been abandoned. The passing of the paintings' ownership rights to the State could also not be established on the basis of §1 (3) of Act XXVIII of 1948 and 24.391/1946 ME because the paintings could not be considered to have been abandoned and the country.

The court also could not establish the acquisition of ownership rights by the third defendant with respect to paintings Nos. 1, 3, 11 and 12 because the judgment on the confiscation of the paintings did not contain any identifying data, and taking into account the gift of 15 paintings recorded in the confiscation judgment, the court could only accept the confiscation of 12 paintings besides the three paintings that had been smuggled abroad.

With respect to the claim of donation (to the State) of paintings Nos. 2, 9 and 10, it accepted the explanation of the trial court's decision in the first trial.

The trial court did not share the plaintiff's view on suspension of the statute of limitations because in its view the nature of the political system cannot be grounds for suspension of the statute of limitations, and it did not consider the wills made by the plaintiff's legal predecessor between 1951 and 1990 relevant to suspend the statute of limitations. It acknowledged that as far as adverse possession is concerned, a will qualifies as the disposal of ownership rights, but only if on this basis a change in ownership actually takes place. In the instant case, this did not happen until 1992.

Regarding paintings Nos. 1 and 3, the trial court held that the first defendant took possession of the paintings in 1950 in the belief that they passed into state ownership due to a government decree. This is confirmed by the listing of the paintings in the museum's permanent inventory. Subsequently, the first defendant possessed the paintings as its own and in accordance with §80 of the Civil Code adverse possession was established on May 1, 1970. In the trial court's view the fate of painting No. 11 was different from that of paintings Nos. 1 and 3 only in that it was never returned and remained in the continuous possession of the state authorities, and the first defendant listed it in its permanent inventory upon notification by the Metropolitan Government's Executive Board. With respect to this painting, the first defendant had to be aware of the circumstances under which the painting passed into its possession which, under close examination, disqualified it from treating it as its own. Consequently, the title of possession to painting No. 11 did not change after 1951; it was in the legal custody of the first defendant by right of the third defendant (the State). Therefore, in accordance with §196 (1) of the Civil Code it must be returned to the plaintiff.

Painting No. 2 was transferred by the Interior Ministry to the second defendant and passed on to the first defendant, therefore the first defendant was justified in its belief that the painting was owned by the state and its possession as its own was established at the time of the transfer the latest. Painting No.7 was impounded as the property of Mrs. Sándor Sváb. Due to unknown reasons and unknown circumstances, it was transferred to the Ministerial Commission of Public and Private Collections, which passed it on to the first defendant as a remainder. There is no information as to whether the first defendant had any knowledge of the circumstances under which the painting was taken into possession; therefore, its possession with malicious intent is not proven. Its adverse possession began in 1950 and ended on May 1, 1970.

The fate and whereabouts of painting No. 9 following 1944 is unknown. The painting was believed lost between 1947 and 1950. The painting turned up in the Foreign Ministry in 1950 and from there it was transferred into possession of the first and then the second defendant. In 1966, the Financial Institutions Center notified the first defendant which possessed the art work that the Weiss family laid claim to the painting because the Hungarian authorities had confiscated it and placed it in a public collection. Since the painting's history was unknown, and, based on the disclosure of the plaintiff's family, possession as its own took place and due to a lack of any circumstances that would have suspended the statute of limitations, adverse possession was established.

Although the first defendant took possession of painting No. 10 under an invalid title but in the belief that it had a valid title for its possession. Following the dismissal of plaintiff's claim in 1966, the plaintiff's legal predecessor did not contest its possession, consequently adverse possession was established in 1976 because no malicious intent in the possession was established, contrary to plaintiff's position.

The ruling concerning court costs is based on §81(1) of the Code of Civil Procedure, with respect to attorney fees determined in accordance with Decree No. 32/2003 (VIII.22) IM and taking into consideration that although plaintiff is the losing party in large part, it was plaintiff that it paid most of the costs in advance.

The plaintiff as well as the first, second and third defendants appealed the decision of the trial court.

In the appeal based on §255(2) of the Code of Civil Procedure plaintiff asked the appellate court to change the decision in accordance with plaintiff's petition to order the first, second and third defendants to return paintings Nos. 1, 2, 3, 4, 5, 6, 7, 9, 10 and 12, and to pay for the court costs. In its view, the trial court recorded facts and evidence contrary to submitted evidence, it weighed evidence incorrectly and drew mistaken substantive legal consequences.

