

**REPORT OF THE SPOILIATION
ADVISORY PANEL IN RESPECT
OF THREE DRAWINGS NOW IN
THE POSSESSION OF THE
COURTAULD INSTITUTE OF ART**

HC 200

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CORRECTION

On page 5, paragraph 21, line 1

"Dr Feldmann was deprived of all four drawings" should read "Dr Feldmann was deprived of all three drawings".

January 2007

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RETURN
TO AN ADDRESS OF THE HONOURABLE THE HOUSE OF COMMONS
DATED 24 JANUARY 2007
FOR THE

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The Right Honourable Sir David Hirst

*Ordered by the House of Commons
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REPORT OF THE SPOILIATION ADVISORY PANEL IN RESPECT OF THREE DRAWINGS NOW IN POSSESSION OF THE COURTAULD INSTITUTE OF ART

INTRODUCTION

The Claim

1. This claim is brought on behalf of the heirs of the late Dr Arthur Feldmann in respect of three drawings now in the possession of the Courtauld Institute of Art (“the Courtauld Institute”). The claimants contend that they lost possession of the drawings on 15 March 1939 when the drawings, together with the rest of Dr Feldmann’s large collection, were seized by the Gestapo in his villa in Brno on the day the Germans invaded Czechoslovakia. The underlying facts on which the claimants rely bear a close similarity to those considered in our recent report on a claim by the same claimants in respect of four drawings now in the possession of the British Museum (HC1052 dated 27 April 2006).

2. Our Terms of Reference (annexed at Appendix 1) provide that our task is to “consider claims from anyone (or from any one or more of their heirs) who lost possession of a cultural object (“the object”) during the Nazi era (1933-1945) where such object is now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit (“the institution”). Since the Courtauld Institute is a registered charity, it clearly comes within the latter category of institution, and we are therefore satisfied that the case falls within our jurisdiction.

3. The three drawings form part of the Witt bequest of over 3,000 Old Master Drawings which was made to the Courtauld Institute of Art, University of London in 1952, when the Courtauld Institute itself did not have the independent legal status which it acquired in 2002. The Courtauld Institute’s legal title to the drawings is impregnable under the Limitation Acts, as was that of the University of London prior to 2002. However, under our Terms of Reference, we are required to give weight to the moral strength of the claim.

The Three Drawings

4. The three drawings comprise:-

- (a) “A lion”, attributed to Carl Ruthart (1630-1703), black chalk, brown wash, watercolour, heightened with white (“the Ruthart”).
- (b) “A dog lying down”, attributed to Frans Van Mieris the elder (1635-1681), black and red chalk, brown wash, pen and ink (“the Van Mieris”).

- (c) “An architectural capriccio”, attributed to Giuseppe Bibiena (1696-1756), black chalk, pen and brown ink, brown and blue wash (“the Bibiena”).

THE FELDMANN COLLECTION

The Collection Itself

5. Dr Arthur Feldmann, a prominent Brno lawyer, owned a large collection of approximately 750 Old Master Drawings which were kept in his villa at 13 Traubengasse, Brno. The high quality of the collection was acknowledged by a number of experts, notably Dr Otto Benesch, the Director of the Albertina Museum in Vienna until 1938 and one of the foremost experts on Old Master Drawings in Europe. In a deposition dated 24 August 1966, Dr Albert Kotal, Professor of The History of the Arts in the University of Brno, testified that, shortly before the Nazi occupation, he visited Dr Feldmann at his villa, accompanied by Dr Benesch, where they studied the art works which were presented to them. Dr Kotal commented that “I can still say today that these works were of extraordinarily high value because they were selected drawings...”.

6. Two lists of drawings compiled by Dr Feldmann in 1931 and 1933 respectively were submitted in evidence to us. The former, comprising 55 Italian drawings, includes an entry “Ferdinando Galli Bibiena Architektur” which is clearly identifiable with the Bibiena under consideration here.

7. On 28 June 1934, Dr Feldmann offered a large part of his collection for auction as a result of the dire financial situation in Europe. The sale was carried out by the auction house of Gilhofer and Ranschburg of Lucerne. The auction catalogue is in evidence before us and includes an introduction by Dr Benesch. Lot 171, listed as Frans Van Mieris I Liegender Hund, is clearly identifiable as the Van Mieris presently under consideration here. Several items remained unsold, including Lot 171, and were returned to Dr Feldmann, as is recorded in notes in the catalogue written by an assistant to the auctioneer, and borne out by Dr Benesch.

