

**IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE**

**CIV-2018-463-127
[2020] NZHC 3193**

BETWEEN LEONORA FAYE JOHNSON AND ALAN
 RUTHERFORD JOHNSON
 Plaintiffs

AND MARIENNE EVA NIXON
 Defendant

Hearing: 2 and 3 December 2019 and 21 February 2020
 Further submissions 26 February 2020 and 6 July 2020

Appearances: B D Gustafson for Plaintiffs
 M S McKechnie for Defendant

Judgment: 3 December 2020

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 3 December 2020 at 4.45 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Solicitors: Rainey Law, Auckland
 Graeme Dennett, Rotorua

Counsel: B D Gustafson, Auckland
 M S McKechnie, Rotorua

Parties

[1] Mrs Leonora Johnson, the first-named plaintiff, is the former wife of the late Mr Alan Johnson. Mr Johnson was a successful surgeon practising in Auckland. He died in January 1995. Mr Alan Johnson Jr, the second-named plaintiff, Mr and Mrs Johnson's son, is the sole executor of his father's estate ("Mrs Johnson", "Mr Johnson Jr" and, together, "the Johnsons").

[2] The defendant, Mrs Marienne Nixon, is the former partner, and the beneficiary of the chattels of, the late Mr Alfred Rimmer. Mr Rimmer died in December 2015.

[3] The issue for determination is which party is entitled to the (net) proceeds of sale of a Charles Goldie portrait, "*Ngaheke – The Widow*" ("the painting").¹ Mr Rimmer was in possession of the painting at the date of his death. Mrs Nixon sold the painting at auction in 2017, the net proceeds being \$173,343.

Evidence

[4] Mr McKechnie, counsel for Mrs Nixon, objected to much of the plaintiffs' evidence, including some of that in the common bundle, on the ground it was inadmissible, whether because it was (unreliable) hearsay or otherwise. I accept most of Mr McKechnie's objections, which will explain to the plaintiffs why I have put to one side some of the evidence on which they sought to rely.

Introduction

[5] Mr and Mrs Johnson owned the painting at the outset of the events in issue. At some point in the late-1970s, after Mr and Mrs Johnson had separated, Mr Brian Rogers acquired possession of the painting. In or about 1981 Mr Rogers transferred possession of the painting to Mr Rimmer, quite possibly selling it, or at least purporting to sell it, to him. Mrs Nixon understood from Mr Rimmer that he had purchased the painting from Mr Rogers.

¹ Charles Frederick Goldie *Ngaheke or perira te kahikura (The Widow)* (1915, oil on canvas, 24 x 19 cm).

[6] After Mr Rimmer's death in 2015, Mrs Nixon sold the painting at auction in December 2017. The gross sale price was \$200,000. The net proceeds, being \$173,343.00, reflect the deduction of commission and other expenses payable by the vendor on the sale. Mrs Nixon is holding those proceeds of sale.

[7] The plaintiffs' case is they retained title to the painting throughout these events. Their case is that Mr Rogers never acquired title to the painting and so Mr Rimmer did not acquire title to the painting. They contend Mrs Nixon held the painting as constructive trustee and breached her equitable duties to them by selling the painting as she did. Alternatively, their case is Mr Rogers "converted" the painting by passing possession to Mr Rimmer, that at the time of sale Mrs Nixon knew the plaintiffs claimed ownership of the painting, and that she wrongfully parted with possession of the painting, in violation of the plaintiffs' rights. This second cause of action was added in an amended pleading which I gave the plaintiffs leave to file and serve in July 2020. Mr McKechnie did not file a fresh statement of defence but nothing turns on that as Mrs Nixon has denied the critical allegations.

[8] The gist of Mrs Nixon's case is that Mr Rimmer did acquire title from Mr Rogers. This is because Mr Rogers either had title at the time he sold to Mr Rimmer, alternatively Mr Rimmer acquired title as a bona fide purchaser for value.

[9] I record here that, although not referred to in argument, s 5(2) of the Limitation Act 1950 is relevant to the claim in conversion.

Background

[10] Mr and Mrs Johnson married in 1960. There was a substantial age difference between the two, Mrs Johnson being 19 years of age or thereabouts at the time and Mr Johnson being 47.

