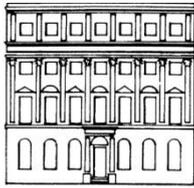


German Historical Institute
London



BULLETIN

ISSN 0269-8552

Norman Palmer:

*Emblems and Heirlooms. Restitution, Reparation, and the Subjective
Value of Chattels: A Legal Perspective*

German Historical Institute London Bulletin, Vol 34, No. 1
(May 2012), pp8-40

Copyright © 2012 German Historical Institute London. All rights reserved.

ARTICLES

EMBLEMS AND HEIRLOOMS. RESTITUTION, REPARATION, AND THE SUBJECTIVE VALUE OF CHATTELS: A LEGAL PERSPECTIVE

NORMAN PALMER

People need to have a past, because it provides a sense of security, roots; it imparts self-worth, identity. We don't notice it when it is there, we consider it a matter of course, but it is not. Children continue to look throughout their lifetime for the father or mother they have never known simply because they need to know where they come from. They will go to any lengths. Adopted children travel back to the country where they were born. Where there is a past, there is a future.¹

Introduction: The Intangible Dimensions of Tangible Things

Tangible objects come in many guises. Some draw their value from subjective association alone. The plainest thing is precious when it has personal meaning. A letter or a photograph, a wedding ring, a child's tooth, even a seaside souvenir, can revive memories and inspire joy or grief. The loss of such an item can be bitterly mourned.

Such things rarely have commercial appeal. They seldom appear at auction or in museums. Nor do they possess that ineffable mys-

The author thanks Kate Hawken and Ji-Shuen Loong for editorial assistance in producing this article.

¹ J. P. Sigmond, 'Some Thoughts on the Importance of Cultural Heritage and the Protection of Cultural Goods', *Art, Antiquity and Law*, 10 (2005), 63-71, at 67, paraphrasing David Lowenthal, *The Past is a Foreign Country* (Cambridge, 1986).

tique that attaches to great art.² Their value lies in their subjective or symbolic resonance. They are cherished because they enshrine memories and form part of a person's identity or make-up. They may be the only surviving trace of a family's history. They may even sum up a whole life.

The vitality of such an object may be unknown to anyone other than the person who senses it. A fictional example is the child's sled 'Rosebud', the name of which was on Charles Foster Kane's lips as he died. The word recalled a childhood loss, still poignant to a dying man some sixty years on. Only he recalled the day when, as a child, he was parted from his family, and his plaything was taken from him. The secret of its meaning died with him. In that case, as in so many, a humdrum chattel represented a lost life and a lost world.

In no context, perhaps, can this symbolism be more potent or poignant than that of chattels owned by families scattered and ravaged by the Holocaust. In such a case the object may be the sole tangible reminder of a life irretrievably erased or scarred by murder, persecution, or displacement: 'a bridge back to a world destroyed.'³ It is hard to imagine a more poignant tale of symbolic association than that of the suitcase, discovered by Mr Michel Levi-Leleu in 2005

² The nature of art has engaged the attention of philosophers as well as jurists. Prominent critics in this regard are Immanuel Kant and Leo Tolstoy: see the latter's *What is Art?* trans. Richard Pevear and Larissa Volokhonsky (London, 1995). Professor Stephen Guest has suggested in 'The Value of Art', *Art, Antiquity and Law*, 7 (2002), 305-16, at 307 that the value of art 'is to be found in the value of its own existence, independent of its doing anything for us. We admire art because of this independent value, and so admire it as "art for art's sake". Looking at art this way introduces us to art's austere quality, through which we respect art, not for anything it "does" for us, but because understanding it properly requires understanding something of importance, perhaps great importance about the world. And so we say that we want to look at a painting by Van Gogh because it is wonderful, not that it is wonderful because we want to look at it. This way of looking at art borrows from the great German philosopher Kant, who not only asserted art's independent value, but took the point even further. The appreciation of art, he thought, was akin to moral appreciation and capable of expressing our highest aspirations.'

³ The phrase is that of Edward Serotta, 'Preserving Jewish Memory', *The Library of Rescued Memories: Pictures and Stories from the Centropa Interviews in the Czech Republic* (Vienna, 2009), 14-16, at 14.

Articles

at an exhibition at the Shoah Memorial Museum in Paris where it had arrived on loan from the collections of the Auschwitz-Birkenau State Museum in Oswiecim. He claimed that the suitcase had belonged to his father Pierre Levi, who was murdered at Auschwitz and whose name and address ('86 Boul, Villette, Paris Pierre Levi') were inscribed on a tag attached to the object. To many, the argument for restitution was compelling: principles of property, inheritance, tradition, and the redress of wrongdoing collectively appealed for the return of the thing to Pierre Levi's descendants. But even so graphic an instance of subjective association embodied more complex values. The Auschwitz-Birkenau Museum resisted the return to the family on the ground that the suitcase no longer symbolized the experience of a single family alone. It had taken on a new character as a metaphor of the panoply of wrongs committed against the Jewish population of Europe in the years 1933 to 1945. Thus interpreted, the suitcase had a part to play in the transcendent imperative to ensure that those evils were never forgotten.⁴

Of course the history or hinterland of an everyday thing may increase its monetary worth. Ordinary things intersect with great people or great events. We are accustomed to see inherently mundane articles achieve high prices because they once belonged to somebody famous or reflect some historic occasion. The 'royal or romantic' association of an item of jewellery, we are told, may great-

⁴ In the words of the Press Release, issued when the claim was settled in 2009: 'The International Auschwitz Council . . . contended that everything left from the camp should remain inviolate and integral . . . The suitcases belonging to people deported to Auschwitz are among the most priceless material testimony to the tragedy that occurred here. They constitute a small remainder of the property left behind by the victims of the gas chambers, and the names on some of them are among the few proofs of the death of specific individuals in Auschwitz . . . [T]he Auschwitz Museum . . . regards the suitcase as one of the rare objects symbolizing and representing the memory of the persons deported to the camp, and . . . wishes to express the deepest understanding of the emotions of the families of Shoah victims.' Under the settlement, the Auschwitz-Birkenau Museum decided to leave the suitcase in the Paris Shoah museum on a long-term basis. Mr Levi-Leleu's family, in turn, renounced its claims. See 'Settlement reached over Auschwitz Suitcases' in the News 2009 section of *Memorial and Museum: Auschwitz-Birkenau* <en.auschwitz.org/m/index.php?option=com_content&task>, accessed 28 Feb. 2012.

ly increase its desirability to investors and connoisseurs.⁵ Earlier this century, the bullet-pierced windscreen of the Austro-Daimler in which the Archduke Franz Ferdinand and his morganatic wife the Countess Sophie Chotek were murdered at Sarajevo was consigned for auction at an estimated 2,300 euros, though 'it probably sold for considerably more'.⁶ Objects associated with Adolf Hitler may be a macabre and tainted class of memorabilia, but the market for them is by no means stagnant.⁷

Converting celebrity value into money is an elusive enterprise. Such value can, however, be objectively verified, whether through competitive bidding at auction or other professional processes. By contrast, the more private and personal items that reflect a lost childhood or family may have no commercial worth at all, or at least none worth litigating over. In general, they are unlikely to find their way into a museum. Even if they do enter a museum their commercial worth remains low. Their value lies in their memories, and those memories may be secret.

One aim of this article is to evaluate the relative importance of such subjective association in the eyes of the law. The article considers the question both in the general context of personal property and through the specific prism of Holocaust-related objects. It seeks to inquire how far our approach to the restitution of Holocaust material reflects and respects the unique subjective value of individual objects to specific claimants, whether these are individuals, families, or nations.

General Litigation Surrounding Personal Chattels

Personal Objects: Does the Law Endow them with Special Value?

The common law of England is not a sentimental institution. One can cite numerous cases where judges have subordinated individual jus-

⁵ *Jabir v. H Jordan & Co* (unreported, 13 Dec. 2010) upheld by the Court of Appeal [2011] EWCA Civ 816.

