

RETURN
TO AN ADDRESS OF THE HONOURABLE THE HOUSE OF COMMONS
DATED 18TH JANUARY 2001
FOR THE

**REPORT OF THE SPOILIATION
ADVISORY PANEL IN RESPECT OF
A PAINTING NOW IN THE POSSESSION
OF THE TATE GALLERY**

The Right Honourable Sir David Hirst

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SPOILIATION ADVISORY PANEL

REPORT CONCERNING A CLAIM IN RESPECT OF A PICTURE NOW IN THE POSSESSION OF THE TATE GALLERY

THE CLAIM

1. The claimant brings this claim on behalf of himself and members of his family, with their authority, in respect of a picture entitled '*A View of Hampton Court Palace*' by Jan Griffier the Elder (c1645-1718), which is now in the possession of the Trustees of the Tate Gallery (the Tate). The claimant contends that his mother lost possession of the picture in Belgium during the war. The claimant has asked to remain anonymous, and we have been advised that we should accede to this request, having regard to the right of privacy enshrined in Article 8 of the European Convention of Human Rights.
2. The claim falls squarely within our functions as laid down in our Terms of Reference (annexed as Appendix 1) which 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 during the Nazi era (1933-1945) where such an object is now in the possession of a UK national collection".
3. The claim, which was first presented formally to the Tate in July 1999 and which was made to us on 25 June 2000, is for compensation, and the claimant does not seek the return of the painting. The Tate has also confirmed that it is anxious to keep the painting in its collection.

THE PAINTING

4. This oil painting, executed on copper and signed by the artist, is a panoramic view of Hampton Court Palace seen from an easterly viewpoint. In the foreground is the eastern range of buildings surrounding Fountain Court, which had recently been completed by Sir Christopher Wren, with the Tudor buildings and courts shown behind. The formal gardens to the east and south, the Maze and the Banqueting Hall are clearly visible, with the river and the Surrey countryside to the south; to the west is the open countryside north of the river, now situated within Bushy Park. On the extreme right is a capriccio which apparently represents Windsor Castle.

5. Jan Griffier the Elder was born in Amsterdam, came to England in his early twenties, and lived in or near London until his return to Holland in 1695. Ten years later he came back to England and bought a house on Millbank, in which he lived until his death. He painted several Thames-side scenes, including a famous view of Syon House, where the painting still remains. The date of execution of the Hampton Court picture is probably about 1710, to judge from the costumes of the

figures and the state of the buildings. It is thus a picture of national interest and importance, representing an early view of one of our great historic buildings by an artist with a lifelong association with the River Thames.

OUR TASK

6. Our task, as prescribed by our Terms of Reference, is six fold:-

- (1) To examine and assess the facts, in particular the circumstances in which the claimant or his family was deprived of the picture, and the circumstances in which the institution acquired it.
 - (2) To evaluate on the balance of probabilities the validity of the claimant's original title to the picture and the validity of the institution's title thereto, subject to the important reservation that our Terms of Reference stipulate that our conclusions on questions of law are not determinative of the parties' legal rights.
 - (3) To give due weight to the moral strength of the claimant's case, and to consider whether any moral obligation rests on the institution.
 - (4) Where appropriate, to assess the current market value of the picture or its value at any other appropriate time.
 - (5) If we uphold the claim in principle, to consider the following possible remedies:-
 - (a) the return of the picture to the claimant (not sought in the present case as already noted); or
 - (b) the payment of compensation to the claimant; 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.
 - (6) Having resolved these matters, we are required to advise the claimant and the institution what would be the appropriate action to be taken, and we are also empowered to advise the Secretary of State what action should be taken in relation to the claim when we consider that the circumstances of the particular claim warrant it.
7. We have received detailed written evidence and submissions from both the claimant and the Tate on which, after consultation with the parties and, in accordance with our Rules of Procedure, we have been able to dispose of the case without recourse to an oral hearing.

THE FACTUAL EVIDENCE

The claimant's family history as described by him

8. The claimant, who was born in 1922, is the son of Jewish parents. Before the war the family, comprising the claimant, his parents, his elder brother and his younger sister, lived in Düsseldorf. The father was a partner in a private bank until he was dismissed by the Nazis in 1933. In 1937 he disappeared and presumably died or was killed in a concentration camp.