8. Mr Karl Feldmann, Dr Feldmann’s son, has testified that, following the auction, no further items were sold and that, on the contrary, his father acquired a few more pieces in the ensuing three years or so.

Gestapo seizure of the collection

9. There is clear evidence proving that, on the day of the German invasion of Czechoslovakia on 15 March 1939, the Gestapo entered Dr Feldmann’s house and seized his collection. Karl Feldmann said that he was present with his wife and other members of his family the day before and saw the drawings in their accustomed

cupboards. Mrs Stepanka Horakova, who had been Dr Feldmann's housekeeper since 1929, has testified that she was present in the villa on 15 March when the Gestapo arrived and forced Dr Feldmann and his wife to depart, bearing only a suitcase and leaving behind the entire collection.

10. Dr Heinrich Rosorius, the Nazi-appointed Trustee of the Feldmann estate, gave evidence in a compensation claim made in Germany that, when he took over in 1940 or 1941, the Gestapo had seized everything other than the villa itself and a briefcase containing some artistic drawings. Otherwise, there is no evidence of the whereabouts of the collection until after the war. When, following his appointment as Trustee, Dr Rosorius visited Dr Feldmann, he found him a sick man. According to the evidence of Hans Hoffman, his nephew by marriage, Dr Feldmann was arrested and tortured by the Nazis in the Spielberg fortress, and died on 16 March 1941.

THE WITT ACQUISITION OF THE DRAWINGS

11. A sale was held at Sothebys on 16 October 1946. It featured a substantial catalogue in which a large group of drawings, Lots 40 to 88 inclusive, were listed as "The Property of a Collector".

12. Lot 55(a) and (b) comprised the Ruthart and the Van Mieris, and Lot 83 comprised the Bibiena.

13. The three drawings were bought by Messrs Colnaghi of 15 Old Bond Street, whose stock books record themselves as the purchasers at the auction, and also as the vendors to Witt on the same day.

14. By letter dated 23 October 2001 Sothebys confirm that there are no surviving notes, memoranda or expertise for the drawings, and their research of their records, in an effort to establish the identity of the anonymous vendor of Lots 40-86, has proved fruitless, apart from the fact, recorded in the marked up copy of their catalogue, that they were consigned on behalf of an anonymous collector by a Channel Islands' firm of solicitors called Bennett and Bennett, who are no longer in existence.

15. There is, however, other evidence linking Lots 40 to 88 with the Feldmann collection. One copy of the Sothebys catalogue has been supplied by the Director of "Collection Fritz Lugt" of 121 Rue de Lille, 75007 Paris. Fritz Lugt (1884-1970) was an art historian of the highest authority and the author of a reference work running to nine volumes which, according to the Grove Dictionary of Art 1996, laid the foundation of the history of collecting prints and drawings and became the basis for all later research. In this copy of the catalogue, the heading to Lots 40-88 "The Property of the Collector" is annotated "Feldmann" in Fritz Lugt's handwriting. In

the British Museum case referred to above, Antony Vaughan Griffiths FBA, the present Keeper of Prints and Drawings at the British Museum, testified that Fritz Lugt had intimate knowledge of the art market from the First World War until his death; Mr Griffiths, in our view correctly, stressed the significance of this evidence for the provenance of Lots 40-88.

PROVENANCE OF THE THREE DRAWINGS

16. There can be no doubt that the Van Mieris formed part of the Feldmann collection in 1934 when it was offered for sale at the 1934 auction and returned to Dr Feldmann unsold. Equally, it is clear that the Bibiena formed part of the Feldmann collection in 1931 when it was included in the list of that date of 55 Italian drawings. In neither case is there any evidence pointing to a disposal in the intervening years prior to 1939 and, while it is conceivable that Dr Feldmann could have sold them, this seems unlikely, not least because the sale of such comparatively minor works would have had no material impact on his financial problems. On the other hand, we have the positive evidence of Karl Feldmann that his father sold no further items following the 1934 auction, fortified by Fritz Lugt's identification of Lots 40-88 at the 1946 auction as part of the Feldmann collection. Consequently, on the balance of probabilities, we are satisfied that these two drawings form part of the Feldmann collection of 15 March 1939.

17. There is no comparable evidence specifically linking the Ruthart to Dr Feldmann in the 1930s. However, significantly, it was entered in the 1946 auction as part of the same lot as the Van Mieris, and within the much larger group identified by Fritz Lugt as part of the Feldmann collection. Although the evidence is more insubstantial, we have concluded on the balance of probabilities that the Ruthart also formed part of the collection on 15 March 1939.