⁶ Sigmond, 'Some Thoughts on the Importance of Cultural Heritage', 65.

⁷ For recent instances of proposed sales of such material, see 'Auction Row over Hitler Desk Set on which the Munich Pact was Signed', *Daily Telegraph*, 15 Nov. 2011; 'Hitler's Sheet to be Sold', *The Times*, 24 Nov. 2011.

Articles

tice to the relentless dictates of legal principle.⁸ But the law is not without compassion in the context of human relationships with chattels. For example, when granting compensation for the violation of a chattel (typically by theft, damage, or unlawful detention) modern courts sometimes pay regard to an individual's personal association with that chattel.⁹ Where damages are sought against the wrongdoer the sum awarded may thus exceed the market worth of the object.¹⁰

A recurrent medium for such awards is litigation over pet animals. Older case law was reluctant to award more than the objective value of a family pet. In Tasmania in 1927, for example, the Supreme Court awarded a mere £2 Australian for the loss of a pet cat that had been unlawfully shot by a neighbour.¹¹ Later authority seems more willing to accept that the owner's loss may include an element of quantifiable subjective value. In Canada, damages to reflect an owner's sentimental attachment to a cherished pet have been awarded against an airline through whose default one dog was killed and

⁸ e.g. Mr Justice Littledale in *Balme v Hutton* (1833) 9 Bing, 471 at 507: 'I think the hardship of a case ought not to form a principle on which the law should act. Society is so formed, that many people fill relations which appear to induce great hardships. If these hardships be of sufficient importance for the legislature to interfere, they will do so.' In the same case at 512 Mr Justice Park said: 'The hardship . . . can be no argument if the law be clear . . . the Court must be governed by the principles of law, and not by the hardship of any particular case.' See also, among numerous similar remarks, those of Mr Justice Patteson and Baron Alderson in *Garland v Carlisle* (1837) 4 Cl & Fin 693 at 740-1 and 747 respectively. These and other cases are discussed in Norman Palmer and Ruth Redmond-Cooper (eds.), *Taking it Personally: The Individual Liability of Museum Personnel* (Builth Wells: Institute of Art and Law, 2011).

⁹ Sometimes they will also inquire whether the violation was vindictive as opposed to inadvertent. This may affect liability and/or the damages awarded. For an early case see *Whittingham v Ideson* (1861) 8 Upp Can LJ 14; Norman Palmer and Anthony Hudson, 'Damages for Distress and Loss of Enjoyment in Claims involving Chattels', in Norman Palmer and Evan McKendrick (eds.), *Interests in Goods* (2nd edn. London, 1998), ch. 34, 867-95, at 882 n.98.

¹⁰ For a detailed older analysis of Commonwealth and US case law in this field, see *ibid.* ch. 34.

¹¹ *Davies v Bennison* [1927] Tas LR 52.

another severely injured,¹² or a boarding kennel that allowed a dog to escape, from which adventure it never returned.¹³ The latter case was cited with approval in a controversial recent decision in an English immigration appeal about an asylum seeker who relied on his acquisition of a cat in England as evidence that he had put down roots in England and developed a family life.¹⁴

Such awards remain rare and one should be wary of overstating them. Moreover, they are generally modest in quantum.¹⁵ But a comparable logic is reflected in cases about inanimate chattels. It has, for example, been held reasonable for the owner of a car to which the owner attached exceptional sentimental importance, and on which he had lavished exceptional attention over the period of his ownership, to spend a greater sum in reinstating the car to its former condition after it was negligently damaged than the amount of its resultant market value. Where the owner of a much-loved MG car named 'Mademoiselle Hortensia' spent a substantial sum in having the car repaired following its damage through the collapse of scaffolding, he was allowed to recover that sum against the scaffolding company whose negligence had led to the damage. The claim succeeded des-

¹² *Newell v Canadian Pacific Airlines Ltd* (1976) 14 OR (2d) 752; and see *Watt v Logan* (1945) 61 Sh Ct Rep 155 at 158.

¹³ *Ferguson and Hagans v Birchmount Boarding Kennels Ltd and Robert Jones and Bert Barrett* (2006) 79 OR 681; and see *Borza v Banner* (1975) 60 DLR (3d) 604; *Somerville v Malloy* [1999] OJ No 428.

¹⁴ Decision of Immigration Judge Mr J. R. Devittie at para 15: 'The evidence concerning the joint acquisition of Maya [the cat] by the appellant and his partner reinforces my conclusion on the strength and quality of family life that the appellant and his partner enjoy . . . The Canadian courts have moved away from the legal view that animals are merely chattels, to a recognition that they play an important part in the lives of their owners and that the loss of a pet has a significant impact on its owner.'

¹⁵ In other contexts the amount of an award for personal anguish caused by a defendant's wrongdoing can be substantial. A vivid example in the field of cultural property is the award of 80,000 NIS for the personal anguish caused to the scholar Elisha Qimron by the violation of his copyright and moral right relating to the defendants' publication of the 'Deciphered Text' produced from the Hidden Scrolls (or Dead Sea Scrolls): *Eisenman v Qimron; Shanks, Robinson and the Biblical Archaeological Society v Qimron* (29 Aug. 2000), a decision of the Supreme Court of Israel sitting as the Appellate Court for Civil Appeals.

Articles

pite the defendant's argument that the car was beyond economic repair and the proper result would have been to write the car off and allow the owner its market value immediately before the damage.¹⁶ Mr Justice Edmund Davies observed that the claimant had owned the car for thirteen years, had devoted himself to its care and maintenance over that time, and clearly believed that 'there was no other car like it'. These factors entitled the claimant to recover the greater cost of repairing the car, unless it was unreasonable for him to pursue that course as opposed to replacing it. The burden of proving that repair was an unreasonable option lay on the defendant and the defendant had not discharged it.¹⁷

Other cases are in line with this approach.¹⁸ The loss of a rosary through the defendant's want of due care resulted in damages to represent its sentimental value.¹⁹ The negligent loss of a long-standing stamp and glass collection built up almost from childhood led to an award of damages to represent the owner's distress and injured feelings.²⁰

Compared to the ravages suffered by Holocaust victims these cases may seem trivial, but that, in a sense, is the point. If the law is prepared to award damages for the personal hurt suffered through the loss of a treasured thing in conditions that fall infinitely short of the terrors of the Holocaust, it could hardly object in principle to a subjective measure of compensation for an owner whose whole family or way of life had been destroyed.

¹⁶ *O'Grady v Westminster Scaffolding* [1962] 2 Lloyds Rep 238; Palmer and Hudson, 'Damages for Distress', 889-90. And see *Scobie v Wing* (1992) 2 WWR 514; Palmer and Hudson, 'Damages for Distress', 892-4.

¹⁷ As to the general requirement that damages founded on the cost of reinstatement (as opposed to diminution in value) must be reasonable in order to be recoverable, see *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (swimming pool) and the archive case of *Aerospace Publishing Ltd v Thames Water Utilities Ltd* [2007] EWCA Civ 3, below p. 17.

¹⁸ e.g. *Piper v Darling* (1940) 67 LL L Rep 419 at 423 per Mr Justice Langton (damages reflecting an 'element of sentiment and predilection' in regard to a negligently damaged yacht); Palmer and Hudson 'Damages for Distress', 877 n. 70.

¹⁹ *Zien v Queen* (1984) 20 DLR (4th) 283 at 294-5.

²⁰ *Graham v Voight* (1989) 95 FLR 146; and see Norman Palmer (ed.), *Palmer on Bailment* (3rd edn. London, 2009), para 37-046.