9. In February 1939 the claimant emigrated with his sister to England, where his brother had already preceded him. He was interned at the beginning of the war, but in 1941 enlisted in the British Army and changed his name. He has lived in England ever since, and now resides in London. Following her vicissitudes during the war (see below) the claimant's mother came to England in 1946, and died here in 1968. She sought compensation from the German Government and was awarded very limited compensation for three pictures allegedly stolen in transit. The claim files, we are informed by the German authorities, do not make any reference to the Griffier painting.

The history of the picture as recounted by the claimant

10. This is based partly on his own recollection and, for the period 1939 onwards, on information imparted to him by his mother. The father had been a keen collector of pictures, both Old Master and Jewish Impressionist paintings, purchasing the bulk of his collection from Gallery Stern in Düsseldorf, including the Griffier which he acquired in about 1932. The claimant recollects the picture hanging on the wall of the dining room in their home. Furthermore he has produced a negative of the painting which has been examined by the Victoria and Albert Museum, with the assistance of Kodak, and authenticated as of probable 1930's origin.

11. In 1939 the mother sent her paintings and furniture, including the Griffier, to Belgium. She herself managed to escape across the German/Belgian frontier. After the German occupation of Belgium in 1940, she remained in hiding and sold the paintings (which were in store) one by one, to finance her basic necessities. In the case of the sale of the Griffier, she told the claimant that she only received enough 'for an apple and an egg'. The only identification she could give of the buyer of the Griffier was that it was a gallery in the Avenue Louise in Brussels. We have made enquiries, and established that there was an art gallery called La Petite Galerie in the Avenue at the relevant time. No records from the Gallery have been traced.

12. The claimant recollects his mother showing him at the end of the war a chronological list of the oil paintings she had sold, but this is no longer available. However, the photograph referred to above was found by him in negative form among her papers, together with the negatives of a number of the other paintings which he states that his father had commissioned for insurance purposes.

The post-war history of the painting

13. The painting, which was then described as “*A Castle in Northern France* by Lucas Van Uden”, next came to light on 24 November 1955, when it was sold at auction by the Kunsthause Lempertz in Cologne to Messrs Roland, Browse & Delbano of 19 Cork Street, London W1 for £166 18s 5d. The transaction was recorded contemporaneously by Messrs Roland, Browse & Delbano in their stock and sales ledgers.

The Tate’s acquisition of the painting

14. On 25 January 1961 the picture (now under the title “*A View of the Palace of Hampton Court and the Grounds, with Barges on the River* by Jan Griffier”) was offered for sale at Sotheby’s by Messrs Roland, Browse & Delbano, but withdrawn at the request of the Friends of the Tate Gallery (the Friends), who purchased it in February 1961 for £400, and donated it to the Tate forthwith. All these transactions are fully documented. Enquiries addressed by Roland, Browse & Delbano, and by the Tate Gallery after the Friends’ gift in 1961, to the Kunsthause Lempertz, failed to elicit any information about their acquisition of the picture, or of its history immediately after the war, save that the previous owner was ‘a serious private collector in South Germany’.

15. The Tate’s Conservation Record of the picture, based on an examination dated 29 August 1969, assessed its general condition as ‘very poor’ with widespread fine elevated cracks and numerous re-touchings. This led to the execution of substantial conservation work to stabilise its condition later in 1969. A very recent report by Mr Stephen Hackney, Paintings Conservator at the Tate Gallery, dated 28 July 1999, records that its condition has not changed in any measurable way since 1969, the frame having created a micro-climate to prevent further environmental variations. It is, however, still in a very fragile condition.

16. The picture has attracted considerable public attention, and has (in accordance with the Tate’s policy of regular rotation of displays) been on view for over 70% of the period of 40-odd years since its acquisition.

The claimant’s visits to the Tate in 1990/1991

17. With the assistance of Sotheby’s, he identified the picture at the Tate on a visit in 1990 and on 15 January 1991 described its history in a manner entirely consistent with the above account to Elizabeth Einberg, the Assistant Keeper of the British Collection, who made a contemporaneous note of the conversation on the picture’s provenance card.