Plaintiff asserted the holding to be incorrect that with respect to paintings Nos. 4, 5, 6 and 12, the ownership rights by plaintiff's legal predecessor could not be established. In this connection, plaintiff asserted to be incorrect and contrary to documentary evidence the statement that József Greiner was Alfonz Weiss's appointed representative and it objected that the trial court did not evaluate the content of the English-language document listed under No. 32. With respect to painting No. 4, it found it damaging that the trial court did not evaluate documents 1/F/3A, 1/F3/B and A/34, it assigned too much probative force to document A/57 and too little probative force to document 1F/1. With respect to painting Nos. 5 and 6, it claimed the statement to be contrary to documentary evidence that the paintings were discovered in the basement of the Budafok Labor Company, or, according to another document in István Herzog's villa at Szemlőhegyi út 29/B. The plaintiff maintained that the paintings were impounded in Mrs. Alfonz Weiss's villa on Kelenhegyi Road, in accordance with the correction in document A/44. With respect to painting No. 5, as well as painting No. 12, it considered it damaging that too much significance was accorded to document A/57 and too little probative force to the report on opening the trunk on June 15, 1945. With respect

to painting No. 6, it considered it damaging that too much probative force was assigned to document A/16.

In its decision, the trial court took an incorrect position regarding the suspension of statute of limitations and regarding the suspension of statute of limitations by will. It denied the existence of a legal practice on the basis of which a will suspend the statute of limitations only if a change in ownership actually takes place. It maintained its former position on the lack of possession as its own, as well as on forceful and malicious acquisition of possession.

The first, second and third defendants requested a partial change in the trial court's decision asking the appellate court to change the binding ruling for the return of painting No. 11 and to dismiss plaintiff's claim to this painting on the basis of the third defendant's adverse possession. It (they?) also appealed for changing the decision with respect to the reasoning and the court costs.

It (they?) also considered it damaging that with respect to painting No. 11 the trial court did not consider the content of document F/3, according to which the painting was passed to the appointed representation of plaintiff's legal predecessor on September 5, 1947, from whom it was passed to Árpád Molnár. It may be assumed that it was impounded from him during the legal process for smuggling and, according to document A/9, it was transferred to the first defendant on October 6, 1950. The trial court also ignored the Supreme Court's opinion that as of 1973 possession as its own appears to be established and it is plaintiff's responsibility to prove that adverse possession did not take place. The plaintiff did not present any such conclusive evidence. In addition to the establishment of adverse possession for paintings Nos. 1, 3 and 7, there can also be no obstacle to establishing adverse possession for painting No. 11.

Furthermore, it (they?) also considered it damaging that, contrary to the interpretation in the Supreme Court's decision (recovering the decision of the trial court in the first trial), the trial court did not evaluate the legal action of the plaintiff's legal predecessor in claiming compensation as a dispositive act of the owner, and despite the defendants' arguments it did not establish the State's acquisition of ownership by taking possession of unclaimed assets, based on §127 of the Civil Code. Pursuant to §112 (1) of the Civil Code, it should have examined whether plaintiff's legal predecessor had abandoned ownership rights to the paintings. In this respect, it should have evaluated the contemporaneous political-social circumstances, the legal actions of the plaintiff's legal predecessor in regard to the paintings and the content of her testamentary disposition, and special significance should have been given to the legal action by the plaintiff's legal predecessor in accepting compensation. With respect to paintings Nos. 2 and 10, it should have evaluated that plaintiff's legal predecessor did not file a lawsuit after the dismissal of her claim in 1965. Based on the above, it should have established that regarding paintings Nos. 1, 3, 7 and 11, the plaintiff's legal predecessor abandoned the paintings' ownership and that the third defendant obtained ownership right to them based on §127 of the Civil Code. The abandonment in return for compensation took place prior to adverse possession; therefore it is on this legal basis that the third defendant's ownership right should have been established. The first, second and third defendants also considered damaging the judgment on the payment of court costs, particularly because, taking into account the ratio between the costs advanced by the plaintiff and the amount in litigation which serves as the basis for the value of the amount lost or gained in the case – even if the trial court's decision is not changed – they should be entitled to receive a minimum of one million Hungarian Forints for court costs.