THE MORAL ISSUES

The Panel's Task

18. Under paragraph 7(c), (e), (g) and (h) of our Terms of Reference, we are obliged to:

- (c) examine and determine the circumstances in which the claimant was deprived of the object, whether by theft, forced sale, sale at an undervalue, or otherwise;
- (e) give due weight to the moral strength of the claimant's case;
- (g) consider whether any moral obligation rests on the institution, taking into account in particular the circumstances of its acquisition of the object, and its knowledge at that juncture of the object's provenance;

- (h) take account of any relevant statutory provisions, including stipulations as to the institution's powers and duties, including any restrictions on its powers of disposal.

The Two International Instruments

19. Our duty to give weight to moral considerations is founded on the terms of two important international instruments. The “Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control” was issued in London on 5 January 1943 and is annexed at Appendix 2. All the Allies, including the United Kingdom, subscribed to this Declaration, which is in the following terms:-

“The Governments hereby issue a formal warning to all concerned, but in particular for persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against countries and people who have been so wantonly assaulted and despoiled. Accordingly, the Governments making this Declaration reserve all their rights to declare invalid any transfers of, or dealings with, property rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong to or have belonged to persons ... resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.”

20. Although the Declaration was never embodied by Statute into English Law, it gives most helpful guidance on the underlying principle. This was echoed in December 1998 in the Declaration of Principles issued by the Washington Conference on Holocaust-Era Assets, which is annexed at Appendix 3, and which stresses the need to achieve a just and fair solution.

The Claimants' Position

21. Dr Feldmann was deprived of all four drawings by a gross act of spoliation by the Gestapo, furnishing an unassailable moral strength to this claim by his heirs.

The Courtauld Institute's Position

22. There is no evidence of any investigation of the provenance of the drawings at the time of acquisition by the Courtauld Institute of Art, University of London. While this omission would be unacceptable under modern standards, the question should be judged by the much less rigorous standards previously applicable and, bearing in mind that these three drawings are comparatively minor works, forming numerically a miniscule proportion (less than 0.1%) of an enormous bequest. In

these circumstances we do not think it would be fair to criticise the Courtauld Institute of Art, University of London or their successors on this account.

Remedies

23. Under our Terms of Reference we are empowered to recommend either:-

- (a) the return of the object to the claimant; or
- (b) the payment of compensation to the claimant, or
- (c) an ex gratia payment to the claimant.

Option (a) is not available in the case of objects vested in a number of national institutions regulated by statute (eg the British Museum by virtue of Section 3 of the British Museum Act 1963 as applied by the Vice-Chancellor, Sir Andrew Morritt, in the case of HM Attorney General vs. The Trustees of the British Museum (2005 EWHC 1089 (Chancery)) – see paragraph 5 of the British Museum report cited above). This restriction does not apply to the Courtauld Institute so in this case option (a) is available.

24. Before considering which option to recommend, we obtained two valuation reports from Christies on behalf of the Courtauld Institute, and from Sir Jack Baer on behalf of the Panel. These two valuations are closely comparable viz:-

	Christie's	Sir Jack Baer
The Bibiena	£6,000-£8,000	£8,000
The Ruthart	£2,000-£3,000	£1,500
The Van Mieris	£700-£1,000	£350
Total	£8,700-£12,000	£9,850

25. In his report, Sir Jack commented on each of the three drawings as follows:-

“The Bibiena is a beautiful drawing and in excellent condition. The Ruthart is a drawing attributed to Ruthart (although it seems to bear a signature of different initials) and is in my opinion an unsatisfactory and certainly unrealistic drawing and therefore difficult to attribute. I cannot understand the attribution of the Van Mieris, and certainly do not believe it can be established as by Van Mieris. I consider it an unattractive image, badly placed on the paper, and of an animal which would be quite unable to stand.”

26. In previous cases in which the return of the object was not an available option (eg the British Museum case), we recommended an ex gratia payment by the Government, as foreshadowed by the Lord Chancellor prior to the establishment of the Panel (see British Museum Report, paragraph 47). We concluded that the public and scholars have had, and will continue to have, the opportunity for access to and enjoyment of these works, and we did not think it unreasonable that the public, in the shape of the general body of taxpayers, should fund the public benefit.