ANALYSIS OF THE FACTUAL EVIDENCE

18. No problem arises concerning the history of the painting from 1955 onwards, given that it is comprehensively documented in both Roland, Browse & Delbano’s and the Tate’s records, and we have no hesitation in accepting this evidence, which is not challenged by the claimant.

19. The claimant's evidence, on the other hand, while partly based on his own recollection, is dependent on information derived from his mother as to the critical wartime events.

20. The mother's account lacks precision, and in particular is vague as to the precise circumstances of her disposal of the picture to the unidentified gallery and, apart from the photograph, other possibly relevant documents, such as her chronological list of disposals are missing. Consequently, we did not think it right to accept this evidence without very thorough consideration. However, our Terms of Reference, following the Washington Declaration dated December 1998 (annexed as Appendix 2), enjoin us to recognise the difficulties of proof after the destruction of the Second World War and the Holocaust and the duration of the period which has elapsed since.

21. Furthermore, there are two important features which we think significantly enhance her credibility:—

- (1) The history of the German occupation of Belgium throws a helpful light on the story as recounted by the mother. For this aspect of the case we are greatly indebted to one of our members, Professor Richard Evans, the Professor of Modern History at Cambridge University, who has specialised in the history of the period, and is the author of several works relating to it. During this period there were severe food shortages imposed by German occupation policy which inflicted great hardship, not least on the Jews, who were barred from gainful occupation. In all probability therefore she was extremely vulnerable, not least because she was in hiding and dependent on the help of others. Otherwise, however, the régime was somewhat less oppressive than in the neighbouring, occupied countries and in particular commercial activity continued including, no doubt, dealing in fine arts. Thus the sequence of events described above fitted the prevalent conditions.
- (2) The picture next turned up less than 15 years later at auction in Germany, having apparently come from a South German collection. It seems to us that, in the middle of the war, the Brussels Art Gallery would have most likely found a customer among the German occupying forces.

22. Both the claimant and the Tate have verified their evidence on oath.

23. The claimant's evidence has been consistent throughout, and the Tate has not challenged its veracity. We therefore conclude that his first hand testimony, based on his own recollection, and also his mother's account of the picture's wartime history as imparted to him, are true.

24. **It follows that we accept:—**

- (1) the evidence as to the father's acquisition of the picture and its presence in the dining room in the family's Düsseldorf home in the 1930's; and
- (2) the evidence as to the mother's disposal of the picture in Belgium during the war. This was tantamount to a forced sale for an undervalue, thus

falling within our remit to examine the circumstances in which the claimant was deprived of the picture ‘whether by theft, forced sale, sale at an under value, or otherwise’.

TITLE

Introduction

25. We have accepted the claimant’s evidence as to his father’s ownership of the picture and its presence in their family home in Düsseldorf in the 1930s. It follows that the family’s original title to the picture, which is not challenged by the Tate once that evidence is accepted, is unimpeachable.

26. Thereafter the position is much more complicated, and involves a number of systems of law in assessing the successive relevant transactions, viz:-

- (a) The mother’s disposal of the picture to the Brussels Gallery during the war, which is governed by Belgian law;
- (b) Roland, Browse & Delbanco’s purchase of the picture at auction in Cologne in 1955, the proprietary effect at least of which is governed by German law as the law of the country where the picture was situated at the time;
- (c) the Friends of the Tate’s purchase of the picture from Roland, Browse & Delbanco in 1961 and its subsequent gift to the Tate, both of which transactions are governed by English law as the law of the country where the picture was situated at the time.

27. The critical purchase is the last since, if the Friends acquired a valid title on, or by virtue of, their purchase, and passed it on to the Tate by virtue of their gift, the Tate’s legal title is sound, irrespective of the status of the two earlier transactions. Nevertheless, we propose to examine the earlier transactions in chronological order, bearing in mind that, if either or both passed a valid legal title to the purchaser under the relevant law, the original legal title of the claimant’s family would be similarly invalidated.

28. On all these matters we have had the advantage of the advice and assistance of Professor Norman Palmer and Mr Donnell Deeny QC who are members of the Panel and also of Ms Jennifer McDermott, who is a partner in Lovells, 65 Holborn Viaduct, London EC1A 2DY and serves as legal adviser to the Panel.