[11] Mr Johnson already owned the painting at the time, having purchased it in 1956 when he was studying in the United Kingdom. He and Mrs Johnson were both very fond of the painting, Mrs Johnson was herself an artist, and they hung the painting in their family home in Epsom.

[12] Mr and Mrs Johnson separated in April 1977. The separation, divorce, and division of matrimonial property was acrimonious.

[13] In the first instance Mr Johnson left the family home temporarily, leaving the painting behind. By December 1977, Mr Johnson had left the family home permanently, taking the painting and items of Mrs Johnson's jewellery with him. That Mr Johnson took the painting was particularly upsetting for Mrs Johnson, as she had understood from him that she was to retain it.

[14] On leaving the family home, Mr Johnson moved in with Mr Rogers and his son, Kerry Rogers, at Mr Rogers' address in Meadowbank. Mrs Johnson and Mr Johnson Jr gave evidence this was for a matter of weeks only, pending Mr Johnson's move to permanent accommodation. Mr Rogers had been a good friend of Mr Johnson for many years, and Mrs Johnson was good friends with Mr Rogers' wife, June. The Rogers had themselves separated at about the same time as Mr and Mrs Johnson, and Mr Rogers had remained in the family home in Meadowbank.

[15] That Mr Johnson had the painting at Mr Rogers' house is established because Mr Johnson Jr saw it hanging there when he visited in January 1978.

[16] In early 1978, Mr Johnson telephoned Mrs Johnson, said the painting was missing, said he wished her to return it and intimated she might know its whereabouts. Mrs Johnson denied knowing the whereabouts of the painting.

[17] A few days after that, Mr Rogers telephoned Mrs Johnson. This was a surprise to Mrs Johnson given her friendship with Mrs Rogers. Mr Rogers asked Mrs Johnson to visit his home to discuss the painting. Mrs Johnson was wary of Mr Rogers and reluctant to go, but did so as she thought he might know what had happened to the painting. On arrival, Mrs Johnson was concerned to find herself alone with Mr Rogers. Mrs Johnson asked Mr Rogers what he knew of the whereabouts of the painting. Mr Rogers said he could not find it but suggested Mrs Johnson accompany him upstairs to the attic where he thought it "might be". Mrs Johnson declined this invitation and left.

[18] Mrs Johnson's evidence is that she laid a complaint of theft of the painting at the Auckland Central Police Station, that she pursued that complaint, but the Police subsequently informed her they had traced it to a service station in the Bay of Plenty but the trail had then gone cold.

Matrimonial property

[19] Mrs Johnson issued proceedings in 1978 to resolve the division of matrimonial property. In June 1979, Speight J issued a judgment recording that, by the time of the hearing in May 1979, the parties had agreed the classification of all assets.² That is, they had agreed what constituted the family home and the family chattels, and what were items of separate property, and the value to be attributed to most of these assets.

[20] Although the parties agreed the painting was a family chattel, the judgment records Mrs Johnson did not accept the value of \$11,000 that Mr Johnson had ascribed to the painting (with other unspecified items). Speight J ordered Mr Johnson to produce the painting to Mrs Johnson for valuation.

[21] The principal issue for the Judge was whether the disparity in the parties' contributions to the matrimonial property warranted a departure from the principle of equal division. The Judge considered it did, and ordered that Mr Johnson was entitled to a two-thirds share and Mrs Johnson one-third. The Judge did not, as counsel say, award one-third of the painting to Mrs Johnson and two-thirds to Mr Johnson. The Judge determined the parties' overall entitlement. The final paragraph of the judgment records that counsel expected to be able to agree on what assets would go to whom to satisfy the division.

[22] Mrs Johnson's evidence, which I accept, is that her husband never did produce the painting as he had been ordered to do. She recalled a "pay-out" in respect of the matrimonial property but no more than that.

