the territory of the United States. Simply put, if a claim is valid a work of art can be returned to the heirs after which it is saleable and freely transferable.

Conclusion

Every day, survivors of the Holocaust pass away. Without diminishing the rights of their heirs to seek restitution of property confiscated by the Nazis, the group that has the highest claim on our collective conscience is those who directly suffered during the Holocaust. Time left to them is limited and while progress has certainly been made since the Washington Conference, there is the danger of "Holocaust fatigue." All involved, whether claimants, non-governmental organizations dedicated to the support of Holocaust victims and survivors, national governments, and museums, both state owned and private, need to redouble their efforts in the relatively short period of time left to those survivors to bring to resolution any of their claims. This is admittedly difficult in tough economic times when funding available for museums in general is diminished, much less that which is available for research, claims consideration, restitution or settlement. Nevertheless, the Prague Conference should act as a catalyst to reinvigorate all those involved in the process and there is every reason to believe that the American museum community will assist in these efforts, as it has in the past.

▶ **Norman Palmer**
SPOLIATION ADVISORY PANEL, UK

INTEGRITY, TRANSPARENCY AND PERTINACITY IN THE TREATMENT OF HOLOCAUST-RELATED ART CLAIMS

Every lawyer in this room will know that it frequently falls to us, the lawyers, to be the harbingers of unwelcome news. Someone once said to me that if there is one thing more galling than paying money to be told what you cannot do, it is paying money to be told what you should not have done. And that is a role that, regrettably, does fall to us very often indeed. There can be no doubt, moreover, that the law is an extremely substantial barrier to the ethical and equitable resolution of claims in this field, and, as I may say, in many others. I will say more about that in due course.

But let me just say at this stage that I think the United Kingdom government has, for at least the past decade and a half, been acutely aware of the shortcomings of law as a mode of dispute resolution, particularly in cases of significant imbalance of power and significant disadvantage on the part of one party. It has manifested this concern in two different ways.

First, by general procedural reforms: We have now had, since 1998, new civil procedure rules, which attach very significant case management sanctions to parties who could reasonably have gone to alternative dispute resolution and did not. And among those case management sanctions would be a refusal to make a cost order in favour of the successful party in the litigation, even though they had won, if they had previously declined a reasonable offer, reasonable invitation to mediate, or go to other dispute resolution. So, we are moving towards a policy

of out-of-court resolution generally, as well as in the case of Holocaust-related art. As I am sure many of you know, in June 2000, the Department of Culture set up a Spoliation Advisory Panel which has continued to sit since that time with entirely unchanged membership over the intervening nine-year period. It is important to understand the limitations of the Spoliation Advisory Panel. Its service is non-mandatory. No party would be compelled to resort to the Spoliation Advisory Panel as it is purely a matter of voluntary adoption.

Second, no party is compelled by law to follow the conclusions and recommendations of the Panel. The Panel is in power to make recommendations to two groups of people: the parties to the dispute and the relevant Minister, i.e., the Minister for the Arts. As regards the parties to the dispute, the Panel would of course give its view as to what should happen, what remedy, if any, should ensue. The adoption of that remedy is then a matter for the parties, who can either repudiate it or adopt it according to their wish. The only occasions in the past in which the remedy recommended by the tribunal has not been adopted are cases where it has not proved legally possible to do so.

And that brings me to the second type of recommendation that we on the Panel might make, which is a recommendation to the Minister. These recommendations can take several forms. One such recommendation might be, and we have done this on several occasions, to say to the Minister: "We think this is a case, where an *ex gratia* payment, acceptable to the claimant, should be made. And because the public have had the benefit of this picture, which has been in the public museum for the last forty, fifty, or sixty years, we think this should come from public accounts." We have never made such a recommendation to the Minister which has not been adopted.

But the other sort of recommendation we can make is about the existing law. Again, we have done this. We can say to the Minister: "Look, we think this item should go back. Justice points in favour of specific restitution, but the law does not permit it." We have national museums in England, which are subjects to governing statutes. These statutes are largely in place to guarantee the independence of these museums, but essentially render inalienable, incapable of disposal, objects that are vested in the trustees of that museum as part of the collection. If we have said for example to the Tate Gallery in the case of our first hearing, which was the Griffier painting of Country Court from the Southern River: "It must go back," they would quite properly have replied: "It cannot go back, we would be breaking the law by doing so." We are therefore able, and we consider it part of our function, to recommend to the Minister that the law be changed, so that museums can do the right thing, when they want to follow our recommendation. So that is the functional and constitutional concept of the Spoliation Advisory Panel.