The mother’s sale in Brussels

29. We have, through Lovells, taken the advice of a leading firm of Belgian lawyers, Messrs Stibbe Simont Monahan Duhot, who provided a comprehensive opinion dated 25 August 2000.

30. They have examined all relevant aspects of Belgian law, viz:-

- (a) The Decree Statute dated 10 January 1941, issued by the Belgian Government in exile, provides inter alia that all acts of dispossession or pledge of moveable and immovable goods that were “subject, by the enemy, since 10 May 1940, to confiscation, seizure, forced sale, or any other measure encroaching on private ownership”, are null and void. However the Decree Statute also stipulates that no claim for restitution may be initiated after the expiration of three years following the return of peace. Consequently, the Belgian lawyers advise that, even assuming that the dispossession was in consequence of an act of the enemy, which they regard as doubtful, any claim under the Decree Statute became time barred three years after the return of peace, ie in 1948.
- (b) Article 1109 of the Belgian Civil Code, which relates to valid consent on entering into an agreement, provides that “there is no valid consent if consent has been given by a mistake, or if it has been obtained by violence or by malice”. However, under article 1304, a claim under this heading is time barred after ten years. Consequently the Belgian lawyers advise that, even assuming in the claimant’s favour that his mother’s sale was tainted by violence, on the grounds that the Brussels gallery unjustifiably took advantage of her state of necessity, a claim under this heading is now time barred.
- (c) “Lésion Qualifiée” entitles a contracting party to rescind a contract where the opposite party misuses the ignorance or needs of the victim in order to obtain an unconscionable benefit. For this to apply there must have been misuse of the victim’s weaknesses or needs which was decisive in the giving of consent, and which created a manifest imbalance between the two parties. The Belgian lawyers advise that, even assuming the claimant could meet these criteria, all claims under Belgian Civil Law became time barred after 30 years following the events through which they arose, i.e. by the early 1970s, pursuant to article 2251.
- (d) A Commission was established in Belgium in 1999 with the aim of investigating the fate of goods belonging to members of the Jewish community of Belgium (in particular goods that were spoliated or abandoned during World War II). However, the Commission’s remit is limited to researching and clarifying what happened to such goods and it has no powers of compensation. It is due to report in 2001 to the Belgian Government who are only then likely to decide whether to create a mechanism to deal with compensation claims. It is therefore irrelevant in the present context.

31. Thus the Belgian lawyers’ conclusion is that, on a general overview, a claim brought by the mother’s descendants in a Belgian court and adjudicated according to Belgian law, even if rightful on its merits, could not succeed on account of the various time bars noted above. We accept this advice.

32. We have taken the advice of Lovells’ German correspondent Herr Leopold von Gerlach who is a qualified German lawyer. He advises that, under German substantive law, contained in section 929 of the German Civil Code, Roland, Browse & Delbanco acquired ownership of the painting, provided three conditions existed:-

- (1) There was a genuine agreement with the auctioneer concerning the transfer of title.
- (2) The painting was handed over subsequent to the auction.
- (3) The auctioneer was either the owner of the painting or acted on behalf of the owner.

33. We have no doubt that conditions (1) and (2) are satisfied. As to condition (3), it seems clear that the auctioneers were acting on behalf of a person whom they were reasonably entitled to conclude was either the owner or acting on the owner's behalf, although his or her identity is shrouded in mystery. Furthermore, we are advised that, under section 1006 of the German Civil Code, there is a presumption that the auctioneer, or the person on behalf of whom he acted, was the owner.

34. Even if pre-condition (3) were not met, we are advised that Roland, Browse & Delbanco could still have acquired a good title to the painting. This would have been the case if the representative of Roland, Browse & Delbanco acted in good faith as to the proper title of the auctioneer or the person on whose behalf the auctioneer acted. Moreover, this good faith is presumed according to the relevant provisions of German Law (section 932 of the German Civil Code). In any event, under section 195 of the German Civil Code a 30-year limitation period would have begun in 1955 (or earlier) and expired in 1985 (or earlier). This 30 year period would have applied had the German court hearing the matter applied German limitation law as either the substantive or the procedural law governing the question in Germany. If, for some reason, English law were applicable, the even shorter English limitation period of 6 years would have applied and expired. Thus the German lawyer's conclusion is that a claim by the mother's descendants brought in a German court and adjudicated according to German law would fail. We accept this advice.