[23] Mr McKechnie questioned Mrs Johnson as to why she did not pursue her husband to produce the painting. Mrs Johnson said she thought Mr Johnson would

² *Johnson v Johnson* (1979) 2 MPC 100 (SC).

produce it eventually. This never occurred, however. Mrs Johnson also said she did not have the resources to chase her husband, and that she also wished to keep her dealings with him to a minimum, having by that time obtained a non-molestation order against Mr Johnson. Mr Johnson was an alcoholic, and it appears from Speight J's judgment that he had suffered "severe setbacks in health due to a partial stroke and other causes".³

[24] Nor did Mrs Johnson revisit the whereabouts of the painting with Mr Rogers.

[25] It is common ground Mr Rogers had possession of the painting by the late 1970s. Indeed, the plaintiffs' pleaded case is that Mr Johnson entrusted possession of the painting to Mr Rogers. To the extent any explanation for this was offered it was to ensure Mrs Johnson did not "get her hands on it".

[26] Mr Johnson Jr's evidence was that the family home in Epsom was sold in about 1979 or early 1980, when he was 18 or 19, but that he saw his father regularly as they had a common interest in sailing. Mr Johnson Jr, who was studying law, became aware of Speight J's decision in 1982. Visiting his father that year, he asked where the painting was and Mr Johnson said "Rogers has it". Mr Johnson Jr said he did not press the subject as his father was not someone to be questioned. Mr Johnson Jr also said that when he graduated in December 1984 he made an unsuccessful visit to Auckland Art Gallery to try to find a record of the painting in the Gallery's records. Mr Johnson Jr also said he always hoped that something would turn up in his father's papers on his death in 1995, which would disclose what had happened to the painting, but nothing did.

[27] Mr Rogers had a severe stroke in the early 2000s and died in August 2011.

Mr Rimmer and Mrs Nixon

[28] Mr Rimmer and Mrs Nixon met in Rotorua in 1979. At the time Mr Rimmer had recently relocated to Rotorua from Ruatahuna and was living in a caravan on a property he owned.

³ *Johnson v Johnson*, above n 2, at 100.

[29] Mr Rimmer and Mrs Nixon began living together in about 1981. Mrs Nixon recalls Mr Rimmer showing her the painting at that time, if not before. Her evidence was Mr Rimmer always admired Goldie paintings and had a close affinity with Māoridom. Mrs Nixon's recollection was Mr Rimmer told her Mr Rogers had brought the painting to him when he lived in Ruatahuna and that he purchased it for £8,000. Mr Rimmer and Mr Rogers knew each other, having fished and hunted together. Mrs Nixon's recollection was Mr Rimmer said he had purchased the painting in the late 1960s or early 1970s.

[30] Mr Rimmer and Mrs Nixon subsequently moved to Hamurana, near Rotorua. Mr Rimmer began dealing in second-hand goods and obtained an auctioneer's licence. Mrs Nixon's evidence was she and Mr Rimmer went to many auctions, and thus became acquainted with others in the trade including Mr Dunbar Sloane Sr of Dunbar Sloane, Wellington, who visited their home on occasion.

[31] It was at Mr Sloane's suggestion that Mr Rimmer had the painting reframed in a "Goldie" frame in 2007 and then, at Mr Sloane's suggestion, in late 2011, Mr Rimmer gave the painting to Mr Sloane to auction. The auction was in April 2012. The painting did not reach reserve and was returned to Mr Rimmer.

[32] The Johnsons first learned of Mr Rimmer's possession of the painting in 2014, following a chance encounter between Mrs Johnson, her daughter (now deceased), and Nena Rogers, Gary Rogers' former wife. Mr McKechnie objected to Mrs Johnson's evidence of what was said on the ground it was hearsay, which it was, and, again, I have put it to one side. What is not in dispute is that as a result of this conversation the Johnsons learned Mr Rimmer had the painting.

[33] The conversation led to two important developments.

[34] First, the Johnsons discovered two articles about the painting published on *Stuff* in April 2012.⁴ One was shortly before the Dunbar Sloane auction and the other was a "follow up" piece, recording that the painting had not sold.

⁴ Bronwyn Torrie "Auction first for Goldie painting" (1 April 2012) <www.stuff.co.nz>; and Bronwyn Torrie "Goldie seller had link to artist: Goldie's former delivery boy sells painting" (2 April 2012) *Stuff* <www.stuff.co.nz>.