27. In the present case the parties jointly request us to make a similar recommendation, submitting that the ideal outcome would be for the drawings to remain in the public domain, and for the claimants to be offered an ex gratia payment equivalent to the full market value of the drawings. The Courtauld Institute contends that it is not in a position to reach a financial settlement, and asks the Panel to explore other means of making such a payment.

28. We have carefully considered this request, but are not persuaded that we should adopt it. Having regard to Sir Jack Baer's report, we accept that two of the three drawings are of poor quality, so that any public benefit to be derived from the three drawings remaining in the public domain would be minimal; consequently, it would not, in our judgement, be fair to burden the taxpayer with the funding of an ex gratia payment to the claimants, albeit modest in amount, when the alternative remedy is available.

29. Accordingly, we recommend that the three drawings should be returned to the claimants.

24 January 2007

The Rt Hon Sir David Hirst – Chairman
Sir Donnell Deeny
Professor Richard J Evans
Sir Terry Heiser
Professor Peter Jones
Martin Levy
Peter Oppenheimer
Professor Norman Palmer
Ms Anna Southall
Dr Liba Taub
Baroness Warnock

Appendix 1: Terms of Reference
Appendix 2: Inter-Allied Declaration
Appendix 3: Washington Declaration

APPENDIX 1

SPOLIATION ADVISORY PANEL CONSTITUTION AND TERMS OF REFERENCE

Members of the Panel

1. The members of the Spoliation Advisory Panel (“the Panel”) will be appointed by the Secretary of State on such terms and conditions as he thinks fit. The Secretary of State shall appoint one member as Chairman of the Panel.

Resources for the Panel

2. The Secretary of State will make available such resources as he considers necessary to enable the Panel to carry out its functions, including administrative support provided by a Secretariat (“the Secretariat”).

Functions of the Panel

3. The task of the Panel is to consider claims from anyone (or from any one or more of their heirs), who lost possession of a cultural object (“the object”) during the Nazi era (1933 – 1945), where such object is now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit (“the institution”). The Panel shall advise the claimant and the institution on what would be appropriate action to take in response to such a claim. The Panel shall also be available to advise about any claim for an item in a private collection at the joint request of the claimant and the owner.

4. In any case where the Panel considers it appropriate, it may also advise the Secretary of State

- (a) on what action should be taken in relation to general issues raised by the claim, and/or
- (b) where it considers that the circumstances of the particular claim warrant it, on what action should be taken in relation to that claim.

5. (a) In exercising its functions, while the Panel will consider legal issues relating to title to the object (see paragraph 7(d) and (f)), it will not be the function of the Panel to determine legal rights, for example as to title;

- (b) The Panel’s proceedings are an alternative to litigation, not a process of litigation. The Panel will therefore take into account non-legal obligations, such as the moral strength of the claimant’s case (paragraph 7(e)) and whether any moral obligation rests on the institution (paragraph 7(g));

- (c) Any recommendation made by the Panel is not intended to be legally binding on the claimant, the institution or the Secretary of State;
- (d) If the claimant accepts the recommendation of the Panel and that recommendation is implemented, the claimant is expected to accept the implementation in full and final settlement of his claim.

Performance of the Panel's Functions

6. In performing the functions set out in paragraphs 3 and 4, the Panel's paramount purpose shall be to achieve a solution which is fair and just both to the claimant and to the institution.

7. For this purpose the Panel shall:-

- (a) make such factual and legal inquiries, (including the seeking of advice about legal matters, about cultural objects and about valuation of such objects) as the Panel consider appropriate to assess each claim as comprehensively as possible;
- (b) assess all information and material submitted by or on behalf of the claimant and the institution or any other person, or otherwise provided or known to the Panel;
- (c) examine and determine the circumstances in which the claimant was deprived of the object, whether by theft, forced sale, sale at an undervalue, or otherwise;
- (d) evaluate, on the balance of probability, the validity of the claimant's original title to the object, recognising the difficulties of proving such title after the destruction of the Second World War and the Holocaust and the duration of the period which has elapsed since the claimant lost possession of the object;
- (e) give due weight to the moral strength of the claimant's case;
- (f) evaluate, on the balance of probability, the validity of the institution's title to the object;
- (g) consider whether any moral obligation rests on the institution taking into account in particular the circumstances of its acquisition of the object, and its knowledge at that juncture of the object's provenance;
- (h) take account of any relevant statutory provisions, including stipulations as to the institution's powers and duties, including any restrictions on its power of disposal;
- (i) take account of the terms of any trust instrument regulating the powers and duties of the trustees of the institution, and give appropriate weight to their fiduciary duties;

- (j) where applicable, assess the current market value of the object, or its value at any other appropriate time, and shall also take into account any other relevant circumstance affecting compensation, including the value of any potential claim by the institution against a third party;
- (k) formulate and submit to the claimant and to the institution its advice in a written report, giving reasons, and supply a copy of the report to the Secretary of State, and
- (l) formulate and submit to the Secretary of State any advice pursuant to paragraph 4 in a written report, giving reasons, and supply a copy of the report to the claimant and the institution.