The Friends' purchase from Roland, Browse & Delbanco

35. The Limitation Act 1939, the statute in force in 1961, extinguished an owner's right to sue and his title six years after the misappropriation, even against a thief as well as against an ordinary buyer, provided that there had been no fraud or fraudulent concealment of the owner's right of action.

36. In our view there could be no possible basis for suggesting that the Friends were guilty of "fraud" or of "fraudulent concealment" of the claimant's right of action, even in the extended sense in which these words are interpreted in English law, since they had no knowledge that such a right existed.

37. **The claimant's title was accordingly extinguished in 1967, thus clothing the Friends, and thereafter the Tate themselves, with an unassailable title.**

38. We further note that the claimant would have been in no better position under the Act now in force, the Limitation Act 1980, which provides that a former owner's title to goods is extinguished, as against a purchaser in good faith,

after six years from the date of purchase, even if the goods were originally stolen, or otherwise misappropriated. In the present case there is no basis for suggesting that the Friends' purchase was undertaken otherwise than in good faith, and no such suggestion has been advanced by the claimant.

The impact of foreign limitation periods in English law

39. This is now governed by the Foreign Limitation Periods Act 1984 (the Act) which provides that, where in any domestic proceedings the law of another country must be taken into account, the laws of that country relating to limitation shall apply, unless they conflict with English public policy. However, the Act does not apply in relation to any matter if the limitation period which, apart from the Act, would have been applied in respect of that matter, expired before 1 October 1985 (the day the Act came into force). Since in the present case the original limitation period expired in 1967, the Act is inapplicable. It follows that the Belgian and German limitation periods would not affect any claim brought in an English court, which would be subject to the English law on limitation periods.

Conclusion

40. Having regard to the considerations advanced above, the Tate has in our opinion good legal title to the picture for two reasons:

- (a) because Roland, Browse & Delbano, the vendors to the Friends, themselves had sound title at the time of their sale; and
- (b) because even if Roland, Browse & Delbano had no such title at that time, any claim against the Tate is now statute-barred under English law, which is the applicable law.

Furthermore, any claims by the mother's descendants brought in either Belgium or Germany would be time-barred under Belgian or German law, as the case may be.

41. It follows that the claimant and the members of the family he represents have no valid legal claim to the picture.

MORAL ISSUES

42. On 5 January 1943 there was issued in London the "Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control" (annexed as Appendix 3). All the allies, including the United Kingdom, subscribed to this very important declaration, which was in the following terms:-

"[The Governments] hereby issue a formal warning to all concerned, but 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 ... 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 ... 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."

Although the Declaration was never embodied by statute into English law, we derive most helpful guidance from the underlying principle.

43. The closing words of the Declaration aptly exemplify the mother's disposal of the picture, which in our view falls within its scope. As a Jew struggling to survive in a hostile environment, and faced with the threat of starvation, she had no alternative but to dispose of her valuable possessions, including the picture, in order to survive, and she had perforce to sell it at an undervalue. **If she were still the claimant, we would be persuaded by the moral strength of her case.**

44. Are the claimant and the members of his family he represents in any weaker position? It was not until 1990 that he first identified the picture at the Tate, and so for the first time had any inkling that it had survived the war. Although he took no action until 1999, we do not think he could be criticised on that count, since it was only towards the end of the decade that the prevailing public attitude now so favourable to Holocaust-related claims developed. **We are therefore also persuaded by the moral strength of their case.**

45. Next we must consider whether any moral obligation rests on the Tate, particularly bearing in mind the circumstances of their acquisition of the picture, and their knowledge at that juncture of its provenance.

46. We stress that, in our view, any obligation to investigate rested on the Tate itself, not on the Friends, who are incorporated as a separate company limited by guarantee, founded in 1958 and governed by a Council of Management which is elected by the members at their Annual General Meeting. Nowadays the Friends support acquisitions already agreed by the Trustees of the Tate, but in 1961 they acted much more autonomously, and (as in the case of the Griffier) pursued their own programme of acquisition. The picture was acquired from reputable dealers, and the Friends' sole intention was to donate it to The Tate as a picture of national importance.