It has to be said that law does still stand in the way of what most of us regard as the relative success of our proceedings. Perhaps the biggest example of its barrierdom, if you like, occurred in 2005, when the British Museum wanted to return to the descendants of Dr. Feldman five Old Master drawings, which had come into the possession of the Museum following the 1939 murder of Dr. Feldman in Brno. The Museum conceived the idea that the Charities Act 1993, which covered all charities, stipulated the obligation to release an object from its collection.

The Attorney General was not convinced, and the matter was taken to the Chancery Court. And the Chancery Court said no. You cannot do that. And the reason you cannot do that is

because there is the civic legislation, the British Museum Act 1963, which says you cannot alienate objects from your collection. That prohibition is not overridden by the Charities Act, so legal proceedings were taken to give the British Museum the power to do what it should have been able to do, and what it undoubtedly wanted to do, and that failed. In the end, the matter came before the Panel and I think by agreement of the parties by then, a financial settlement was negotiated.

It was a sad episode, and I am pleased to be able to report that there is now legislation passing through Parliament, which will give British national museums the power to relinquish their ownership of such objects even though there is the General Prohibition Act, which overrides the British Museum Act to a certain extent.

I suppose you could say that whereas law can create problems, it can also create solutions in the end. Those are examples of statutory laws. There are also many examples of cases where the ingenuity of the common law can also in the end assist resolutions.

What I find gratifying about this area is that lawyers are increasingly thinking outside the box. The international agencies still talk aloud about restitution of the object. And of course, in many if not all cases, that is the preferred option. But there is more than one way to skin a cat, and sometimes if you can exert legal sanctions and remedies other than specific legal restitution, you might at least bring the other party to the negotiation table and eventually get what you want. Even if you do not get what you want in the end, you may get something, which is second best.

Let me give you some examples. Supposing that a museum is told: "You have got a Holocaust-related object on loan to you".

And they say to you: "Yes, I am sure that is true, that is not our problem, we are going to return it to the lender at the end of the period of loan because if we do not do that, the lender is going to sue us anyway, so why do not you fight it out with the lender?" The lender of course would probably be a museum or a private collector in a country where it is utterly fruitless to bring any legal action against them because if it were fruitful to do so, we would have done so years and years ago.

You say to the museum: "Yes, all right, you do that. And if you do that, if you return it, we will sue you for damages." The English law quite clearly says that if a person knowingly returns an object in defence of that right to somebody who is not entitled to it, then they are guilty of the tort of conversion. Now the object is gone and you will not get restitution, but you will get damages and damages can be quite substantial. At the thought of a prospect of paying damages on the return of the object, the museum may actually be discouraged to do so, even a borrowing museum that is protected by an Immunity Statute as we now have in England. Because as Charles Goldsteen has often said, it is only immunity from seizure, it is not immunity from suit that these statutes confer. You say to the museum: "Okay, exercise your right of immunity, return the object and we will sue you for damages: 5 million, 20 million, whatever the picture is worth." But well, it is worth a try. None of this do I guarantee will work, of course.

This pertains to other examples as well: In the Spoliation Advisory Panel, I first had a case where we awarded a grieve *ex gratia* payment, and we included within that a sum which was long specified to account for the British public benefit in having had the use of this picture over the preceding forty years. And this curiously reflects the doctrine of English restitution law, or

the doctrine for a reasonable hiring charge. If your property has been wrongly retained over a certain period, you may be entitled to a payment that represents the value of its use in the hands of the party that has had it in its possession.

I do not think there has been any case like this since. But this remedy has been invoked. And of course the Tate-Griffier case was the case where we did not recommend the return of a picture; a settlement which would have been quite acceptable to the claimants. Supposing you do return a picture. Could the claimant turn around and say: "Thank you very much, I am very glad, at last, I have got my property back. By the way, you have had the use of my property for the preceding forty years, and therefore, the adoption of the reasonable hiring charge suggests that you might consider compensating me for that use as well." Well, maybe you think these things sound too baroquely ingenious, maybe you think this sounds too aggressive. But in my experience, it could be very helpful to explain to people, whatever the position with regards to restitution of the object itself, that there are other solutions which may equally be unpalatable to a recalcitrant and intransigent defendant.