Scope of Advice

8. If the Panel upholds the claim in principle, it may recommend either:
 - (a) the return of the object to the claimant, or
 - (b) the payment of compensation to the claimant, the amount being in the discretion of the Panel having regard to all relevant circumstances including the current market value, but not tied to that current market value, or
 - (c) an ex gratia payment to the claimant, and
 - (d) in the case of (b) or (c) above, the display alongside the object of an account of its history and provenance during and since the Nazi era, with special reference to the claimant's interest therein; and
 - (e) that negotiations should be conducted with the successful claimant in order to implement such a recommendation as expeditiously as possible.
9. When advising the Secretary of State under paragraph 4(a) and/or (b), the Panel shall be free to recommend any action which they consider appropriate, and in particular may, under paragraph 4(a), direct the attention of the Secretary of State to the need for legislation to alter the powers and duties of any institution.

APPENDIX 2

INTER-ALLIED DECLARATION AGAINST ACTS OF DISPOSSESSION COMMITTED IN TERRITORIES UNDER ENEMY OCCUPATION OR CONTROL (WITH COVERING STATEMENT BY HIS MAJESTY'S GOVERNMENT IN THE UNITED KINGDOM AND EXPLANATORY MEMORANDUM ISSUED BY THE PARTIES TO THE DECLARATION).

London, January 5, 1943

His Majesty's Government in the United Kingdom have to-day joined with sixteen other Governments of the United Nations, and with the French National Committee, in making a formal Declaration of their determination to combat and defeat the plundering by the enemy Powers of the territories which have been overrun or brought under enemy control. The systematic spoliation of occupied or controlled territory has followed immediately upon each fresh aggression. This has taken every sort of form, from open looting to the most cunningly camouflaged financial penetration and it has extended to every sort of property – from works of art to stocks of commodities, from bullion and bank-notes to stocks and shares in business and financial undertakings. But the object is always the same – to seize everything of value that can be put to the aggressors' profit and then to bring the whole economy of the subjugated countries under control so that they must slave to enrich and strengthen their oppressors.

It has always been foreseen that when the tide of battle began to turn against the Axis the campaign of plunder would be even further extended and accelerated, and that every effort would be made to stow away the stolen property in neutral countries and to persuade neutral citizens to act as fences or cloaks on behalf of the thieves.

There is evidence that this is now happening, under the pressure of events in Russia and North Africa, and that the ruthless and complete methods of plunder begun in Central Europe are now being extended on a vast and ever-increasing scale in the occupied territories of Western Europe.

His Majesty's Government agree with the Allied Governments and the French National Committee that it is important to leave no doubt whatsoever of their resolution not to accept or tolerate the misdeeds of their enemies in the field of property, however these may be cloaked, just as they have recently emphasised their determination to exact retribution from war criminals for their outrages against persons in the occupied territories. Accordingly they have made the following joint

Declaration, and issued the appended explanatory memorandum on its meaning, scope and application:-

DECLARATION

The Governments of the Union of South Africa; the United States of America; Australia; Belgium; Canada; China; the Czechoslovak Republic; the United Kingdom of Great Britain and Northern Ireland; Greece; India; Luxembourg; the Netherlands; New Zealand; Norway; Poland; the Union of Soviet Socialist Republics; Yugoslavia; and the French National Committee:

Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries that they intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

Accordingly, the Governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons (including juridical persons) resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

The Governments making this Declaration and the French National Committee solemnly record this solidarity in this matter.

London
January 5, 1943

APPENDIX 3

WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS PRINCIPLES WITH RESPECT TO NAZI-CONFISCATED ART

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.

I. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.

II. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Conference on Archives.

III. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.

IV. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be made for unavoidable gaps or ambiguities in the provenance in the light of the passage of time and the circumstances of the Holocaust era.

V. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.

VI. Efforts should be made to establish a central registry of such information.

VII. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.

VIII. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.

IX. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.

X. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.

XI. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.



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