47. As one would expect, immediately after accepting the gift The Tate did institute enquiries. They first communicated with Roland, Browse & Delbano, who replied on 4 March 1961 as follows:-

"The picture was bought by us from a sale in Cologne, where it was described as Lucas van Uden "A Castle in the North of France". We wrote to the auctioneers to find out whether they knew of any former history, but we have just heard it was given to them by a private collector, whose name they did not disclose to us, and that is, unfortunately, all".

48. The Tate followed this up with a letter to the Kunsthuis Lempertz, who replied on 10 April 1961 as follows:-

“...We regret that we have got to inform you of the impossibility of getting into touch with the previous owner of the picture by Jan Griffier who purchased (sic) us the object for our sale in November 1955 so that we are sorry to be unable to give you any information about its previous history. The person in question was a serious private collector of Southern Germany. and at this time we didn’t have any reason to doubt, whether the picture had been painted by Lucas van Uden.”

49. Meanwhile the Tate had also addressed enquiries to the Rijksbureau voor Kunsthistorische Documentatie, which is the Netherlands Institute for Art History in the Hague, who replied on 6 March 1961 that they had looked into their photographic files and in abstracts for sale and other catalogues, but were unable to find any trace of the picture. There the matter rested until the claimant’s visit to the Tate in 1990.

50. Should the Tate have done more at the time they acquired the painting to investigate the picture’s provenance? In making this judgement we have been greatly assisted by the expertise of one of our Members, Ms Anna Southall, the Director of the National Museum & Gallery of Wales, and of Mr Neil MacGregor, the Director of the National Gallery. The question must be judged by the standards of 1961, not 2000, and, aided by their advice, we are satisfied that the scope of the Tate’s enquiry was reasonable by the standards of the time, when museum buyers were characteristically concerned with the history and importance of the picture rather than with any considerations of spoliation. Furthermore, at that time, there were no grounds for suspicion that there was anything amiss with the picture’s provenance. **We have not identified any grounds for criticising the conduct of the Tate in this matter.**

REMEDIES

51. Having upheld the claim in principle, our first option would be to recommend the return of the picture to the claimant and his family. However, as already noted, they do not seek its return, which would in any case be debarred under present statute law which prohibits the disposal by the Tate and other major national collections of objects vested in them (section 4 of the Museums and Galleries Act 1992), subject possibly to an application to the Charity Commissioners under Section 27 of the Charities Act, 1993, for permission to dispose of the object. We take note, however, of the memorandum submitted by the Charity Commission to the Select Committee on Culture, Media and Sport for their enquiry into *Cultural property: Return and Illicit Trade*, which emphasised that, if Trustees made an application for authority to return a particular item to its ‘rightful’ owner, they would have to balance any moral case for return against their responsibilities to keep the property in the public domain for the public benefit.

52. The Select Committee on Culture Media and Sport, in their Report dated 18 July 2000, has recommended that, in cases where a claim to restitution is upheld by the Panel, this barrier should be removed, and that consultation should

begin to secure cross-party agreement to this end (paragraphs 193-194 of the Report). Mr Alan Howarth, the Arts Minister, said that he accepted the Committee's recommendation that there should be consultation specifically on the case for legislation to permit the return of objects which were wrongfully taken during the period 1933 to 1945. We are aware that he has written to the relevant bodies to set this consultation in train. We would welcome the opportunity to consider the matter, which falls within our Terms of Reference, (see para 9) but would wish to approach the question as a matter of general principle, rather than in the context of an individual claim such as the present one.

53. Under our second option we are empowered to recommend the payment of compensation but we do not think it would be appropriate to award compensation in the legal sense, seeing that the claimant and his family have no legal claim.

54. We therefore turn to our third option, and ask whether it would be appropriate to recommend an *ex gratia* payment. For the reasons given above, and particularly in the light of the London Declaration, we are persuaded that the claimant and his family have a valid moral claim, having regard to the spoliation which they have suffered, and that this should be reflected in an *ex gratia* payment.

55. In fixing the amount, we have a wide measure of discretion, which must be exercised in the light of the facts of the particular case. Here we have come to the conclusion that the strength of the moral case advanced by the claimant and his family merits an *ex gratia* award broadly equivalent to the full realisable value of the picture, subject to appropriate adjustment, as explained below. However, we emphasise that this should not be taken as a precedent for an *ex gratia* award in any future case, which would depend on its particular circumstances.