In her counterclaim an appeal, plaintiff explained that ownership rights cannot be relinquished by implied conduct and that defendants' position in this regard is erroneous. Plaintiff's legal predecessor accepted the amount of compensation in the late 1950s when she had no way of knowing that the Hungarian People's Republic would initiate negotiations with the Government of

the United States of America in the 1960s and that an Agreement on Asset Claims would be signed in 1973. Taking this into account, the submission of a claim for compensation cannot be interpreted as relinquishing ownership rights. §1641 (1) of the American Act on the Settlement of Foreign Claims specifies that if someone does not receive full compensation for the claimed amount he will not be legally stripped of any rights with respect to the return of assets by a foreign state. In preparing the wills the testator deliberately dealt with the fate of her belongings in litigation, which is verified by statements by Paul Green and Balázs Pásztor. Based on the aforementioned, the legal position of the first, second and third defendants with respect to relinquishing ownership rights and the acquisition of ownership of unclaimed assets by the State is unfounded.

The first, second and third defendants asked the court to uphold the dismissive provisions of the trial court's decision. In regard to the suspension of the statute of limitations, they cited the Supreme Court's case No. BH 2005. 13 which did not consider political circumstances as obstacles to enforcing a claim. Contrary to plaintiff's arguments alleging the suspension of the statute of limitations, they claimed that the will's content is vague; therefore it cannot be considered as suspending the period of limitations. Furthermore, plaintiff's position with respect to a treating the property as its own is in contradiction with the Supreme Court's position set forth in its decision recovering and remanding the trial court's decision in the first trial. Forceful acquisition of possession denotes physical violence, and acquisition of possession in bad faith is ruled out by the publication of painting No. 10's acquisition.

The Metropolitan Court of Appeals has reviewed the trial court's decision in its entirety since that decision did not contain any provisions not under appeal or rendered final at the first instance level (§228 (4) of the Code of Civil Procedure).

The appeal by the plaintiff is unsubstantiated, the appeal of the first through third defendants with respect to the main object of litigation is substantiated.

The trial court's statement of facts is supplemented by the Metropolitan Court of Appeals as follows:

The Agreement on the Settlement of Claims between the Governments of the Hungarian People's Republic and the United States, dated March 6, 1973, (hereinafter: "Agreement") was preceded by lengthy negotiations. They were based, among others, on provisions issued by a special commission created for this purpose of U.S. citizens with respect to the enforcement of claims against the Hungarian Government. The provisions were received by the representative of the Hungarian party which requested access to additional documents available to the American party; however, they were not made available by the American party. Nevertheless, the Agreement was concluded.

The American Government widely publicized how U.S. citizens could enforce their claims against the Hungarian Government in line with U.S. regulations. To pay for claims awarded by the American party, a special fund was created from revenues from the sale of assets of the Hungarian state and its citizens and payments of obligations by the Hungarian Government in accordance with the Agreement.

During the negotiations in preparation for the Agreement, the parties' authorized representatives explained their positions, specifically including the art collection of plaintiff's legal predecessor. Originally, the Hungarian party contested the claim of plaintiff's legal predecessor because in its view no nationalization had taken place, at the same time it acknowledged that the art works could not be taken out of the country. At the June 17, 1966 round of talks, the Hungarian party dismissed the claim, but it promised to review the case. In a letter sent by the Financial Institutions Center to the first defendant on May 10, 1966 it is apparent that the Financial Institutions Center had exact

knowledge of the compensation claim by plaintiff's legal predecessor and as its basis it mentioned confiscation as well as placing the paintings in public collections.

In its report, the U.S. for Foreign Claims Settlement Commission took the position, in connection with the case of Géza Dános that the art works' placement in public collections as well as the barring of their return from such collection qualifies as the appropriation of property.

With respect to the claim by plaintiff's legal predecessor against the Hungarian Government, filed on the basis of the International Claims Settlement Act of 1949 as amended, under file no. HUNG-2079, a so-called final decision was issued on July 7, 1959, which awarded compensation for paintings Nos. 1, 3, 4, 5, 7, 9, 11 and for 1 1/3 interest of painting No. 12, because, according to the reasoning, the Hungarian Government appropriated them on May 12, 1954 without compensation.

With respect to painting No. 11, the Metropolitan Court of Appeals corrects the statement of facts by the trial court, based on the parties' identical presentation, in that the painting was released from the custody of the state authorities, since in 1947 it was delivered to József Greiner who represented plaintiff's legal predecessor. The State took possession again during the criminal procedure against Mrs. István Herzog.

In other matters the trial court established the relevant statement of facts correctly, and the Metropolitan Court of Appeals also agreed with the substantive decision on dismissing the claim. It did not share, however, the trial court's legal position to return the painting and only partially agreed with the legal reasoning of the trial court's decision.