Again, however, such cases should be approached with caution. There are decisions on the other side of the line,²¹ though mainly of an older vintage.²² The leading case on damages for disappointment involved a claim for breach of contract,²³ and says nothing about the sort of liability that might arise, for example, in tort, where a defendant steals a chattel of sentimental value or, having acquired first possession of it in good faith, refuses to surrender it, in defiance of the owner's enduring title.

Specific Redelivery and Injunction

The principle of subjective association is not, however, entirely novel. As early as *Somerset v Cookson*²⁴ in 1735 we find the judge observing that it would be 'very hard' if somebody who came by an object of antiquity through trespass or other wrong 'should have it in his power to keep the thing paying only the intrinsic value'. In fact this was a case where recognition of the special value of a particular chattel found expression not in the form of an enhanced award of damages, but through the grant of a court order for delivery up of the object. It is well established that a person whose chattel has been wrongfully taken or detained may, at the court's discretion, obtain an order for the return of the chattel, rather than for the mere payment of damages, where financial compensation alone would be an inadequate remedy. Such inadequacy may be apparent where the chattel is unique, irreplaceable, or integral to some ancient family tradition. A vivid early example is *Pusey v Pusey*²⁵ in 1684, where the court ordered specific redelivery of the ancient horn by which the Pusey estates were held.

Heirlooms are a particularly compelling illustration of the sort of chattel that is likely to attract specific relief. Other ancient cases

²¹ As to cars see *Darbishire v Warran* [1963] 1 WLR 1067, distinguishing *O'Grady*. And see *Jennings v Wolfe* [1950] 3 DLR 442 (trophy bearskin); *Abbass v Hoyt's Moving and Storage Ltd* (1981) 47 NSR (2d) 648 (memorabilia).

²² For an extreme case see *Miner v Canadian Pacific Railway Co* (1911) 18 WLR 476; Palmer and Hudson 'Damages for Distress', 884.

²³ *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732.

²⁴ (1735) 3 P Wms 390.

²⁵ (1684) 1 Vern 273.

Articles

involve successful claims for the return of family pictures²⁶ and a Roman altar.²⁷ There is, of course, every reason why the general principle should apply in similar manner to emotionally charged objects that were spoliated during the Holocaust, such as a painting given as a wedding present that counts as a 'childhood icon'.²⁸ Indeed the circumstances in which a Holocaust-related object became lost (such as murder, forced flight, or other persecution) may intensify the moral imperative that it shall be returned to the victim's family. If the Auschwitz suitcase had come into the possession of a private collector and Mr Levi-Leleu had established a valid legal claim, it seems unthinkable that a court would award him the mere economic value of the suitcase, in preference to an order for its return.

The thinking behind cases like *Somerset v Cookson* and *Pusey v Pusey* bears a family resemblance to a more recent decision on the equitable remedy of injunction.²⁹ In a recent dispute about the title to certain watches that once belonged to Sir Edmund Hillary, the children of his first wife (who had died in 1975) sought an injunction to restrain Sir Edmund's widow Lady Hillary from allowing them to be sold at auction. Lady Hillary had already consigned the watches to an auction house at Geneva and now argued that the balance of convenience favoured maintaining the status quo, allowing the sale to proceed, and granting the offspring damages in the event that title to the watches was ultimately shown to lie with them. An important strand in her defence was the presence of a term, in her contract with the auction house, that purported to oblige her to pay the auction house the commission that it would have earned (and its costs incurred to date) if the watches were withdrawn from sale. Having decided that the children had a strong arguable case for asserting title to the watches, Mr Justice Venning held that the injunction should lie. In his words:

²⁶ *Lady Arundell v Phipps* (1803) 13 Ves 95.

²⁷ *Somerset v Cookson* (1735) 3 P Wms 390.

²⁸ This term was applied to the von Kalckreuth painting *The Three Stages of Life* successfully claimed by Marietta and Ernest Granville while it was on loan to the Royal Academy from the Neue Pinakothek in Munich. See Norman Palmer, *Museums and the Holocaust* (Builth Wells: Institute of Art and Law, 2000), 19.

²⁹ *Hillary v Hillary* [2010] NZHC 1985 (12 Nov. 2010), HC Auckland.

Emblems and Heirlooms

As to the balance of convenience, certainly at least in relation to the Everest watch and Peter's watch, both have an intrinsic value in themselves to the family of Sir Edmund, which cannot be addressed by money. Damages would not be an adequate remedy. Those factors support the issue of an injunction.³⁰

Archives and Reinstatement

Even a corporation may, it seems, have a uniquely personal interest in tangible property of a cultural or historic nature that it has diligently accumulated, catalogued, and archived over its lifetime. The dispute in *Aerospace Publishing Ltd v Thames Water Utilities Ltd*³¹ was whether the proper redress available to the owner of an archive for the substantial destruction of the archive by flooding should take the form of a financial payment to represent the diminution in value of the archive or should rather consist of a sum of money to reflect the cost of reinstating the archive. Both in principle and in quantum these two measures of assessment were significantly disparate. Lord Justice Longmore³² acknowledged that this collection of historically significant material was a distinctive creation, distinguishable both from a mere assemblage of commercial goods and from a single marketable item of high cultural and economic worth:

[T]he present case is not a case of a readily marketable asset, nor yet of a unique chattel like a rare manuscript, a Picasso painting or a Stradivarius violin. In the first sort of case little difficulty will arise; reinstatement will not usually be appropriate as it would not be reasonable to reinstate if an article can be bought in by the claimant at a lower cost. In the case of a unique chattel it may be reasonable to reinstate but it will not be too difficult, by reference to past auction prices, to assess realistically a market value even though the chattel is itself unique. It will then be easy to compare figures for reinstatement and market value.

³⁰ Ibid. at para 17. Cf. *Tudberry v Sutton* (1998) 20 Qld Lawyer Reports 13 at 21 per Judge McGill QC.

³¹ [2007] EWCA Civ 3.

³² At paras 50–2.

Articles

Lord Justice Longmore then proceeded to explain the peculiar character of the archive and his sympathy for the arguments in favour of its reinstatement. In so doing he likened the archive to a human memory and described its construction as 'a labour both of love and dedication':

Plutarch . . . regarded the human memory as an archive. In a similar way the archive in the present case represents the companies' memory and, as such, is an asset whose value could in conventional parlance be described as 'priceless' and whose actual value can only be calculated with considerable difficulty . . . It was a labour both of love and dedication to build up and then catalogue the archive in the first place . . . If the archive of a famous and long-established art dealer such as the Fine Art Society Ltd or an auctioneer such as Christie's or Sotheby's were destroyed, it would be mealy-mouthed in the extreme to confine recovery to the re-sale value of individual items.

Claims by Nation-States

The philosophy of the family heirloom cases is, to some extent, matched by the modern judicial approach to claims by States for the return of looted national treasures, such as archives, art, and archaeological items. Here again the tendency is to favour an order for the return of a culturally outstanding object rather than damages. Where a foreign State can show that its domestic laws grant it a superior right of possession over undiscovered portable antiquities or other cultural objects unlawfully removed from its territory, the court will almost invariably grant to that State an order for specific restitution against the wrongful possessor. In two modern cases courts have appealed to the identity of the looted objects as 'keys to the ancient history' of the State to justify ordering their return.

In *Webb v Ireland and the Attorney General*³³ the outcome of such reasoning was to recognize that title to a hoard of valuable ninth-century ecclesiastical artefacts, found on land close to Derrynaflan Abbey, lay with the Republic of Ireland in preference to the finders,

³³ [1988] IR 353.

who were however rewarded for having declared the find. In *Government of the Islamic Republic of Iran v Barakat Galleries Ltd*³⁴ the question was whether certain provisions of Iranian law conferred on Iran the ownership of and the right of possession over antiquities that were allegedly buried on and illicitly excavated from Iranian territory. The Court replied in the affirmative. Citing the Chief Justice of Ireland in *Webb*, the Chief Justice Lord Phillips of Worth Matravers regarded it as 'universally accepted' that one of the most important national assets belonging to the people of a country consists of their heritage and of the objects that constitute 'the keys to their ancient history'; and that a necessary ingredient of sovereignty in a modern State was and should be the ownership by the State of discovered objects constituting antiquities of importance which had no known owner.

