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**REPORT OF THE SPOILIATION ADVISORY PANEL IN
RESPECT OF A PAINTED WOODEN TABLET, *THE
BICCHERNA PANEL*, NOW IN THE POSSESSION
OF THE BRITISH LIBRARY**

The Honourable Sir Donnell Deeny

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to be printed 12 June 2014*



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REPORT OF THE SPOILIATION ADVISORY PANEL IN RESPECT OF A PAINTED WOODEN TABLET, *THE BICCHERNA PANEL*, NOW IN THE POSSESSION OF THE BRITISH LIBRARY

INTRODUCTION

1. The Claimants are the surviving heirs of the five former shareholders of a Munich art gallery (the Gallery). Their claim is in respect of a painted wooden panel made in the city-state of Siena in 1488 entitled "*Biccherna-Tafel. Der Einzug und der Auszug der Beamten*" ("*Biccherna Panel. The Entrance and the Exit of the Public Officers*") (the Biccherna Panel or the Work), now in the possession of the British Library Board (the Board) in the British Library. Panels or tablets such as the Biccherna Panel were used originally to cover documents in the Biccherna, the city's treasury.
2. This is the Claimants' second claim to the Spoliation Advisory Panel (the Panel), the first being the subject of the Panel's Report dated 24 November 2004¹ (the 2004 Report). As with their first claim, the Claimants ask to remain anonymous, and, as before, the Panel accedes to this request having regard to the right to privacy set out in Article 8 of the European Convention on Human Rights.
3. The Biccherna Panel is said to be by the Italian Renaissance painter Guidoccio Cozzarelli (d. 1516-17), known for his depiction of cityscapes, and depicts the entrance and exit of public officers on horseback through a palace gate. It is described as 500 mm x 335 mm in size, and carries the British Library shelfmark "Davis 768".
4. The Gallery's shareholders were of Jewish origin. Over the course of two days in June 1936, the Aryanised Berlin auction house of Paul Graupe sold by auction (the Sale) the Gallery's entire contents. The Sale included paintings, drawings, statues, armoury, furniture, tapestries, and carpets. In all, 513 lots were sold by Graupe. Among those lots, the Graupe auction catalogue included the Work as Lot 49.
5. The Sale by Graupe followed an extortionate tax demand for 1935 made by the German tax authorities upon the Gallery's shareholders. The circumstances in which the Sale came about were the subject of a lengthy narrative in the Panel's 2004 Report, where the Panel concluded that the Sale was a forced sale as a direct result of the 1935 tax demand.
6. The Work was sold at the 1936 Sale to an unidentified purchaser. What happened to it immediately thereafter remains unknown, but it reappeared at auction again at Sotheby's in London some six years later on 24 June 1942 as part of the collection of Mr Arthur Bendir, and was acquired by Mr Henry Davis. It was donated to the Trustees of the

¹ Report of the Spoliation Advisory Panel in respect of a Painting now in the possession of Glasgow City Council, 24 November 2004, HC 10, The Stationery Office, ISBN 0-10-293145-3.

British Museum in 1968 and, following Mr Davis's death in 1977, formed part of a collection of bookbindings called the Henry Davis Gift which was transferred by the Museum's Trustees to the Work's present holder, the Board.

7. The Claimants now seek the transfer of the Work to them. While the Board accepts the basis for the claim, given the importance of the Work it prefers a remedy which would see the Work remain in the British Library as part of the Henry Davis Gift such that it can remain freely accessible for research and display.
8. The parties engaged in amicable discussions about the Work before the claim was referred to the Spoliation Advisory Panel in July 2013, with the Board sharing information about the Work's provenance, among other things, with the Claimants. However, as the Board itself is legislatively constrained from disposing of the Work other than as provided for in Section 2 of the Holocaust (Return of Cultural Objects) Act 2009 (the 2009 Act) (through a recommendation by the Panel to the Secretary of State for Culture, Media and Sport, and the Secretary of State's approval of that recommendation), the claim was referred to the Panel for its determination.