In the current appeal, it is no longer the object of dispute between the parties whether a ground for abandonment of the lawsuit exists since plaintiff has enforced a claim not for compensation (indemnification) but for ownership. Neither was it disputed by the parties any longer that paintings Nos. 1, 2, 3, 7, 9, 10 and 11 used to be in the ownership of Erzsébet Herzog, nor did the first through third defendants contest the fact that the paintings in litigation were part of Erzsébet Herzog's estate and were inherited by plaintiff.

In her appeal, plaintiff objected to the trial court's decision to dismiss the claim for paintings Nos. 4, 5, 6 and 12 because it did not find the ownership of plaintiff's legal predecessor substantiated.

The Metropolitan Court of Appeals shares plaintiff's legal position that are based on the absence of ownership rights by the late Erzsébet Herzog plaintiff's claim should not have been dismissed. In this regard, the trial court drew its conclusions by evaluating available, contemporaneous, often contradictory documentary evidence dating from the time the paintings were transferred into the possession of different state organizations and established a lack of inheritance for paintings Nos. 4, 5, 6 and 12 by the late Erzsébet Herzog in accordance with the provisions of §206 of the Code of Civil Procedure. In their appeal against the trial court's decision, both the plaintiff and the first through third defendants argued that the court assigned too much probative force to some and too little to other documentary evidence.

In this respect, the Metropolitan Court of Appeals emphasizes that in judging the inheritance of the Herzog collection by certain individual family members, primary significance should be assigned not to the available legal documents as evidence but to the fact that with respect to this special historical and art historical issue, the third defendant, through its representative, made a statement of admission of substantive legal nature, closing the previous dispute, set forth partly in the Agreement and partly in a letter by Minister Bálint Magyar, and which cannot later be revoked unilaterally.

By discharging the private law Agreement, the third defendant, even in accordance with own presentation, has paid compensation for paintings Nos. 4, 5, and for the 1/3 ownership of painting No. 12. Based on sub clause 1./ of Section 2 of the Agreement, by virtue of the explanation in the supplement to the statement of facts, the Agreement's material scope extends both to the paintings that previously passed into State ownership and to those belonging to the class of so-called "other requisition", i. e., paintings placed in public collections. In interpreting the Agreement, this same conclusion can be drawn even if one disregards document No. 19/1. attached by the Foreign Ministry of the Hungarian Republic in the appellate proceeding before the Supreme Court which was to be omitted from the record in line with the reasoning of the decision reversing and rewarding the decision of the trial court in the first trial (first paragraph on p18).

Decree No.12 of 1987 adopting the Vienna Convention on International Agreements of May 23, 1969, took effect on September 15, 1987. The Convention's fourth article excludes the Convention's retroactive effect, however, this exclusion does not apply to any regulations set forth in the Convention to which contracts are subject based on international law regardless of the Convention.

This means that under customary international law, legal principles applied before the conclusion of the Convention or before a party joined it, do not belong in the scope of otherwise excluded retroactive force. A generally accepted rule, which was applied under customary international law prior to the Convention is the principle of "pacta sunt servanda" described in Section 26 of the Convention. In accordance with this, contracting parties are bound by all contracts in force and they must execute such contracts in good faith. In the interpretation of the contract, in addition to its text, any other document prepared by one or more contracting parties in connection with the conclusion of the contract must be considered pertinent and which is recognized by the other contracting parties as a document relevant to the contract. Certain expressions must be accorded special meanings if it can be established that that was the intention of the contracting parties.

The parties of the Agreement drew up a number of joint minutes about the negotiations, there were exchanges of documents that enabled them to get acquainted with each other's positions. This way the Hungarian party could study the substance and scope of the claims enforced by the American party, they could clarify the contested issues and later they signed the Agreement. Upon accepting the American lump-sum claim that included, among others, Erzsébet Herzog's claim, and after fulfilling the compensation, the third defendant can no longer dispute the fact successfully that the art works affected by the agreement used to be in the ownership of plaintiff's legal predecessor since the fulfillment of the compensation means a de facto admission of this. It must also be pointed out that the so-called final decision, which was part of the negotiations, was issued with respect to the claim of plaintiff's legal predecessor against the Hungarian Government, meaning that it was a legal document delivered to the recipient by the American Government as legal representative, which, as evidenced from statements made during the negotiations, even the third defendant interpreted as a claim against it. Accordingly, in the current lawsuit, following the signing of the Agreement the third defendant cannot return to its position prior to the closing of the dispute demanding further documentary evidence to verify ownership rights.