What may be true of nations may also be true of families and other communities or groups. They too may harbour a morally unanswerable need to possess the keys to their ancient history. While their entitlement may only rarely if ever be embodied in statutes, the moral demand that a family treasure be returned to that family may yet prove persuasive both within and beyond the courts. Victims of persecution whose loss has occurred through the gross violation of human rights, and for whom the contested object has a unique subjective value surpassing its mere economic worth and rendering it otherwise irreplaceable, might fairly expect an order for specific return rather than some monetary award.

Sale of Goods Cases: The Decree of Specific Performance

On occasions the commercial courts have dealt sensitively with the special interest that a collector may have in perfecting his or her acquisition of a distinctive object. Such cases involve no history of looting but a simple refusal to perform a contract. Sellers of cultural or historical objects sometimes change their minds between contract and delivery, forcing the disappointed buyer to seek redress at law. Whereas the normal remedy for a seller's failure to deliver, say, a washing machine or a cargo of salt will be a judgment for damages, the seller of a distinctive cultural object may be ordered to deliver the

³⁴ *Government of the Islamic Republic of Iran v Barakat Galleries Ltd* [2009] QB 22, [2007] EWCA Civ 1374.

Articles

exact thing. The normal mechanism to achieve this will be a decree of specific performance, justified on the ground that (as with the cases of wrongful detention of heirlooms) damages are an inadequate remedy. A serious collector may well have a sufficiently personal interest in a chattel to qualify for such an order.

A modern case in point is *Smythe v Thomas*,³⁵ where the seller had agreed to sell to a private collector a 1944 Wirraway Australian Warbird aircraft. The seller later refused to deliver the plane and the buyer sued. One of the questions before the court was whether the seller should be allowed to keep the plane and merely compensate the buyer in damages, paying him the difference between the value of the plane and the price that the buyer had agreed to pay, or should hand over the plane itself. Acting Justice Rein rejected the argument that the seller should be liable only in damages, saying 'in my view the nature of the subject of the bargain, which is not only a fine looking aircraft . . . but is a vintage and unusual item, leads me to conclude that the case is one in which . . . the relief of specific performance of the contract sought should be granted.' This case may be contrasted with an English decision over eighty years earlier, where a dealer who had bought Hepplewhite chairs for resale in his business was held entitled to damages from his seller who refused to deliver them, but failed to persuade the court to grant him an order of specific performance. In this case damages were an adequate remedy.³⁶

Holocaust-Related Objects

Is Money Ever a Sufficient Remedy?

The choice between monetary compensation and specific restitution raises a potentially delicate question for bodies that are appointed to hear claims for the return of Holocaust-related objects. In England such a body exists in the form of the Spoliation Advisory Panel. The Panel is empowered to recommend either the return of an object or the payment of a monetary sum, whether by way of compensation or *ex gratia* payment. Normally payments are recommended on *ex gratia*

³⁵ [2007] NSWSC 844.

³⁶ *Cohen v Roche* [1927] 1 KB 169.

terms, on the reasoning that the term 'compensation' should be confined to payments in respect of surviving legal rights and no legal right survives on the facts in question. It is not impossible that the Panel might be urged to take account, in deciding whether to recommend the return of the object or an *ex gratia* payment, of the nature of the original owner's relationship with the chattel. As we have seen, at common law the remedy of specific delivery is generally confined to cases where the owner's predominant subjective interest in the chattel means that damages would be an inadequate remedy. Claims relating to a merchant's trading stock might generally be expected to attract an award of damages rather than the remedy of enforced redelivery. But suppose that the dispossession occurred through the operation of racially discriminatory laws in Germany at the height of the Nazi era. The ethical demand, that such atrocities be redressed, may not be adequately fulfilled by an award of money even though the victim had acquired the chattel only in order to sell it. The mere payment of money may fall short of achieving full justice, however liberal the sum and however impersonal the victim's connection with the chattel.

Not all of the public pronouncements acknowledging the subjective value of chattels are from common law countries such as England and Australia, and not all are decisions of courts. In a determination made by the Dutch Restitution Committee in 2009, the question was whether the Committee should apply the presumption, authorized by its terms of reference, that transactions by which Jewish people disposed of precious objects of a private nature during the Nazi occupation were flawed by Holocaust-related oppression. The claim concerned certain objects that had been the property of Carl Van Lier, an Amsterdam dealer, and had since the War variously found their way into the collections of the Netherlands Institute for Cultural Heritage and the National Museum of Ethnology at Leiden. The Committee concluded that most of the objects that departed from Van Lier's stock had not been disposed of involuntarily through theft, confiscation, or coercive dealing, or any direct threat thereof. But in the single case of a hunting horn made of elephant ivory, the Committee took a different view. There was evidence that Van Lier attached personal value to the object and that it belonged to his private collection as opposed to his trading stock. Among the clues to this effect was a photographic family portrait in which Van Lier was

Articles

blowing the horn. This went to trigger the more lenient standards of proof applicable to private possessions and to justify the Committee's conclusion that Van Lier did not part with the horn willingly.

[T]he Committee feels that there is sufficient cause for another judgement with regard to one object, NK 396, an ivory hunting horn. In a family portrait of Van Lier from around 1930, he is blowing this horn. For the family, this photograph provides a salient image of their forefather and of an art object that was of unique value to him, thus giving the object an emotional value to the family.

Comparison Between the Dutch and the United Kingdom Spoliation Bodies

The Van Lier claim illustrates several differences between the Dutch Holocaust claims experience and that of the UK. One is the absence from the regulating terms of the Spoliation Advisory Panel of any formal dichotomy between commercial possessions ('trading stock') and private possessions, and of any presumption that a disposal of privately owned objects during the Nazi era was involuntary. A further point of contrast perhaps is the relative value and commercial appeal of objects claimed within the two countries. While much of the cultural material claimed in the Netherlands has been of high value, claims have also been made for a significant number of relatively everyday objects. This is consistent with the level of original takings by the Nazis and their satellites: we are told that many Dutch people owned at least one good painting or item of furniture sufficiently attractive to the predators to be filched.³⁷ It is therefore unsurprising that such objects should now be the subjects of claims. In the United Kingdom, which was never occupied or ransacked, claims are likely to be limited to things stolen on the Continent and brought into the country after the War. Once again, the main targets of such importation are likely to have been the higher-value objects, many of which will have since found their way into museums.

³⁷ Palmer, *Museums and the Holocaust*, 2-3, n. 8.

The Link Between Preservation and Value

Not all Holocaust-related objects, then, are intrinsically ordinary. Many of the paintings and other chattels claimed by Holocaust survivors or their descendants have a pronounced cultural or historical significance. The past decade has witnessed a sharp rise in the number of such claims. At the beginning of the present century the Blair government responded by establishing the Spoliation Advisory Panel. The task of the Panel was to advise the government on claims against publicly funded museums by Holocaust survivors and their families.

It comes as no surprise that most of the claims brought before the Panel have been for cultural objects of high financial value. At the risk of generalization, such objects may have stood a better chance of surviving the war because preserving them would have been a priority. There is also a better chance that the provenance of such objects will have been recorded and that their original owner will be identifiable. Such objects are more likely to be worth the cost of investing in legal advice and action. Where the law allows special redress against museums, in the shape of the Spoliation Advisory Panel and the Holocaust (Return of Cultural Objects) Act 2009, the benefits of such redress are naturally confined to those who claim objects desirable enough to have been acquired by museums.