THE PANEL'S TASK

9. The task of the Spoliation Advisory Panel is to consider claims from anyone (or from any one or more of their heirs), who lost possession of a cultural object during the Nazi era (1933-1945), where such an object is now in the possession of a UK national collection.
10. In considering a claim, the Panel's Terms of Reference (set out in the Appendix) require it to advise the claimant, the institution, and, where it considers it appropriate, the Secretary of State for Culture, Media and Sport on what action should be taken in relation to the claim. If the Panel recommends the transfer of an object from a collection belonging to one of the bodies named in Section 1 of the 2009 Act to the claimant, and the Secretary of State approves the recommendation, that body is empowered to return the object in question to the claimant under Section 2 of the 2009 Act. The Board is included among the bodies named in Section 1 of the 2009 Act.
11. The Panel has taken into account submissions and documents from the Claimants, and submissions from the Board, in order to weigh the moral strength of the Claimants' case; to decide whether any moral obligation rests on the Board; and to advise the Claimants, the Board, and the Secretary of State accordingly. In performing these functions, the Panel's paramount purpose is to achieve a solution which is fair and just both to the Claimants and to the Board.

THE CLAIMANTS' CASE

12. The Claimants first notified the Panel's Secretary of their claim to the Biccherna Panel by letter dated 11 July 2013 from their Berlin lawyers together with supporting documents. They submit that the Work

(purchased by the Gallery in 1930) formed part of the 1936 Sale and, given the Panel's findings about the forced nature of the Sale in the Panel's 2004 Report, they seek the transfer of the Work from the Board to them.

13. Among the supporting documents provided by the Claimants is a formal declaration given in 1954 by the long-time secretary of one of the Gallery's shareholders, which was submitted as part of a claim to the German Compensation Authority set up under the Federal Compensation Act passed by the Bundestag in 1953. Attached to the declaration is a ledger which collates the Gallery's inventory at the time of the Sale, the cost price of each item, the sales values at the time of purchase and the Sale in 1936, and the price obtained at the Sale. Those details appear to have been compiled from a number of sources, including articles in *Die Weltkunst* contemporary to the Sale, a copy of the 1930 Cassirer auction catalogue for the collection of Dr Albert Figdor (which lists the Biccherna Panel as Lot 15), and a copy of the Graupe auction catalogue annotated with the prices achieved at the Sale. The 1930 cost price for the Biccherna Panel is listed as 15,000 Reichsmarks, with sale price estimates at the time of acquisition and the Sale of 20,000 Reichsmarks and 6,000 Reichsmarks respectively. The price obtained at the Sale is given as 2,800 Reichsmarks (£228 at the then rate of exchange).
14. The documents produced by the Claimants also include a report by an historian dated 25 May 2013, which attaches a number of relevant historical documents. The report refers to and attaches extracts from the Reich Chamber of Culture files (now part of the Regional State Archive in Berlin) which document the Sale and the Work's inclusion in it. It also attaches a 1949 agreement made before the post-war Restitution Agency of Upper Bavaria between the Gallery's shareholders and the dealer who took control of the business after its Aryanization in 1936. This agreement documents the objects returned to the shareholders by the dealer after the war. The Work is not included among them.
15. The combination of these documents leads the Panel to conclude on the balance of probability that the Work was the property of the five shareholders in the Gallery at the time of the Sale in 1936, and that it was sold by Graupe at the Sale for the hammer price of 2,800 Reichsmarks. The identity of the purchaser, and what happened to the Work before its reappearance at Sotheby's in 1942, remain unknown.
16. The Panel's 2004 Report accepted that the Sale by Graupe was a forced sale: it arose as a direct result of antisemitic discriminatory measures taken by the German tax authorities against the Gallery's shareholders in the form of an extortionate tax demand for the year 1935. The Panel determined there that the circumstances in which the Sale took place were sufficient to establish a strong moral case in the Claimants' favour. The Panel is satisfied the shareholders were

deprived of the Biccherna Panel by way of forced sale at the 1936 Sale by Graupe.