With respect to painting No. 6, it is significant that as a result of the pre-trial expert review, in which the director of the first defendant participated, the Minister of Culture and Education, Bálint Magyar, whose supervisory authority extended to both the first and second defendants, wrote a letter to Attorney Dr. Péter Komáromi dated December 16, 1997 in which he stated: "In essence, it has been successfully clarified, primarily based on documents obtained by the family, which individual work of art was in the ownership of which Herzog family member before its placement in the public collection." According to previous minutes dated May 12, 1997, the ownership by plaintiff's legal predecessor of nine paintings, including painting No. 6 was acknowledged.



Therefore, a legal statement by the first through third defendants' representatives confirms the fact that an agreement was reached about the issue of how the heirs had divided the Mór Herzog collection among themselves by the execution of the will. The statement of admission settling the dispute cannot later be unilaterally revoked.

The Metropolitan Court of Appeals notes that the reason why the Supreme Court in its decision reversing and remanding the trial court's decision in the first trial of annulment did not assign special significance to the above-described documents was because at the time not all Herzog heirs were involved in the lawsuit and their legal representative represented the whole family. In the second trial, however, all interested parties participated as defendants and none of them contested the statements of facts by the expert committee. Only the interested parties can make an authentic statement about the ways of dividing the estate among themselves. The Metropolitan Court of Appeals also points out that above-described statements considered of substantive legal significance do not mean an admission that the works of art in litigation were part of the estate by the plaintiff's legal predecessor at the time of his death and that the plaintiff's claim to ownership was acknowledged by the third defendant. Therefore, with respect to the minister, one cannot speak of the application of §109/C (1) of Act on State Finances effective at the time of the minister's statement because the statement cannot be classified as exercising ownership.

In regard to the aforesaid, it had to be investigated on its merit whether plaintiff's claim for the paintings' return can be met.

In this respect the Metropolitan Court of Appeals points out that in accordance with §253 (3) of the Civil Code of Procedure the appellate court is also entitled, within the limits of the appeal and the appeal's counterclaims, to decide on rights enforced in the lawsuit, as well as on issues cited by the defense against them, that were not tried and decided by the trial court. Consequently, in the Metropolitan Court's position the primary obstacle to discharging the claim based on §115 (3) of the Civil Code is Act LXIV of 2001 on the Protection of Cultural Heritage, §46 the paintings in litigation are protected works of art, so changing their place of custody for longer than 90 days requires an official permit in accordance with §51 (2) of the Act, their transfer to a foreign country requires an authorization procedure in accordance with §54-56. The requirement of a separate administrative procedure, however, was no obstacle for the court to investigate the plaintiff's claim as to the establishment of ownership.

With respect to confiscated paintings Nos. 1, 3, 11 and 12, it had to be examined whether the third defendant obtained the paintings' ownership as a result of executing the decision of the criminal trial against Mrs. István Herzog, which ordered the confiscation of all her assets, despite the fact that the paintings were in Erzsébet Herzog's ownership.

In this respect, the Metropolitan Court of Appeals did not agree with the legal reasons of the trial court. In a civil trial the court has no authority to overrule the decision of a criminal trial; therefore the decision's legality to order the confiscation of all assets in the criminal case against Mrs. István Herzog cannot be investigated. In accordance with §75 of the Civil Code, which provided general retroactive effect for rights and obligations arising prior to the promulgation of the Civil Code but not judged by a court ruling, the issue must be judged in accordance with provisions set forth in §120 (1) of the Civil Code. Accordingly, the third defendant could have acquired ownership rights to the paintings based on a government decree even if they were in the ownership of the plaintiff's legal predecessor, provided the third defendant's good faith can be established. The burden of verifying good faith in the lawsuit fell on the third defendant who did so by attaching decision No. 4070/1949/17 by the Budapest Metropolitan Court, dated August 23, 1950 on the first instance level, and decision No. 10.161/1950/23 by the Supreme Court, dated June 26, 1951, on the second instance level. Confiscation of assets was ordered on the basis of decree No. 23.300/1950 IM whose

§7 (1) made it possible to order the confiscation of the defendant's assets as well as assets in other people's ownership if "the confiscation order against the defendant appears to extend to that asset." All that was required was to summon the asset's owner to the trial hearing. Under such legal regulations third defendant's good faith in acquiring ownership cannot be ruled out by the circumstance that the paintings' ownership rights were not clarified during the criminal proceeding. Consequently, third defendant acquired ownership rights to paintings Nos. 1, 3, 11 and 12, even though it was later established that the paintings were owned by the plaintiff's legal predecessor.