The Spoliation Advisory Panel

The Minister for the Arts established the Spoliation Advisory Panel in June 2000 to consider claims against publicly funded museums by those who lost possession of cultural objects between the years 1933 and 1945. The Panel is entrusted with evaluating the moral quality as well as the legal force of individual claims. Paragraph 7(e) of its Terms of Reference requires the Panel to 'give due weight to the moral strength of the claimant's case' while Paragraph 7(g) requires the Panel to 'consider whether any moral obligation rests on the institution'. In the latter regard, the Panel must take into account 'in particular' the circumstances in which the object was acquired by the institution, and the institution's knowledge at that juncture of the object's provenance. The phrase 'in particular' admits of considerations other than the circumstances of a museum's acquisition, includ-

Articles

ing the basic proposition that the object was taken from the claimant without consent and in circumstances never since ratified. An innocent acquisition does not therefore necessarily denote a creditable retention. The institution may owe a moral obligation to return an object irrespective of any moral transgression on its part.

*A Survey of Claims before the Spoliation Advisory Panel*³⁸

Tate

The case of the painting *View of Hampton Court Palace* by Jan Griffier the Elder in the Tate Gallery, which was the subject of a report by the Panel in January 2001, is now well known. The children of a woman whose husband had been shot by the Nazis and who, in hiding from the Nazis in Belgium, was compelled to part with a treasured object in return for enough money to buy an apple and an egg, were awarded an *ex gratia* payment to reflect, with certain adjustments, the current market value of the work. This resolution was acceptable to the claimants and to the Tate Gallery, which was at that time debarred by law from disposing of Holocaust-related (and indeed other) objects vested in the Trustees as part of its collection. No less convenient to the Gallery was the Panel's further proposal that the payment be drawn from public funds and not from the Gallery's own resources. The award of money was supplemented by a recommendation that a commemorative notice be installed in the space adjacent to the painting, recalling the circumstances in which it was lost.

Among the significant features of the Griffier recommendation was the emphasis by the Panel on the public benefit derived from the Tate's forty-year possession of the work. This was regarded as relevant to two distinct questions: the identity of the payer of the *ex gratia* sum and the computation of the sum itself. On the first point, as we have seen, the Panel held that the payment should be made from general funds and not from the Tate's own resources. On the second

³⁸ In addition to the cases discussed below there are further reports from the Panel on claims involving the Courtauld Institute. See *Report of the Spoliation Advisory Panel on Eight Paintings in the Possession of the Samuel Courtauld Trust* (24 June 2009); *Report of the Spoliation Advisory Panel in respect of an Oil Sketch by Sir Peter Paul Rubens 'The Coronation of the Virgin', now in the Possession of the Samuel Courtauld Trust* (15 Dec. 2010).

point, the Panel held that the sum payable should include an amount for the past public enjoyment of the work in addition to its market value.

Between 2004 and 2009 the Panel reported on seven further claims for the restitution of objects in museums. In two of them – the Burrell and British Library claims – the Panel recommended the specific restitution of the work. Both recommendations were made despite the fact that a legal bar existed on the relinquishment of the work from the collection in which it resided. In the Burrell case the object was not eventually relinquished to the claimants while in the Benevento case it was.

Burrell

In 1936 a German Jewish family, who were shareholders in a prominent and reputable firm of art dealers, were subjected to a penal and discriminatory tax demand by a newly appointed tax inspector with Nazi sympathies. Being forced to sell their stock at very short notice, they consigned it to auction in Berlin. The sale arguably yielded normal market prices, but would never have occurred but for the victimization of the family. The receipts vanished immediately into the maw of the tax authorities. One senior member of the family, acutely distressed, had died of a stroke in a taxi after leaving an interview with the inspector. The rest of the family discharged the fictitious debt and fled to the United States.

One picture, thought at the time of the sale to be the work of Chardin but later discredited by Pierre Rosenberg, was knocked down to a dealer. The dealer re-sold it in Berlin shortly after the auction. The buyer was Sir William Burrell, the Scottish shipping magnate and a distinguished collector. Sir William took the work to Scotland and in 1944 he and Lady Burrell donated it, along with some eight thousand other works, to the Corporation of the City of Glasgow. The gift was made subject to an express prohibition (apparently contractual in nature) on any disposal from the collection. It denied to the donees any entitlement whatever to 'sell or donate or exchange' works from the collection.

The Panel noted the sizeable volume of works donated by Sir William and the difficult conditions under which the gift was executed. It exonerated the City of moral blame and accepted that the

Articles

Jewish family's legal title was now defunct, but held that the moral argument for redress had been amply established. Notwithstanding Sir William's embargo on disposal, the Panel recommended the return of the work to surviving members of the family. It took the view that it was arguable that the prohibition on disposal should not apply to an act of restitution in circumstances such as these, and it recommended that the City take legal advice on this question.

Contrary to the Panel's expectation, the legal advice received by the City of Glasgow did not recognize any liberty in the City to dispose of the painting in the circumstances or on the grounds stated by the Panel. In the event the parties agreed on an *ex gratia* payment, and the work remained with the City.

British Library

In 1946 a British army officer named Captain D. G. Ash offered to the British Museum a twelfth-century missal in Beneventan script. He said that he had bought it from a Naples bookseller while on active duty in 1944. In fact, the missal belonged to the Archdiocese of Benevento. It had been removed from Benevento in unidentified circumstances, not necessarily by Captain Ash. Dr Collins, the curator to whom the officer showed the missal, recommended that he investigate whether it was war loot. In 1947 the missal was offered for auction at Sotheby's in London and the Museum, having conducted no further independent investigation of its provenance, acquired it.

In a claim by the Archbishop, whose predecessor had first requested its return in 1978, the Panel concluded that on a balance of probabilities the missal was removed from the possession of the Archdiocese during or shortly after the hostilities that affected the region in 1944. It followed that the removal occurred within the time span (1933–45) stipulated in the Panel's terms of reference. The Panel further concluded that the Museum had paid insufficient regard to the prospect of unlawful removal when it acquired the work, and that the moral case for restitution was made out.

As with the Burrell claim, the Panel took the view that neither the admitted extinction of the Archdiocese's legal title by lapse of time, nor the existence of a legal bar to disposal (in this case, a statutory bar imposed by the British Library Act 1972) should inhibit it from recommending that the object be returned. The Panel proposed not only

(i) that the missal be returned, but also (ii) that the British Library Act 1972 be amended to make this possible, and (iii) that until such amendment was made the missal should be sent to Benevento on loan.³⁹

Both the terms of the preliminary loan to Benevento, and the form of the required statutory amendment to the British Library Act 1972, continued to be debated over a long period after the Panel's report. In the event the Missal did not finally return to Benevento until early in 2011. Meanwhile the subtle and delicate political considerations that bear upon any prospective amendment of UK national museum statutes had led the British Museum in another case to explore an alternative route to achieve the power to renounce objects from its collection.⁴⁰ The occasion for this development was a claim for the restitution of four Old Master drawings bought by the Museum in 1946. The Gestapo had in 1939 seized the drawings from Dr Feldmann, a Jewish lawyer in Brno in Czechoslovakia, who was later murdered by the Nazis. The Chancery Division of the High Court, though sympathetic to the claim and to the Museum's desire to honour it, held that the provision on which the Museum relied (section 27 of the Charities Act 1993) did not grant to the Museum any overriding power of relinquishment, such as to enable the Museum to disregard the prohibitions on disposal in the British Museum Act 1963.

Ashmolean

In 2000 descendants of the deceased Jewish banker Jakob Goldschmidt laid claim to a work by Mair von Landshut, *Portrait of a Young Girl in a Bow Window*, now held by the Ashmolean Museum. Goldschmidt had owned the painting in Germany before the Second World War. The Ashmolean had accepted it as a bequest from the estate of William Spooner in 1967, knowing at the time that it had belonged to Goldschmidt between the wars.