THE BOARD'S CASE

17. The Board's position is set out in its statement of case dated August 2013. While the Board does not dispute that (a) the Biccherna Panel is the subject of the claim, (b) it was the same work sold by Graupe in the 1936 Sale, and (c) the Sale was a forced sale within the scope of the Panel's Terms of Reference, it prefers a remedy which would see the Work remain in the British Library as part of the Henry Davis Gift. The Board's preferred remedy is advanced solely on the basis that the Board's retention of the Work is acceptable to the Claimants but, as the Panel notes above, it is not: the Claimants seek restitution of the Work.
18. The Board advances a number of reasons why the Biccherna Panel should remain in the British Library. First, the Work is situated there within a remarkable collection of bindings and other material for the physical handling of written materials which offers a uniquely stimulating research environment. Secondly, as part of the Library's wider collection, the Biccherna Panel assists scholars in understanding the various ways in which books and documents have been treated in a great variety of practical and cultural settings. The Board submits:

"The Biccherna tablet genre, for example, was later the subject of art history deception, as evidenced in the Library's collection by two nineteenth century forgeries ... [The Biccherna Panel] is a significant part of this broader collection, made available by the Library to researchers because it is unusual and would not normally form part of less wide-ranging collections."
19. Thirdly, the Biccherna Panel offers an exceptional example of the patronage of Pandolfo Petrucci in Siena, which rivalled that of the Medici in Florence but is less well known and to date less studied. Other works demonstrating Petrucci's patronage are held in British collections such as the British Museum and the Victoria and Albert Museum. These complementary examples together with the Biccherna Panel make possible the fuller understanding of the historical and artistic significance of such works. Fourthly, the Board is able to safeguard the Biccherna Panel under internationally recognised environmental conditions, with access to expert conservators. Finally, the Board makes the Work available beyond the confines of the Library through loans to institutions both inside and outside the United Kingdom. For all these reasons, the Board submits that the Panel should recommend the retention of the Work in the British Library as part of the Henry Davis Gift.
20. The Panel has already established the principle that the importance of a spoliated object to a national collection is not a paramount consideration in making its recommendations under its Terms of Reference. Nor does the Panel consider that the importance of maintaining the integrity of any gift or collection trumps the other factors

it is obliged to assess and evaluate. In considering the Board's preferred remedy, the Panel notes that its paramount purpose is to achieve a solution which is fair and just to both parties. This requires it to evaluate the title to the Work and to consider any moral obligation which the Board has in connection with the Work.

TITLE TO THE WORK

21. The Panel's Terms of Reference require it to consider both the original title of the Gallery's shareholders to the Biccherna Panel and the current title of the Board. Salient events in this regard are the Sale by Graupe in 1936, the acquisition by Mr Davis at Sotheby's in 1942, the donation by the deed of gift to the Trustees of the British Museum in 1968, and the transfer of possession to the Trustees (and the resultant formal transfer to the Board) upon Mr Davis's death in 1977.
22. The Panel accepts that the Gallery's shareholders had legal ownership of the Biccherna Panel before its consignment to the 1936 Sale. However, the Panel has concluded on the balance of probability that the 1936 Sale, despite the conditions in which it was conducted, conferred a good title on the acquirer of the Work, which title thereafter passed (through various intermediate acquirers) to the Board. If the 1936 Sale was not competent to pass title to the unknown acquirer, the sale and purchase of the Biccherna Panel at the Sotheby's auction in 1942 would, as an unlawful conversion, have triggered the six-year limitation period imposed by Section 2 of the Limitation Act 1939. It follows that the shareholders' original title would have expired, at the latest, by the end of 1948 by virtue of Section 3 of the Limitation Act 1939. It would appear to follow that the Board now has title. The Claimants do not seek to persuade the Panel otherwise.

MORAL OBLIGATION

23. According to the Board there is no surviving record of any assessment of the provenance of Mr Davis's collection either upon his gift to the Trustees in 1968 or when it came into the Board's possession following Mr Davis's death in 1977. Under the terms of gift in the 1968 trust deed, Mr Davis retained possession of the collection for the remainder of his life. The Board considers that the collection inventory, which contained the details of the immediate provenance for each item, would have provided assurance to Library staff of Mr Davis's title.
24. The Board says that it is likely that any assessment of the collection's suitability for the then British Museum Library would have focused on the collection and the quality of its items rather than their provenance. Research undertaken by the Board since the Claimants' approach in June 2013 has failed to establish the identity of the buyer of the Work at the 1936 Sale or how the Work came into Mr Bendir's possession before the Sotheby's sale in 1942, where (as Lot 69) it was sold for £200.
25. Previous research carried out by the Board between 1999 and 2000 to identify works with uncertain provenance during the Nazi era (1933-

1945) failed to identify the Biccherna Panel's gap in provenance between 1936 and 1942. This was because the Board had taken a risk-based approach to their enquiries given the very large number of items (running to many millions) in the Library's collection, and focused upon the more valuable items which were more likely to have been of greater interest to spoliators and more profitable to buyers (such as the book trade) upon resale.