In this respect, the Metropolitan Court of Appeals refers to point 1/c. of decree No. 15/1993 (III. 12.) of the Constitutional Court which says that the acquisition of ownership by the State cannot be annulled even if it is based on an unconstitutional regulation or an unlawful but non-appealable government decree. Therefore the Constitutional Court put down in its decree that "it does not follow from the currently unconstitutional and annulled regulations on nationalization or other forms of appropriation by the state, or the illegality of former government proceedings related to ownership acquisition by the state, or the lack of legal remedy against them, that the establishment of unconstitutionality or illegality today entails the termination of the state's ownership right."□ The plaintiff herself did not refer to the establishment of unconstitutionality of the Justice Ministry decree, which was the basis for the confiscation, only to the illegality of the former government procedure which, even if it were verified, would not result in the termination of third defendant's ownership right, nor would it mean that the final decisions could simply be disregarded.

Furthermore, the four paintings under confiscation were the subject of the Agreement on the Settlement of Claims between the Governments of the Hungarian People's Republic and the United States, dated March 6, 1973, which itself rules out the ground for plaintiff's claim to ownership rights to the paintings covered by the Agreement. In accordance with article 2 (1), the Agreement's material scope extended to claims by the Government of the United States and its citizens covering Hungarian nationalization, involuntary liquidation, expropriation measures or other forms of requisition. Such a requisition took place in case of paintings Nos. 4, 5, 7 and 9 whose return was requested by the plaintiff, because prior to the Agreement the representative of the third defendant denied the fact of nationalization of these paintings yet refused to return the paintings claimed by the plaintiff and placed in public collections. By signing the Agreement, the third defendant, however, accepted the American position described in connection with the Dános collection according to which requisition must also cover placement in a public collection as well as the refusal to return an art work. Consequently, the Agreement rules out the enforcement of plaintiff's ownership claim with respect to paintings Nos. 4, 5, 7 and 9 as well.

The Metropolitan Court of Appeals, in agreement with the trial court, did not share the first through third defendants' legal position that announcement or acceptance of a compensation claim qualifies as relinquishing ownership rights in accordance with §112 (1) of the Civil Code. Abandonment must be purposeful, declared or tacit but not assumed, nor can it be an addressed legal declaration. Abandonment means that the owner does not wish to remain the owner of a movable asset in the future. If, however, the owner declares in a legal addressed to another person that with respect to a movable asset in someone else's possession he/she requests compensation instead of the return of the asset, then it is not abandonment but an agreement offer in the framework of a contractual legal relationship, which replaces absolute ownership rights. Neither can the behavior of plaintiff's legal predecessor interpreted as waiving ownership rights by not taking the paintings with themselves when leaving the country, because plaintiff's legal predecessor emigrated under circumstances that ruled out taking the paintings. Taking this into consideration, the waiving of ownership rights by the plaintiff's legal predecessor cannot be established, the paintings did not become abandoned assets, therefore, third defendant could not have acquired ownership rights to them based on §127 of the Civil Code. In this respect the appeal by the first through third defendants to change the court's justification is unfounded.

In the view of the Metropolitan Court of Appeals's position, in case of injury to the ownership rights, the owner is entitled to the right to choose. In accordance with §115 (3) of the Civil Code, plaintiff can start a lawsuit and demand the termination of illegal interference or infringement, or if the asset is not in his possession he can demand its return, or he can demand financial compensation or indemnification from the party causing the injury. The simultaneous application of the two possibilities is conceptually precluded. By submitting a contractual claim to the Hungarian Government for the purpose of reparation, which the third defendant accepted by signing the Agreement, the plaintiff's legal predecessor ruled out the possibility of returning to the absolute ownership claim because this claim ended upon the enforcement of the contractual claim. The fact that the plaintiff's legal predecessor did not personally participate in the conclusion of the Agreement has no significance since the Government of the United States had widely publicized the ways in which U.S. Citizens could enforce their claims against the Hungarian Government. By domestic legal regulations the United States Government undertook to collect the claims and, as a representative on behalf of its citizens, to enforce them against the Hungarian Government. As a result, a treaty-type agreement was concluded as to what the Hungarian party must perform and on what basis. The United States Government used not its own funds but those of the Hungarian Government to fulfill those claims. Plaintiff's legal predecessor accepted the injurious situation by submitting a claim and accepting money, so it cannot return to its ownership claim. This statement is true to painting No. 12 as well, even though plaintiff's legal predecessor claimed and received compensation for only 1/3 ownership of the painting. The Metropolitan Court of Appeals's position finds the plaintiff's position incorrect, which holds that it is the third defendant who must prove title for the acquisition of ownership, since it is the plaintiff who bases her claim on ownership. That is why it is the plaintiff who has to prove she has an unfulfilled claim due to the violation of the ownership right, even though the Agreement records the full and final settlement of claims.