The inter-war history of the work was one of the matters in dispute. Following the economic crisis of 1929, Goldschmidt had been

³⁹ It will be seen from this claim that both the historical sweep and the material scope of the Panel's jurisdiction are wide. The victim was a religious institution, there was no direct element of racial persecution, and it is at least as likely that the work was removed by Allied as by Axis forces.

⁴⁰ See below.

Articles

obliged to commit many of his art objects towards the discharge of debts incurred on the collapse of the Danatbank, which he had founded. The relevant instruments of commitment were made first with the Danatbank itself and latterly with the Thyssen Iron and Steel Works. The Ashmolean contended that the von Landshut was among the committed works, and that its sale at auction in 1936, far from being an involuntary effect of Nazi policy and/or Goldschmidt's Jewish identity, followed from the agreement made by Goldschmidt in 1932 with the Thyssen organization, by which Thyssen were to manage Goldschmidt's debts. By the time of that sale, Goldschmidt himself had already (in 1933) departed for the USA.

The heirs alleged that Goldschmidt had continued to own the work until its sale in 1936, that it was not among the works secured towards the payment of his debts, that even if it was thus secured it had been secured only by a pledge, which did not transfer ownership to his creditors, that the sale of the object that was Goldschmidt's enduring property was a forced sale vitiated by material duress and/or the generally oppressive conditions afflicting Jews in Germany, and that those general conditions had prevented Goldschmidt from redeeming his financial position and discharging whatever debts (if any) the work had been sold to satisfy. On the strength of these assertions, the heirs argued that the proper moral outcome was the return of the work to them from the Ashmolean.

The Spoliation Advisory Panel rejected this analysis, holding in effect that the work was among those secured in favour of Goldschmidt's creditors, that the security executed by Goldschmidt gave to the creditors both ownership of the work and the right to sell it on default, that the sole occasion for the sale was the failure of Goldschmidt to discharge the secured debts by other means, and that both Goldschmidt's inability to redeem his finances and the consequent sale of the von Landshut were causally unconnected with and untainted by the generally oppressive conditions afflicting Jewish people in Germany over the period in question.

The Panel further held that the Ashmolean, having been aware on its acquisition that the work had once belonged to Goldschmidt, had reasonably and properly concluded that his cessation of ownership stemmed from general and personal financial crises. It followed that the Ashmolean could not be visited with any moral censure in respect of the manner of its acquisition, or indeed in respect of its

response to the claim: 'When the Painting was bequeathed to the Ashmolean in 1967 there was no reason to suspect that it could be the subject of a spoliation claim. It must also be remembered that the circumstances of the Danatbank's collapse and Goldschmidt's liabilities were internationally known and easy to reference. Thus it would have been natural to assume that the Painting had been sold in 1936 to meet Goldschmidt's debts.'⁴¹ The Panel accordingly recommended that no action be taken in response to the claim.

The Rothberger Porcelain Claims: British Museum and Fitzwilliam Museum

On the application of the claimant, Mrs Bertha Gutmann of New Jersey, and with the consent of the museums concerned, the Panel considered jointly two separate claims concerning porcelain items. The first item was held in the collection of the British Museum, and the second in the collection of the Fitzwilliam Museum. Both items had allegedly been taken by the Gestapo in 1938 from the claimant's uncle, Heinrich Rothberger, in a seizure substantiated by authoritative historical research published in 2003 on Mr Rothberger's art collection. Neither Museum disputed the claimant's assertion of entitlement to the items. The claimant was able to produce for the Panel a series of wills of family members that established her sole entitlement to the objects.

Identity of the British Museum item. The British Museum Curator of Pre-History and Europe advised the Panel that she considered it very likely that the piece in the museum collection was the piece owned by the claimant's uncle. Her opinion was based, among other factors, on the description of the object in a publication of the time, the rarity of the object, and the fact that no others similar to it had been traced to date. It was, in her view, also unlikely that the piece would have been disposed of before the Gestapo seized the collection. The piece had been presented to the British Museum by a member of staff in 1939 and, though it was not known how he acquired it, the Museum accepted that he might have seen it in Vienna and known the Rothberger collection. Accepting the curator's reasons, the Panel accepted

⁴¹ *Report of the Spoliation Advisory Panel in respect of a Painting held by the Ashmolean Museum in Oxford* (1 Mar. 2006), para 47.

Articles

that the Museum piece was the piece formerly owned by Mr Rothberger.

Identity of the Fitzwilliam item. The Director of the Fitzwilliam Museum advised the Panel that a former director had bequeathed the item to the Museum in 1960. The former director had bought it prior to October 1948, when it was valued by Sotheby's valuation at his home in Cambridgeshire, and stated by Sotheby's to be from the Rothberger Collection. The exact circumstances in which the donor acquired the item were unknown. While inconsistencies in the references to the Rothberger item and the Fitzwilliam item in the 1938 sale catalogue meant that the two items could not conclusively be said to be one and the same, the Panel concluded that it was likely that the Fitzwilliam item, having regard to its size, form, decoration, label, and Sotheby's statement, had indeed belonged to Rothberger. The Panel therefore accepted that the museum piece was formerly the property of, and had been taken from, Heinrich Rothberger.

The Panel went on to conclude that both museums now had unchallengeable legal title to the porcelain in their possession. The foundation for this view was that any once-existent claim was now time-barred under the Limitation Act 1939. Further, in the Panel's view the museums had acquired the objects in good faith. The British Museum had exercised acceptable museum practices characteristic of the era, whereas the Fitzwilliam Museum, while perhaps under a heavier obligation by the 1960s to inquire into provenance, was under-resourced and could not therefore be criticized for the measures and practices that it exercised at that time. The Panel further observed that, whereas any relinquishment of the British Museum piece was prohibited under the British Museum Act 1963, no similar statute prevented the Fitzwilliam Museum from relinquishing the item in its possession.

Having concluded that there was no claim at law, the Panel went on to consider the moral position. It acknowledged that the moral basis for each claim was substantial. As to the British Museum item, the Panel acknowledged that the claimant would ideally have preferred specific restitution, as she had sought for the Fitzwilliam piece. In the circumstances, however, it accepted that the preferable solution was to recommend (i) an *ex gratia* payment reflecting the contemporary value of the item as appraised by independent valuers, combined with (ii) a public acknowledgement of the item's prove-

nance, and of the goodwill of the successor to Mr Rothberger, in any future display or publication of the item. The Panel took account of three independent capital valuations, and of the likely insurance costs had the items remained with the claimant's family, in reaching a recommended valuation of £18,000. It further recommended that such payment be made by the state from central funds and not by the Museum. This recommendation was considered to conform to the general advice of the Lord Chancellor, and to reflect a fair solution, given that the tax paying public will be able to continue to study the item and derive benefit from it. In relation to the Fitzwilliam item, the Panel concluded that, while the piece was of considerable importance to the Museum's collection, the moral demands of specific restitution outweighed this consideration and that specific restitution should be made.

Some Observations on the Spoliation Advisory Committee Claims

The Subjective Element

While all of the foregoing items had an objective money value, some at least would also have been personally meaningful, not only to the original owners but to their descendants and family. Many were privately collected by connoisseurs, who might be expected to cherish such things for their own sake. Many were taken in barbarous and discriminatory conditions that cried aloud for atonement. All those objects that had belonged to private persons recalled a past way of life that had been irreversibly mutilated. Such circumstances would have intensified the moral impulse towards restitution in cases where the loss was attributable to Nazification. But none of the claimants sought any independent financial redress for the personal anguish that they suffered in consequence of their being deprived of the objects. This may have been because there was no reprehensible conduct by the particular respondent,⁴² though in principle that alone might not have been a barrier.⁴³

⁴² The one exception to this remark was the Benevento claim, and there the claimant was in effect (if not nominally) an institution.