56. We have been furnished with four valuations by highly respected experts in this field, as follows:-

- a) Sotheby's (Mr David Moore-Gwyn, the Head of their British Department) instructed by the claimant, valued it at £250,000;
- b) Christie's (Mr Francis Russell, and Mr John Stainton of their British and Irish Art Department) instructed by the Tate, both valued it at £120,000-£180,000;
- c) Mr Johnny van Haeften of Johnny van Haeften Ltd, 13 Duke Street, St James' also instructed by the Tate, valued it at £150,000;
- d) Sir Jack Baer of Hazlitt Gooden and Fox, 38 Bury Street, St James', instructed by the Panel, valued it at £100,000.

57. Following examination under studio conditions, Sotheby's and Mr van Haeften assessed the condition of the picture as good having regard to its age and fragility. Sir Jack Baer, following a similar examination, assessed its condition as very poor, and said that, had it been in good condition, he would have valued it at £150,000. Christie's did not elaborate their report. Mr Moore-Gwyn very fairly explained that his valuation was a "high saleroom estimate"; this was a reasonable approach on Sotheby's part but one which, from our standpoint, sets too high a criterion on the valuation scale.

58. Sir Jack also stated that during the 1980's and 1990's a total of 80 paintings by Griffier appeared at public auctions of which no more than three fetched over £60,000, the highest price being £85,000 for a picture painted on copper sold in 1995. Griffier's canvas of "*Queen Anne's Visit to Greenwich*" fetched £64,000 at auction in 1999, and a further canvas of Greenwich was sold privately for £95,000 in 2000.

59. The wide disparity between the experts' valuations makes our task at this stage difficult, all the more so because of this disagreement as to the picture's condition, though all agree as to its fragility.

60. There is however a consensus between Christie's (taking the middle of their range) and Mr van Haeften on a figure of £150,000. Sir Jack Baer's reduction from £150,000 to £100,000 is contingent on his opinion as to the picture's condition which is controversial but, significantly, in accordance with the Tate's own assessment. If Sotheby's estimate is discounted to a lower level, for the reasons given above, it comes closer to the consensus. We are also influenced by the prices for paintings by Griffier including, in particular, the two topographical views of Greenwich.

61. Reconciling all these figures as best we can, we have come to the conclusion that a fair valuation is of the order of £140,000.

62. There are, however, a number of other factors to take into account before arriving at a suitable *ex gratia* award. Had the claimant and his family retained the picture they would, as prudent owners, have needed to ensure the care and conservation of this fragile painting in a manner at least similar to the initial treatment and subsequent stewardship of the Tate. There can be no question that this treatment and stewardship not only involved the Tate in appreciable expenditure but also contributed to the current value of the work. Furthermore, the family would most probably have incurred insurance premiums, as did their father. If the family had sold it at auction at some point over the last 40 years, they would probably have had to pay a seller's commission.

63. We do not attempt to put a precise figure on any of these adjustments but, taken together, they clearly represent significant potential expenses for the claimant and his family.

64. On the other hand, we take into account the substantial benefit derived by the Tate and the public from its possession of the work over the past four decades. This benefit would not have been enjoyed had the claimant and his family not been deprived of the work in the circumstances already described.

65. Looking therefore at the case in the round we recommend an *ex gratia* payment of £125,000. We also recommend that the Tate should display alongside the picture an account of its history and provenance during and since the Nazi era, with special reference to the interest therein of the claimant and his family.

Discussion

66. The Tate have submitted to us that, in the absence of any legal liability or moral wrongdoing on their part, they should not be called upon to pay. We are sympathetic to this plea since they are free both of any legal liability and of moral blame. We therefore consider that the responsibility for redress should rest on the Government.

67. We have thought very carefully about the appropriateness of recommending that the payment which we propose should be borne by the taxpayer. We think it right so to recommend for the following reasons:-

- (1) When announcing the membership of the Panel on 13 April 2000, Mr Alan Howarth, the Arts Minister said:-

“Governments across the world are committing themselves to do what can, at this late stage, be done to redress a number of terrible wrongs that were perpetrated in the Nazi era. The Government is determined to set an example of how a civilised society should behave.