[35] The relevant part of the first article reads:⁵

Auction first for Goldie painting

A Goldie painting being auctioned in Wellington this week is being sold by an elderly man who delivered paper to the artist in the late 1930s.

Ngaheke - The Widow, an oil on canvas, was completed by Charles Frederick Goldie in 1915 and has never been auctioned before.

Its owner bought the work more than 50 years ago from a friend whose grandmother acquired it directly from Goldie's wife, Olive. The Rotorua man, who did not want to be identified, was not sure whether it was sold or given to his friend's grandmother.

The man left school at 12 to earn money for his family, becoming a delivery boy. He recalled delivering paper on his bike to Goldie's Auckland studio. Later he began collecting Maori artefacts and acquired the Goldie, which he recently had restored.

...

[36] Mrs Johnson's evidence was that she telephoned Mr Sloane after seeing this article and told him the painting had been stolen but that Mr Sloane refused to tell her the name of the vendor, absent a Court order requiring him to do so.

[37] Secondly, in August 2014, Mrs Johnson laid another complaint of theft with the Police in Auckland. The Police did not conduct any investigation and closed the file about 10 days after opening it. Following strenuous objection by Mrs Johnson and Mr Johnson Jnr, in February 2015 the file was transferred to Kerikeri and assigned to Senior Constable Vernece Davies, who made enquiries of all relevant parties (or those still alive) in 2015.

Police file

[38] The Police file includes SC Davies' job sheets and also emails with Mrs Nixon, amongst others. What follows is taken from the job sheets and emails, to which no objection was taken.

[39] SC Davies spoke to Gary Rogers who told her that Mr Johnson had stayed at the Meadowbank address "for about a year and a half". This is in marked contrast to

⁵ Bronwyn Torrie "Auction first for Goldie painting", above n 4.

the plaintiffs' evidence of a few weeks only. Gary Rogers recalled the Goldie painting and, indeed, thought there were two of them. Gary Rogers told SC Davies of an incident one night when Mr Johnson was intoxicated, and angry because Mrs Johnson wanted the paintings; that Mr Johnson tried to destroy the paintings; that Mr Rogers restrained him; and that thereafter Mr Rogers "took them off the wall and put them in his vehicle", where he kept them. It became apparent at trial that this account, and the next, derived from his father, or his brother Kerry Rogers who was also living at the Meadowbank address. Gary Rogers was not living at the Meadowbank address at the relevant time.

[40] SC Davies' notes also record Gary Rogers going on to say:

...

From what I recall Alan hadn't paid any rent to Dad and they got into an argument about it one night. Alan was drunk again as he was most nights, and decided to give the paintings to Dad in lieu of rent.

I think Alan just wanted them gone, because he knew it would piss [Mrs Johnson] off, and to cover the rent he hadn't paid he therefore gave them to Dad. I think after that and I have no idea how long after, but Dad took the paintings to some people he knew in Glen Murray, down Mercer way.

...

He was also a hunter and he'd often go to Ruatahuna to hunt with a friend, Alfred RIMMER. Alfred ... was a bit of an artefacts [collector] of some kind.

About nine years ago I visited Dad in an old folks home. I recall having a conversation with him about old times and the Goldie paintings that Alan had given him. He told me he had sold them to Alfred RIMMER for about \$8000 each. I told him that was very cheap.

...

Dad is dead now, so I couldn't give a stuff if he had stolen them, but that was not the case at all, and I'm telling you the absolute truth about how they came into Dad's possession.

[41] Some time after these conversations, Gary Rogers telephoned SC Davies and retracted what he had said, although SC Davies had reservations about the reliability of the retraction.

[42] SC Davies also spoke to Mr Rimmer and Mrs Nixon. This was on 30 September 2015. SC Davies' notes record that, by that time, Mr Rimmer had

dementia and Mrs Nixon spoke for him on occasion. In any event, Mr Rimmer told SC Davies he bought the painting from Mr Rogers “in either the late 70s/early 80s” and that he paid “many thousands of dollars” in cash as was his usual practice. As Mr Gustafson, counsel for the plaintiffs, submitted this reference to a purchase in the late 1970s/early 1980s was different from Mrs Nixon’s understanding of a purchase 10 years earlier, and different from the “more than 50 years ago” stated in the *Stuff* article.