⁴³ It will have been noted that the Panel is empowered to make money awards in place of the specific return of works. In the two cases where the Panel proposed a money award (Griffier/Tate and Rothberger/British Mu-

Articles

Power to Renounce

Statutory prohibitions on disposal have until recently dominated the claims brought against national museums. Apart from the Benevento missal and Fitzwilliam porcelain claims, there has been no single case in which return was recommended and return has actually yet taken place. In *Attorney-General v Trustees of the British Museum*,⁴⁴ the British Museum tried to avoid the need for legislative amendment by recruiting section 27 of the Charities Act 1993 to justify the return of works that the Museum felt morally obliged to return. The failure of this attempt left the route to restitution unresolved and intensified the demand for a clear source of authority by which national museums like the British Museum could relinquish Holocaust-related cultural objects when they considered the circumstances to justify the release. In due course the Government issued a consultation paper.⁴⁵ It was not, however, until four years after the *British Museum* case that the path was unblocked. This occurred through the enactment of the Holocaust (Return of Cultural Objects) Act 2009, examined below.

The claim in *Attorney-General v Trustees of the British Museum* involved four Old Master drawings taken by the Gestapo at Brno in March 1939 from the Czech lawyer and collector Dr Arthur Feldmann, who was imprisoned and subsequently murdered. All four drawings were later acquired by the British Museum: three by purchase and one by bequest. The Museum wished to return the drawings, contending that it had a moral obligation to do so. But its application on that ground to the Chancery Division of the High Court failed. The Vice-Chancellor held that the Charities Act could not be invoked to override the statutory prohibition on disposal.

The story did not end there. Following the decision of the High Court, the claimants moderated their claim to one for financial payment, and the parties jointly referred the claim to the Spoliation Advisory Panel, which upheld it. The drawings remained in the Mu-

seum), the claimants were willing to accede. It is a question whether the refusal of a claimant who is unwilling to accept money should conclude the matter and whether money can include a sum to represent distress. The Panel can also recommend commemorative and conciliatory action.

⁴⁴ [2005] EWHC 1089.

⁴⁵ *Restitution of Objects Spoliated in the Nazi Era: A Consultation Document* (July 2006).

seum, and Dr Feldmann's descendants received a recommended *ex gratia* sum of £175,000. This sum comprised a contemporary market valuation of £186,000 from which £11,000 was deducted to take account of potential insurance and sale costs that the claimants might reasonably have been expected to incur had they possessed the works and decided to sell them. The Panel further recommended that the sum be paid from central funds rather than by the British Museum.

Nor, as we have seen, did the story end with the settlement of the particular claim. Both the Feldmann case and that of the Benevento missal raised in sharp focus the inconvenience of those statutory fetters on disposal that inhibit a museum from adopting the morally imperative solution of relinquishing spoliated objects. The scope and content of legislative amendments designed to relax these fetters were in due course the subject of a consultation document published by the Department of Culture, Media and Sport.⁴⁶ At that time it was the apparent view of the DCMS that the statutory power of release recommended in the Benevento claim should be effected by separate and specific legislation, while the power to release objects in response to more 'mainstream' claims (such as Burrell or the British Museum) should be conferred by general legislation, but on terms circumscribed by some such phrase as 'in circumstances directly related to' or 'arising or resulting' from the actions of the Nazis, their collaborators or allies.⁴⁷ In fact, the outcome was a single piece of legislation, the Holocaust (Return of Cultural Objects) Act 2009.

The New Statutory Power to Transfer Objects from Collections

Summarized broadly, the Holocaust (Return of Cultural Objects) Act 2009 enables certain national institutions in the United Kingdom to release Holocaust-related objects from their collections, and to transfer those objects to claimants including Holocaust survivors or their descendants.⁴⁸ There had for some time been disquiet about the

⁴⁶ *Restitution of Objects Spoliated in the Nazi Era: A Consultation Document* (July 2006).

⁴⁷ *Ibid.* paras 3.1 to 3.24.

⁴⁸ By section 4(2) the Act extends to England and Wales, and Scotland. The heading to section 2 of the Act reads 'Power to return victims' property'.

Articles

British Museum's perceived inability to make restitution to the descendants of Dr Feldmann. In 2005, as we have observed, the Chancery Division of the High Court held that it was impermissible to override the constraints imposed by the British Museum Act by an appeal to section 27 of the Charities Act 1993.⁴⁹ It became clear to the government that new legislation was needed. As we have seen, a Consultation Paper seeking advice on the potential form of that legislation was published in 2006.⁵⁰

The new legislation is tightly drawn, both in regard to the institutions covered,⁵¹ and in regard to the material that might be relinquished. It is couched in discretionary terms and at no point mandates the return of any object. So much is plain from its long title, 'An Act to confer power to return certain cultural objects on grounds relating to events occurring during the Nazi era'. By section 2(1) of the Act, any institution to which the Act applies may transfer an object from its collections if two conditions are met. The first condition, imposed by section 2(2), is that the Advisory Panel has recommended the transfer. The second condition, imposed by section 2(3), is that the Secretary of State has approved the Advisory Panel's recommendation.⁵² The foregoing power does not affect, and thus cannot enable an institution to override, any trust or condition subject to which any object is held. So much is stipulated by section 2(6), which resembles in this regard the equivalent provision in section 47(4) of the Human Tissue Act 2004.

⁴⁹ *Attorney-General v Trustees of the British Museum* [2005] EWHC 1089 (Ch).

⁵⁰ Above, n. 45.

⁵¹ These are prescribed by section 1 of the Act, and include the Trustees of the British Museum, the Trustees of the Imperial War Museum, the Board of Trustees of the National Gallery, the Board of Trustees of the Wallace Collection, the Board of Trustees of the National Museums and Galleries on Merseyside, and the Board of Trustees of the National Museums of Scotland. This list is not exhaustive. By section 2(4) the Secretary of State may approve a recommendation for the transfer of an object from the collections of a Scottish body only with the consent of the Scottish Ministers. By section 2(5) 'Scottish body' means the Board of Trustees for the National Galleries of Scotland, the Trustees of the National Library of Scotland, and the Board of Trustees of the National Museums of Scotland.

⁵² The power conferred by section 2(1) 'is an additional power': section 2(7).

By section 3(1), the term 'Advisory Panel' means for the purposes of the Act a panel for the time being designated by the Secretary of State for those purposes. The Secretary of State may designate a panel for the purposes of this Act only if the panel's functions consist of the consideration of claims which (a) are made in respect of objects, and (b) relate to events occurring during the Nazi era.

Aside from various provisions related to the coming into force of the Act,⁵³ the sole outstanding provision of the Act is the sunset clause contained in section 4(7). Under that provision, 'This Act expires at the end of the period of 10 years beginning with the day on which it is passed'.

The fact that the Act authorizes an institution to transfer an object from 'its' collections indicates with reasonable clarity that relinquishment is authorized only where the object has formerly become the property of that institution. On this analysis there is conversely no statutory authority to relinquish where the institution is merely in possession of the object and does not own it. It can hardly be supposed that the Act empowers an institution to dispose of an object that is not its own property. If, therefore, there is any realistic prospect that a Holocaust-related object remains the property of some person other than the institution, the statutory enablement may not apply and the institution would need to take further advice before relinquishing that object. Of course, if the owner of the object is the claimant now seeking its transfer there would seem to be no pre-existing bar on its release by the institution to that party, and the Act is unnecessary to achieve that: the institution would simply be returning the object to the party who has legal title. Moreover, there are many cases (probably the majority) where, however deplorable the original deprivation, the institution is in fact the current owner. So much is clear from the substantial number of cases before the Spoliation Advisory Panel where the Panel has concluded, or the parties have conceded, that the victim's original ownership is defunct.

⁵³ Section 4(3): 'The preceding sections of this Act come into force on such day as the Secretary of State may by order appoint.' By section 4(4): 'An order may make different provision for different purposes.' By section 4(5): 'Before appointing a day for the coming into force of the preceding sections of this Act so far as they relate to Scottish bodies the Secretary of State must consult the Scottish Ministers.' By section 4(6): ' "Scottish body" has the meaning given by section 2(5).'