The Metropolitan Court of Appeals notes that, in accordance with the explanation set forth in the Supreme Court's decision reversing and remanding the trial court's decision in the first trial, the Hungarian court has exclusive legal authority to decide a lawsuit and in judging an ownership claim Hungarian law must be applied. (In this lawsuit §55 (1) d), §21 (1) and §22 (1) of Government Decree No. 13 of 1979 must be applied.) Consequently, §1641 (1) of the United States Act on the Settlement of Foreign Claims is not applicable. Nor do facts of this case with respect to the cited provision exist since the late Erzsébet Herzog's claim was dismissed in part and without explanation because the nationalization, expropriation or other forms of requisition of her other assets did not take place between the date of her becoming a U.S. citizen (June 23, 1952) and the date set forth in the law (August 9, 1955). In addition, she only claimed compensation for 1/3 ownership of painting No. 11. Nor does it have any significance on what date the plaintiff's legal predecessor received the compensation awarded by a decision: before or following the conclusion of the Agreement, since on the one hand the so-called final decision was made in regard to the claim against the Hungarian Government and this is how it was fulfilled, and on the other hand, in its summation the American party took it into account, as it is explained above.

Adverse possession in respect to paintings Nos. 1, 3, 11 and 12 as a third claim, and paintings Nos. 4, 5, 7 and 9 as a second claim can be established. Contrary to plaintiff's position, defendant's treating the property as its own was established. Both on the basis of the execution of the order of confiscation and the Agreement, the third defendant and its agencies were justified in considering their possession final along with placing the paintings in their permanent inventory. Forced or malicious possession cannot even be considered in view of the provisions of the Agreement. With respect to the suspension of the statute of limitations, the Metropolitan Court of Appeals agreed with the reasoning of the trial court, therefore, in this regard it only notes §253 (4) of the Code of Civil Procedure. The Metropolitan Court of Appeals also shared the trial court's position in that no suspension of the statute of limitations took place. In other words, the act of inheritance by ?\_\_\_\_? can only be considered a conditional disposition over ownership rights, which condition is only met

by death. In its absence, the disposition does not even reach the recipient. In addition, it is not even proven whether in her will Mrs. Alfonz Weiss née Erzsébet Herzog disposed of all the paintings in litigation or only some of them. Nor can the fact be disregarded that she did not file a claim of ownership for the paintings in litigation before or after the political system changed. An explanation for this may be that she regarded her own claim settled and that is why she did not mark in her will dated November 30, 1990 any paintings currently in litigation in a manner that could identify them individually.

With respect to painting No. 10, the Metropolitan Court of Appeals fully agrees with the trial court's reasoning and therefore it only notes its correctness based on §253 (4) of the Code of Civil Procedure.

Painting No. 2 did not pass into first defendant's possession based on decree No. 1600/1944 ME because it was left by plaintiff's legal predecessor in Dr. Henrik Lóránt's custody.

At an unknown date, the painting was transferred from Dr. Henrik Lóránt into the possession of the domestic security services under unknown title. The painting was passed by the Interior Ministry into the possession of the first defendant on February 13, 1962. Painting No. 2 is covered by the scope of the Agreement. On August 13, 1965, plaintiff's legal predecessor requested the verification of the painting's transfer into state possession. Therefore, as of this date, possession as its own was established. Based on the explanation in regard to adverse possession, the statute of limitations expired on August 13, 1975 and the third defendant obtained the painting's ownership rights based on §121 of the Civil Code.

According to the document attached under No. 1/F/3/B, which was prepared by the Ministerial Commission on Art Objects Looted from Public and Private Collections, painting No. 6 was discovered in the Budafok Labor Company's basement in the trunk of plaintiff's legal predecessor and transferred to the first defendant. According to another contemporary document (A/44), however, the painting was impounded on July 24, 1944 in the Szemlőhegy villa of István Herzog. Later, at an unknown date, the following was entered on the document: "Mrs. Alfonz Weiss, Kelenhegyi út 38." Nevertheless, in 1947 the painting was not released to József Greiner, the representative of plaintiff's legal predecessor, and there is no information on whether the representative of plaintiff's legal predecessor requested the return of the painting. On July 19, 1950, the painting was placed in the first defendant's permanent inventory as a remainder, as part of the Légrády collection. Even though research in the 1990s verified the ownership right of plaintiff's legal predecessor to this painting as well, the painting was in a museum's custody on the date that Government Decree No. 13 of 1954 (which amended Decree No. 13 of 1949) took effect, and its owner's identity could not be established based on available and contradictory information. In accordance with Decree §11 (1), "owner" also meant an authorized person; however, no information in this respect surfaced. Therefore, conditions in line with Government Decree §9 were met since at that time the owner of the painting could be considered unknown, it could not be established who was the owner and there was no known representative either. Consequently, on May 12, 1954, the date when the Decree took effect, the painting was transferred, *ipso iure*, into state ownership.