[43] Then, in a subsequent email to SC Davies of 12 November 2015, Mrs Nixon said “According to [Alfred’s] memory he paid about \$8,000 (he thinks he paid in Pounds) ... way back in late 1960’s or early 1970’s from Brian Rogers”.

[44] In a separate report, SC Davies stated that she queried Mr Rimmer “about the background history that the Auction House placed on the website when advertising [the painting] for auction which has caused the [plaintiffs] to believe Mr Rimmer is lying about how he obtained it”. Mr Rimmer stated that most of what had been printed was accurate but could not explain the reference to the words “whose Grandmother acquired it directly from Goldie’s wife”. SC Davies recorded Mr Rimmer said he had “no knowledge of this information or where it came from”.

[45] In December 2015, SC Davies advised her superiors that the investigation was hampered by a lack of evidence but she considered Gary Rogers’ account of the gift in lieu of rent “quite plausible and believable” in which case Mr Rogers had been entitled to sell the painting to Mr Rimmer. Her recommendation that no further action be taken was accepted and advised to the plaintiffs and Mrs Nixon.

[46] After Mr Rimmer’s death, Mrs Nixon sold the painting at auction in 2017 through Dunbar Sloane. The relevant part of the auction catalogue repeated the claim that the painting had been “purchased originally by the grandmother of a family friend directly from artist’s wife, Olive Goldie” and that the vendor estate had purchased it “circa fifty years ago”. Mrs Nixon’s evidence was she was not consulted about this in advance of the publication of the catalogue.

[47] By letter of 1 October 2018, the plaintiffs' solicitors asked Mrs Nixon to have her solicitors contact them to discuss the return of the painting or compensation. Counsel for Mrs Nixon replied shortly thereafter, to the effect that Mr Rimmer's family had advised he had possession of the painting from the 1960s and the painting had been sold in 2017.

[48] The plaintiffs issued these proceedings on 25 October 2018.

Gary Rogers

[49] I have discussed the plaintiffs' and Mrs Nixon's evidence above. It remains to summarise Gary Rogers' evidence at trial. Although the plaintiffs had served a signed brief of evidence for Gary Rogers, he disclaimed this at trial on the basis of lack of memory. Accordingly, I have put his brief to one side. His viva voce evidence was as follows.

[50] Gary Rogers' memory of events was poor. He visited the Meadowbank address once whilst Mr Johnson was staying there; he saw the painting hanging at the house on that occasion; he always thought there were two Goldie paintings, not just the one; Mr (Brian) Rogers used to keep the painting in his car or in his attic; his father explained his ownership of the painting by saying Mr Johnson owed him "rent and other things"; that at some point his father told him he had taken the painting to Glen Murray (Waikato) and then, later, that he had sold it to Mr Rimmer for \$8,000 or \$9,000; that his father was involved in various businesses; that he and Mr Johnson "used to sit around and drink all night"; and that Mr Johnson and Mr Rogers shared some business interests. Gary Rogers expressed doubts about the propriety of some of Mr Rogers' and Mr Rimmer's business operations but that was opinion and not fact, and of no assistance to me.

[51] Gary Rogers was an unsatisfactory witness. He failed to answer the subpoena the plaintiffs had served, despite every conceivable effort being made to accommodate him and, ultimately, had to be arrested and brought to Court. More importantly, I have reservations about whether he could recall events accurately. This is not surprising given the lapse of time, but Gary Rogers also candidly acknowledged his deficiencies in this regard.

Submissions

[52] Mr Gustafson submitted that, at all material times, Mr and Mrs Johnson were the owners of the painting; that Mr Rogers did not acquire title to the painting; that if Mr Rogers did not have title he could not pass title to Mr Rimmer, whether or not Mr Rimmer paid for the painting; and, if relevant, that Mr Rimmer was not a bona fide purchaser for value. Mr Gustafson challenged Mr Rimmer's bona fides, in the sense of his being on notice or having reason to be suspicious as to the provenance of the painting, rather than the price Mr Rimmer paid or is said to have paid for the painting. As to the return of the proceeds of sale, Mr Gustafson submitted that Mrs Nixon stood in Mr Rimmer's shoes, and thus was required to account to the plaintiffs as he would have been whilst alive.