If we talk about reform in the way I had, I would just want to make a few points. One of them is this: Understandably, because of our preoccupation with restitution, we focus on the immediate present ultimate holder of the work of art, which may be a museum, a private collector, or even a commercial organization. Of course, the various national and international instruments, including the Council of Europe, correctly recommend that the countries relax their limitation periods in cases like this.

I think that is right. The claims could be brought. But it is not impossible that the party at the extremity of the chain, the ultimate

holder against whom the restitutional remedy is sought, is actually the most innocent person in the chain of thought. It may come as a blinding revelation to this entity, whether it is an institution or an individual, that this is a Holocaust-related work of art. I have known such cases. I am not saying that you in anyway diminish the remedies of the claimant in such a case. All I am saying is this: We ought to consider the role of the predecessors in the chain. We ought to consider, if we are relaxing limitation periods as against the ultimate holder, perhaps also relaxing limitation periods upstream so that the holder can turn around to the person who sold it to him, and say to him: "All right, I will have to give it back, I want the remedy from you."

Perhaps we should consider whether they should be able to leap from upstream as well. So if you bought from a dealer who is going bankrupt, there is someone in the line, particularly someone who knew what was happening. In that case, the remedy should spread further up the line as well. In fact, I would even suggest that you should give consideration to giving the claimant the remedy against the people earlier in the line as well. Supposing there are entities or individuals in the chain of supply to the ultimate museum who actually knew perfectly well all along what was going on. They are still around and they have got plenty of money, and they made an enormous profit out of this sale. I do not see why the claimant should not be able to proceed against them. Either in addition to, or instead of against the ultimate museum that is the actual holder.

If they can proceed against them, I do not see why the ultimate holder should not proceed against them as well. It does not seem to me inequitable to relax the limitation periods against the ultimate holder, limitations possibly obstructive to an ultimate settlement, if you relax only those limitation periods. If the

stand-alone ultimate recipient finds that there are other, guiltier people that can be brought in, other, more morally responsible people who could be included in the remedial pattern, I think that might make some ultimate holders actually less intransigent, less recalcitrant, more willing to come to the table and seek the solution. But of course, all this you might think is over ingenious or in some way lawyers' sand pit talk, nothing that any rational human being wants to deal with.

Let me say in conclusion that I cannot overemphasize my belief that all forms of legal remedy here and other procedural remedies should go hand in hand with education. Increasingly, I find the need for people to really understand what happened. If they understand what happened, they are much more responsive to means of finding solutions.

I will tell you this personal story because to me it does illustrate the need for education. In July 2001, I gave a talk on the subject in Melbourne, and at the end of this talk, two people came up to me. One was an old man. He had tears in his eyes, and he just said: "Thank you for helping to make sure that nobody forgets." The other was a young woman and she said to me: "So you are Jewish, then?" That was her take on what I was saying. The implication was that we have to be Jewish to be interested in this. And I think this is where the education comes in. And at the end of the day, I think enlightenment has been far more important than law.

Thank you.

The Search for Works of Art and Other Cultural Assets: A Business or Moral Obligation?

▶ **Nawojka Cieslinska-Lobkowicz**
FREELANCE ART HISTORIAN AND PROVENANCE RESEARCHER, POLAND

THE OBLIGATION OF THE STATE OR A HOBBY OF THE FEW. THE IMPLEMENTATION OF THE WASHINGTON PRINCIPLES IN POLAND

I am saddened that not much good can be said about the policy of my country regarding the problems discussed at this Conference. I do not want to use this opportunity to flatly condemn my country and thus "soil my own nest." However, I do want to call on the government of my country to recognize the commitment made through its signature of the Washington Principles in 1998.

This was the statement made in 2006 by the director of the Polish Ministry of Culture and National Heritage department that is responsible for the museum policy:[1]

> "We respect the decisions of the Washington conference. […] But we have no such problem. Poland was not in coalition with Hitler and has looted nothing."

The same official announced elsewhere:

1 *Gazeta Wyborcza*, February 22, 2006.