Articles

But in cases where there might exist other potential claimants, capable of asserting title, it might be imprudent of the institution to assume that it owns the object and that the Act itself justifies release to the immediate claimant. Such a situation might arise where family members are in disagreement (or have simply not been consulted) about the ownership and desired destination of the object.

Conclusion

The enlarged ability of national museums to relinquish Holocaust-related objects, introduced by the Holocaust (Return of Cultural Objects) Act 2009, gives statutory recognition to the value of a claimant's personal association with such an object. It impliedly acknowledges that sometimes only the restitution of the object (as compared, for example, to a money payment) is an appropriate response to the claimant's sense of personal loss.

The fact that some Holocaust-related objects are of minor economic value but substantial personal importance nonetheless suggests a need to reappraise certain conventional attitudes to the management of claims. Of course, one cannot tell how many minor-value objects are extant and identifiable, and concern about such items may prove to be disproportionate to the power of public or private agencies to do anything about them, or indeed to the cost of such action if it were in theory viable. But to an extent it may be the very flaws of the existing treatment that make such identification so difficult. Despite the tremendous economies and other advantages extended to claimants by the existence of the Spoliation Advisory Panel the existing regime patently favours those who claim high-value objects. There are few if any instances of claims to items of intense subjective value and high sentimental worth, or indeed of low economic value. Aside from the Rothberger porcelain award of £18,000 (for a single item) the lowest-value claim appears to have been for the Burrell-donated painting *Pâté de Jambon* valued by the Panel at £7,500. This valuation was reached only after the attribution of the work to Chardin had been discredited. While family emblematic status has occasionally been attributed to work claimed outside the Spoliation Panel (for example the von Kalckreuth 'childhood icon') the conscious ascription of such status remains rare. One looks in vain for

assertions of such status (and for claims for money payments to reflect personal distress at deprivation) in submissions before the Spoliation Advisory Panel. No doubt this is in part because a claim can be brought before the Panel only where the institution is in possession of the claimed work, and in those circumstances claimants are likely to demand the physical redelivery of the work itself. But there seems no reason in principle why a claim for compensation or an *ex gratia* payment to relieve personal distress might not be combined with a claim for specific restitution, or indeed advanced as an alternative.

This atmosphere of disadvantage to the small-scale victim may be reflected in other corners of our legal system. For example, there is an ingrained and justified judicial dislike of litigation that costs more than the value of its subject matter. A sense of proportion in such matters is part of the overriding principle that courts must do justice between the parties. A successful claimant might therefore fail to recover costs from the losing party where the matter at hand could reasonably and more economically have been referred to alternative dispute resolution. A typical expression of this view can be found in the judgment of Lord Justice Ward in *Tavoulares v Lau*,⁵⁴ where the warring parties had collectively expended £85,000 on a dispute over art works that were valued at a maximum of £23,500. Lord Justice Ward said:

This litigation fills me with despair . . . litigation must be fun if the parties are prepared to spend that much on a rollercoaster ride to judgment without pausing, either of them, to suggest that mediation would be a more sensible way to resolve their differences . . . I would have thought that there are very easy ways through mediation and a bit of common sense to resolve this matter and hopefully to resolve it quickly and without a further extraordinary waste of money.

Here again, however, one must beware of reducing this area of restitution to a simple matter of economics. While no litigant should be encouraged to take prodigal action in pursuing a claim for restitution, it seems fair to suggest that certain Holocaust-related objects are

⁵⁴ [2007] EWCA Civ 474.

Articles

so heavily charged with legitimate personal concerns, peculiar to the individual and divorced from their economic value, that it could be reasonable to pursue them through court action, even though the cost of such action exceeds their economic worth. A similar argument might be made about claims by indigenous peoples to recover ancestral remains or other relics having spiritual force. In many cases court action may be the only way to compel a museum or private possessor to pay serious attention to a claim. Indeed there is one instance where an English national museum has agreed to mediation only after being taken to court.⁵⁵ It would be unfortunate if the low economic value of the material claimed were to be invoked as a ground for denying costs to the successful claimant.

The emotional bond between a Holocaust victim and a chattel might suggest that an element of personal hurt could figure in a claim for damages based on the loss or destruction of the object. It is notable that almost every Holocaust-related claim in England has related to an existing chattel of which the claimant has (at least initially) sought specific restitution. There has been no claim for either compensation or an *ex gratia* payment based on the wrongful taking or violation of a chattel that no longer exists. Should such a claim arise, there is no reason in principle why it should not lead to redress founded in part on the claimant's subjective anguish. And if such redress could be awarded where the chattel is destroyed or irretrievably lost, it might also be awarded where the chattel continues to exist but is no longer in the possession of the particular defendant.⁵⁶ Such an award might occur where a museum knowingly returns a borrowed work to its lender in open defiance of a legitimate third party claim by a Holocaust survivor. The museum is liable to the third party in the tort of conversion,⁵⁷ but there can of course be no question of specific restitution. Payments might extend both to the market value of the chattel and the emotional suffering inflicted on

⁵⁵ *Tasmanian Aboriginal Centre v Natural History Museum* (2007).

⁵⁶ Such a claim could not be brought before the Spoliation Advisory Panel because the Panel's jurisdiction extends only to cultural objects 'now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit'. *Spoliation Advisory Panel, Constitution and Terms of Reference* (Revised, June 2000) para 3 (emphasis added).

⁵⁷ *Marcq v Christie Manson & Woods Ltd* [2004] QB 286.

the true owner in consequence of the chattel's being irretrievably lost. A similar result might be justified where the chattel has passed through the hands of successive buyers and re-sellers, all of whom have committed conversion but none of whom has the current possession of the chattel.

Some of these ideas may appear fanciful. To the extent that they relate to proceedings in court, they also turn on the precarious premise that the claimant retains the title to sue. In many instances that will not be true because the limitation period will have expired. It may be that in time a court will find ways of mitigating the effect of time bars on Holocaust-related claims, though that prospect is uncertain. Such matters aside, it would seem fair to take account of the power of personal association in the structuring and resolving of Holocaust claims.

It was Mr Bernstein in *Citizen Kane* who reminded us of the fortuitous nature of memory. Recalling a girl on the Jersey ferry, whom he had glimpsed for only a second some forty years earlier, he said that not a month had passed when he did not think of her.

A fellow will remember a lot of things you wouldn't think he'd remember. You take me. One day, back in 1896, I was crossing over to Jersey on the ferry. And as we pulled out, there was another ferry pulling in, and on it there was a girl waiting to get off. A white dress she had on. She was carrying a white parasol. I only saw her for one second. She didn't see me at all. But I'll bet a month hasn't gone by since that I haven't thought of that girl.⁵⁸

We do not always appreciate, at the time they occur, those experiences that will live in our thoughts. Nor can we foresee the memories that will last for as long as we live. Where so much of a person's past has vanished through conflict or extermination, the simple things which echo that past should be treated as precious, and graced by formal recognition. Law and government should share in that recognition.

⁵⁸ The speech was delivered by the great actor Everett Sloane, playing Bernstein. Mere reproduction of the text cannot do justice to the delivery.

Articles

NORMAN PALMER QC (Hon) CBE FSA is a barrister specializing in the cross-border restitution and lending of cultural objects. He is a member of the Spoliation Advisory Panel and from 2001 to 2011 chaired the Treasure Valuation Committee. He has acted as adviser and advocate in many law cases involving looted objects of art and antiquity, including the landmark decision of the English Court of Appeal in *Government of the Islamic Republic of Iran v Barakat Galleries Ltd* in 2007. His law practice includes writing loan and exhibition agreements for leading museums and advising governments on the drafting of laws relating to national cultural heritage. He is the Emeritus Professor of the Law of Art and Cultural Property at UCL and a Visiting Professor of Law at King's College London.