[53] Mr McKechnie submitted that Mr Johnson was the owner of the painting at all material times and thus entitled to sell or gift the painting to Mr Rogers as he submitted the evidence suggested had occurred; and that, in any event, Mr Rimmer acquired the painting as a bona fide purchaser for value, thus Mrs Nixon was entitled to retain the proceeds of sale.

Discussion

[54] I turn now to record the decisions I have reached on the relevant points.

[55] The first is that I am satisfied on the balance of probabilities that Mr Johnson did not transfer title to the painting to Mr Rogers, even if he could have done so given Mrs Johnson's interest in the painting, which was a family chattel.

[56] Mr Rogers' possession of it resulted either from Mr Johnson leaving it with him for safekeeping, or from theft, and given the view I have reached below, I am not required to decide which.

[57] The evidence to support a transfer of title to Mr Rogers derives from the statements made by Gary Rogers to SC Davies and at trial. These in turn derived from Mr Rogers or Kerry Rogers, to the effect that Mr Johnson gave the painting to Mr Rogers in lieu or in consideration of rent.

[58] Strictly speaking this hearsay evidence from Gary Rogers may be admissible and may well be what his father or brother recounted to him. But it is at significant odds with the plaintiffs' evidence which I prefer. I consider their recollection more reliable and more plausible.

[59] The relevant evidence for the plaintiffs on this point was that Mr Johnson only stayed at the Meadowbank address briefly, and certainly not for anything like the 18 months Gary Rogers estimated to SC Davies. Mrs Johnson's evidence was "for a few weeks" and Mr Johnson Jr's evidence was "six weeks ... until he got new accommodation lined up". As Mrs Johnson said, the value of the painting would have far exceeded the fair rent for such a period.

[60] I also accept Mrs Johnson's evidence that her husband was very attached to the painting, and he would never have parted with it, and certainly not in consideration of rent for what was (by Mr Johnson's standards) very modest accommodation indeed. Speight J made much of the standard of living and accommodation Mr and Mrs Johnson had enjoyed. I also accept Mrs Johnson's evidence of her husband's irate telephone call accusing her of taking the painting. This telephone call cannot be reconciled with his having given the painting to Mr Rogers.

[61] Mr McKechnie submitted Mr Johnson's statement to his son, in 1982, "Rogers has it" provided support for Gary Rogers' account or was evidence of acquiescence on his part. I do not accept this submission. I am not able to read into that statement anything more than Mr Johnson knowing by then Mr Rogers had the painting, or so Mr Johnson thought. In fact, the painting was in Mr Rimmer's possession by this time.

[62] Secondly, I am satisfied Mr Rimmer must have acquired at least possession of the painting by 1981. I also consider it likely that Mr Rimmer paid Mr Rogers to purchase the painting. There would be no reason for Mr Rogers to part with it otherwise.

[63] Thirdly, in the usual course of events, a person who does not have title (Mr Rogers) cannot pass title (to Mr Rimmer). The relevant provision at the time of the events in question would have been s 23 Sale of Goods Act 1908, and is now s 149

Contract and Commercial Law Act 2017. Both codify the principle *nemo dat quod non habet*, that is a person cannot give that which he or she does not have.

[64] However, as mentioned above, s 5 of the Limitation Act, which continues to apply in this case, is relevant. Section 5 provides:

5 Limitation in case of successive conversions, and extinction of title of owner of converted goods

- (1) Where any cause of action in respect of the conversion or wrongful detention of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion or wrongful detention takes place, no action shall be brought in respect of the further conversion or detention after the expiration of 6 years from the accrual of the cause of action in respect of the original conversion or detention.
- (2) Where any such cause of action has accrued to any person and the period prescribed for bringing that action and for bringing any action in respect of such a further conversion or wrongful detention as aforesaid expires without his having commenced action to recover possession of the chattel, the title of that person to the chattel shall be extinguished.
- (3) Nothing in this section shall affect the provisions of subsection (1) of section 26 of the Sale of Goods Act 1908.