Summarizing the above, the Metropolitan Court of Appeals has found that the plaintiff successfully proved that she obtained ownership to all the paintings in the litigation by inheritance from the late Erzsébet Herzog. The claim, however, could not be fulfilled because the claim of plaintiff's legal predecessor ceased while she was still alive partly because the third defendant obtained ownership rights by a final criminal decision based on §120 (1) of the Civil Code to paintings Nos. 1, 3, 11 and 12, by force of law to painting No. 6, and by adverse possession to paintings Nos. 2 and 10. With respect to all paintings covered by the confiscation of assets, and paintings Nos. 5, 7 and 9 the

compensation paid within the framework of the Agreement as an obligatory legal relationship, rules out any further enforcement of claims by the plaintiff due to the claim's fulfillment and termination. If, however, the Agreement as representing plaintiff's legal predecessor cannot be considered obligatory then the paintings in its material scope were acquired by the third defendant ten years after the date of the Agreement by the fact that neither suspension, nor discontinuation of the statute of limitations can be established.

Based on a special regulation, the provision of Act LXIV of 2001, the court could only decide on the existence of the plaintiff's ownership and not the possession of the paintings.

The Metropolitan Court of Appeals did not agree with the argument set forth at the appellate hearing by the plaintiff's legal representative that the first, second and third defendants cannot cite an alternative legal basis for the acquisition of ownership in their defense. Since if plaintiffs have the right to designate an alternative legal basis for their claim then they cannot contest the defendants' use of this legal tool. Any type of defense that is suitable to support a substantive counterclaim or a position related to the dismissal of a claim is permitted. The plaintiff's assertion was that the plaintiff obtained ownership rights to the paintings by inheritance. The enforcement of this claim is ruled out if Erzsébet Herzog, the plaintiff's legal predecessor, was not the owner, or if she could not have an ownership claim. The defendants are entitled to cite any legal basis, even an alternative one, that supports this position, which otherwise does not bind the court, apart from a substantive counterclaim.

Taking the above into consideration, the Metropolitan Court of Appeals upholds the trial court's provisions of dismissal and, changing its decision with respect to painting No. 11, based on §253 (2) of the Code of Civil Procedure, it dismisses the plaintiff's claim entirely.

The plaintiff has lost the lawsuit and based on §78 (1) of the Code of Civil Procedure it must pay court costs to the defendants. The amount of the court costs was determined by the Metropolitan Court of Appeals in accordance with §79 (1) of the Code of Civil Procedure taking into account the value of the object of litigation and the significant amount of work done by the defendants' representatives because at the time of the claim's submission Decree No. 32/2003. (VIII. 22.) IM was not in effect and so it could not be applied to establish lawyer fees. In establishing the amount of lawyer fees the Metropolitan Court of Appeals took into consideration that the representatives of the first, second and third defendants always submitted joint statements; therefore the amount of work done by each representative could not be identified. As a result, the following fees have been established: HUF4,000,000 per attorney for work performed on the first instance level; HUF3,000,000 for each attorney for work performed in the second instance proceeding based on the Supreme Court's writ of annulment; HUF2,500,000 for lawyer fees for the repeated proceeding on the first instance level, and HUF1,000,000 for lawyer fees for work performed for the repeated proceeding on the second instance level. The third defendant advanced a translation fee of HUF217,300 which had to be included in the court fee. The representative of the fourth and fifth defendants and the representative of the sixth and seventh defendants appeared at one hearing but did not submit a counterclaim for appeal therefore their fees were established in proportion to the work performed.

The appeal fee unpaid by the first, second and third defendants due to their exemption must be paid by the plaintiff as the losing party, in accordance with §13 (2) of Decree No. 6/1/1986 (VI. 26.) IM.

Budapest, January 10, 2008.

Mrs. Czukorn, Dr. Judit Farsang /s/  
president of the chamber

Mrs. Világhyn, Dr. Terézia Böcskei  
presenting judge

Dr. Klára Szabó  
judge

In witness whereof:  
Rounded rubber stamp of  
The Metropolitan Court of Appeals