26. The Board did not consider that the items comprising Mr Davis's gift fell within the scope of those enquiries for two reasons. First, most of the items in the Henry Davis Gift had been acquired through British dealers or auction houses, and therefore were considered to be of lower risk. The difficulty with this approach, of course, is that it does not immediately identify items with gaps in provenance during the Nazi era. The Panel acknowledges the constraints which strained public finances place upon the limited resources available to publicly-funded institutions. But with stewardship comes a responsibility to determine provenance and to identify any gaps in provenance. Principle 2 of the International Council of Museums Code of Ethics, first adopted in 1986, expressly recognises this obligation. The Panel considers that priority in identifying and determining gaps in provenance should also be given to items of significant public or scholarly interest, whether as the subject of institutional loans or through high level access at their home institution. Quite properly, the Board has since engaged in a review of the provenance of other items in the Henry Davis Gift and, subject to resources, will carry out similar work on other collections.
27. Secondly, when the Biccherna Panel was catalogued by scholars in 1984 and between 1979 and 2010, its provenance was not noted. In addition, the final volume of the 1979-2010 descriptive catalogue was in preparation at the time, which included provenances. The Panel gathers that the final volume of the catalogue did not identify the relevant gap in the Biccherna Panel's provenance. Further, although the Biccherna Panel was placed on the German Lost Art Database by the Claimants in 2008, the Board says this database is devoted largely to artworks rather than bibliographic material and it was not aware of this listing until the Claimants' approach in June 2013.
28. The Panel accepts that, given the extraordinary number of items in the British Library's collection, it was appropriate for the Board to adopt a risk-based approach to identify works with uncertain provenance during the Nazi era in the Library's collection. Taking into account the circumstances of Mr Davis's gift and the apparent negative results of the subsequent cataloguing work carried out in connection with the gift, the Panel thinks that it was unlikely the Board would have learned of the Biccherna Panel's part in the 1936 Sale and the resulting gap in provenance to 1942 until the Work itself had been subject to detailed provenance research or indeed until the Claimants' approach to the Board. For these reasons the Panel does not consider that any significant moral blame attaches to the Board.

29. The Biccherna Panel has formed part of the British Library's on-line database of bookbindings since 2008, which coincides with the Claimants' listing of the Work on the Lost Art Database. Indeed, the Work's listing on the Library's on-line database of bookbindings provided a means through which the Work came to the Claimants' attention. Since the Board became aware of the Claimants' interest in the Work, it has actively engaged with them on issues of provenance, claim and remedy. The Board is to be commended for its approach to this claim.

THE PANEL'S CONCLUSIONS AND RECOMMENDATION

30. As the Panel noted in its introduction, the Claimants seek the transfer of the Work to them. The Panel has determined that the Biccherna Panel formed part of the inventory owned by the Gallery's shareholders at the time of the forced sale by Graupe in 1936, and that the circumstances in which the Sale took place establish a strong moral case in the Claimants' favour.

31. The shareholders were compensated by the German Government following a claim under the Federal Compensation Act. They were paid 75,000 Deutschmarks as an overall payment for the entire loss, which could not be broken down for particular individual objects. The Panel determined in its 2004 Report that only a tiny fraction of that compensation would be attributable to any item in the Sale. For this reason the compensation payment does not influence the Panel in determining the appropriate remedy.

32. The Panel has considered carefully all of the submissions as to the appropriate remedy made by the Board. Those submissions rest upon the importance of the Biccherna Panel as part of its wider collection and of maintaining the integrity of the Henry Davis Gift, and the agreement of the Claimants. As the Panel noted, the Board's position on the importance of a spoliated object to a national collection is not a paramount consideration in its Terms of Reference. In balancing the moral strength of the Claimants' case against the Board's position, the Panel is of the opinion that the just and fair solution is the transfer of the Work to the Claimants.