[65] On my reading of s 5(2), the plaintiffs' title to the painting, at the very least for the purpose of any claim against Mrs Nixon in tort, was extinguished many years prior to 2018. The effect of this extinguishment is that the plaintiffs cannot succeed on their second cause of action in conversion.

[66] That leaves the plaintiffs' claim for breach of trust.

[67] Assuming for the sake of argument Mr Rogers held the painting on trust for Mr and Mrs Johnson, I accept he acted in breach of trust by selling it or parting with possession of it to Mr Rimmer by, as I have found, 1981.

[68] The issue then becomes what Mr Rimmer knew or should have known or suspected at the time of acquisition. That is the critical time, not what he may have understood subsequently.⁶

[69] Mr Gustafson submitted several matters evidenced Mr Rimmer's lack of bona fides. These were the conflicting accounts Mr Rimmer gave, whether directly or through Mrs Nixon, as to when Mr Rimmer had purchased the painting — late 1960s/early 1970s to Mrs Nixon in about 1981, and then late 1970s/early 1980s — and whether he had paid in sterling or dollars counted against him (New Zealand introduced decimal currency in 1967). Mr Gustafson submitted Mr Rimmer only changed his account, that is to his having acquired the painting in the late-1970s/early 1980s, when he learned that Mr and Mrs Johnson had been in possession of the painting until the late-1970s.

[70] Mr Gustafson also relied on the false account of the provenance of the painting in the *Stuff* article, being that Mr Rimmer had owned the painting for about 50 years and that he had acquired it from a friend (presumably Mr Rogers) whose grandmother had purchased it from Mr Goldie's wife. Mr Gustafson submitted both of these statements were patently untrue, as they were, and could only have derived from Mr Rimmer himself.

[71] Lastly, Mr Gustafson submitted Mr Rimmer had plainly waited until Mr Rogers died (in 2011) before entering the painting for auction in 2012.

[72] As I have said, it is what Mr Rimmer knew or ought to have suspected at the time of acquisition that is critical. I have already made several references to evidence that I am required to put to one side. The gist of this evidence was that anyone who knew Mr Rogers would have known he had not come by this painting legitimately. On that basis, Mr Rimmer, his close friend, would have well understood or at least suspected that this painting was not Mr Rogers' to sell. In my view, this evidence, even if admissible, is insufficient to establish on the balance of probabilities the necessary knowledge or suspicion on the part of Mr Rimmer at the time of acquisition.

⁶ *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 (CA) 473 line H – 474 line B.

[73] I accept the matters to which Mr Gustafson referred suggest that by 2015 Mr Rimmer knew, or had at least come to suspect, Mr Rogers did not own the painting at the time he sold it. However, this was many years after the acquisition.

[74] For these reasons, I am not persuaded Mr Rimmer was on notice of a breach of trust by Mr Rogers at the time he acquired the painting, and that is the critical time.

Conclusion

[75] To conclude, the plaintiffs' claim in conversion is precluded by s 5(2) of the Limitation Act.

[76] As to the claim for breach of trust, I am unable to find Mr Rimmer was on notice of a breach of trust at the time he acquired the painting from Mr Rogers. Accordingly, that claim cannot succeed.

[77] The outcome of this case will be a significant disappointment for the plaintiffs, and Mrs Johnson in particular. It was clear from her evidence that she remains deeply attached to the painting and, quite understandably, considers that she has been wrongly deprived of something precious to her, and that this has occurred through absolutely no fault of her own. That she was deprived, either by Mr Johnson and/or Mr Rogers, is clear.

[78] The outcome may have been different had it been possible for the plaintiffs to commence proceedings earlier and/or had the main protagonists been alive at the time of trial. Unfortunately, for all involved, it is difficult to prove critical matters to the required standard so long after the events in question occurred.

[79] Lastly, I record that I issued a minute earlier this week seeking to confirm the understanding I had previously that the proceeds of sale of the painting were intact. The answer I received today is that they are not. As it turns out, by the time of that response, I was ready to issue this judgment, so nothing turns on that point.

Result

[80] I dismiss the plaintiffs' claim.

Costs

[81] My preliminary view is the parties should bear their own costs in this matter but they may make submissions if they wish.

Peters J