33. The power of the Board to dispose of any article transferred to it by Trustees of the British Museum is circumscribed by the provisions of the British Library Act 1972 and does not include restitution to anyone (or to any one or more of their heirs) who lost possession of a cultural object during the Nazi era. Section 2(1) of the 2009 Act does, however, permit the Board to transfer such an object upon recommendation by the Panel and approval by the Secretary of State of the Panel's recommendation. The Panel notes that, by virtue of Section 2(6) of the 2009 Act, the Board's power to make such a transfer is subject to any trust or condition on which the object is held. The Panel sees nothing in the deed of gift which expressly prohibits the transfer of the Work, but of course responsibility for ensuring it does not rests with the Board before any transfer is made. The Panel

understands that the Board is satisfied that the terms of Mr Davis's gift do not impede a transfer of the Biccherna Panel to the Claimants.

34. The Panel is of the opinion that the just and fair resolution of the claim in the present case is the transfer of the Biccherna Panel by the Board to the Claimants. The Panel recommends to the Secretary of State accordingly. The Panel has no objection if the Claimants choose to accept compensation in lieu of restitution, presumably at market value less cost of sale. That is a matter for the parties.

12 June 2014

The Hon Sir Donnell Deeny – Chairman
Professor Sir Richard J Evans – Deputy Chairman
Tony Baumgartner
Sir Terry Heiser
Professor Peter Jones
Martin Levy
Peter Oppenheimer
Professor Norman Palmer
Ms Anna Southall
Professor Liba Taub
Baroness Warnock

Appendix: Constitution and Terms of Reference

APPENDIX

SPOLIATION ADVISORY PANEL CONSTITUTION AND TERMS OF REFERENCE²

Designation of the Panel

1. The Secretary of State has established a group of expert advisers, to be convened as a Panel from time to time, 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 an 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").
2. The Secretary of State has designated the expert advisers referred to above, to be known as the Spoliation Advisory Panel ("the Panel"), to consider the claim received from on for in the collection of ("the claim").
3. The Secretary of State has designated as Chairman of the Panel.
4. The Secretary of State has designated the Panel as the Advisory Panel for the purposes of the Holocaust (Return of Cultural Objects) Act 2009.

Resources for the Panel

5. 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

6. The Panel shall advise the claimant and the institution on what would be appropriate action to take in response to the 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.
7. 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

² Revised following enactment of the Holocaust (Return of Cultural Objects) Act 2009.

- (b) where it considers that the circumstances of the particular claim warrant it, on what action should be taken in relation to that claim.
- 8. In exercising its functions, while the Panel will consider legal issues relating to title to the object (see paragraph 15(d) and (f)), it will not be the function of the Panel to determine legal rights, for example as to title;
- 9. 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 15(e)) and whether any moral obligation rests on the institution (paragraph 15(g)).
- 10. Any recommendation made by the Panel is not intended to be legally binding on the claimant, the institution or the Secretary of State.
- 11. 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

- 12. The Panel will perform its functions and conduct its proceedings in strictest confidence. The Panel's "proceedings" include all its dealings in respect of a claim, whether written, such as in correspondence, or oral, such as at meetings and/or hearings.
- 13. Subject to the leave of the Chairman, the Panel shall treat all information relating to the claim as strictly confidential and safeguard it accordingly save that (a) such information which is submitted to the Panel by a party/parties to the proceedings shall normally be provided to the other party/parties to the proceedings in question; and (b) such information may, in appropriate circumstances, including having obtained a confidentiality undertaking if necessary, be communicated to third parties. "Information relating to the claim" includes, but is not limited to: the existence of the claim; all oral and written submissions; oral evidence and transcriptions of hearings relating to the claim.
- 14. In performing the functions set out in paragraphs 1, 6 and 7, the Panel's paramount purpose shall be to achieve a solution which is fair and just both to the claimant and to the institution.
- 15. 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 the 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 objectives, and 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 appropriate 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 7 in a written report, giving reasons, and supply a copy of the report to the claimant and the institution.

Scope of Advice

16. 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, or
 - (d) 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.

17. When advising the Secretary of State under paragraph 7(a) and/or (b), the Panel shall be free to recommend any action which they consider appropriate, and in particular may under paragraph 7(b), recommend to the Secretary of State the transfer of the object from one of the bodies named in the Holocaust (Return of Cultural Objects) Act 2009.

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