The Spoliation Advisory Panel will be a distinguished body advising claimants, Trustees of the holding collections and also the Government itself. The Government will take its recommendations very seriously indeed – let no one doubt our commitment to right these historic wrongs.”

- (2) Prior to the establishment of the Panel, when foreshadowing our work, the Lord Chancellor, on behalf of the Government wrote as follows:-

“It is envisaged that the recommendations on all claims will be made, in the first instance, to the Government. Claims against institutions in England would be made to the DCMS. It would then be for the Government to discuss the matter with the institution concerned; but, at the end of the day, it will be the Government which either has to provide financial compensation or, where necessary, introduce legislation to enable an object to be returned.”

- (3) Throughout the 40 odd years during which the picture has been owned by the Tate and exhibited over such a large proportion of that period, the public has had the benefit of access to and enjoyment of the picture. Future visitors to the Gallery will enjoy a similar privilege. We do not think it unreasonable that the public, in the shape of the general body of taxpayers, should fund this public benefit.

SUMMARY OF RECOMMENDATIONS

68. For the above reasons, we unanimously recommend:-

- (1) That the Government should make an ex gratia payment of £125,000 to the claimant on behalf of himself and the other members of his family.
- (2) That the Tate Gallery should display alongside the picture an account of its history and provenance during and since the Nazi era, with special reference to the interest therein of the claimant and his family.

18 January 2001

The Rt Hon Sir David Hirst – Chairman
Mr Donnell Deeny QC
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: Washington Declaration

Appendix 3: Inter-Allied 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

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.

APPENDIX 3

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 today 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

**NOTE ON THE MEANING, SCOPE AND APPLICATION OF THE
INTER-ALLIED DECLARATION AGAINST ACTS OF
DISPOSSESSION COMMITTED IN TERRITORIES UNDER ENEMY
OCCUPATION OR CONTROL**

1. The Governments who have today issued this Declaration include all the Governments of the United Nations who have suffered the invasion of their national territory by brutal and rapacious enemies.
2. The Declaration is being communicated on behalf of all parties to the Governments of the other United Nations, with an invitation to consider marking their adherence to the principles embodied in the Declaration by some pronouncement of their own. The Declaration is also being brought to the notice of neutral Governments. The parties to the Declaration are collaborating to arrange the maximum publicity for it, through the press and by broadcasting.
3. The Declaration is in the form of a general statement of the attitude of the participating Governments and of the French National Committee towards the acts of dispossession, of whatever nature, which have been, and are being increasingly, practised by the enemy Powers in the territories which they have occupied or brought under their control by their successive aggressions against the free peoples of the world. The Declaration makes it clear that it applies to transfers and dealings effected in territory under the indirect control of the enemy (such as the former "unoccupied zone" in France) just as much as it applies to such transactions in territory which is under his direct physical control.
4. In the Declaration the parties "reserve all their rights" to declare invalid transfers of or dealings with property, rights etc., which have taken place during the period of enemy occupation or control of the territories in question. It is obviously impossible for a general declaration of this nature to define exactly the action which will require to be taken when victory has been won and the occupation or control of foreign territory by the enemy has been brought to an end. Dispossession has taken many forms and all will require consideration in the light of circumstances which may well vary from country to country. The wording of the Declaration however, clearly covers all forms of looting to which the enemy has resorted. It applies, eg, to the stealing or forced purchase of works of art just as much as to the theft or forced transfer of bearer bonds.
5. In so far as transfers or dealings are confined in their scope to the territory of a particular country, the procedure of examination and the decision reached regarding their invalidation will fall to be undertaken by the legitimate Government of the country concerned on its return. The Declaration marks, however, the solidarity in this important matter of all the participating Governments and of the French National Committee, and this means that they are mutually pledged to assist one another as may be required, and, in conformity with the principles of equity, to examine and if necessary to implement the invalidation of transfers or dealings with property, rights, etc., which may extend across national frontiers and require action by two or more Governments.

6. The expression of solidarity between the parties also means that they are agreed so far as possible to follow in this matter similar lines of policy, without derogation to their national sovereignty and having regard to the differences prevailing in the various countries. The parties making the Declaration have accordingly decided as a first step in this direction to establish a committee of experts, who will consider the scope and sufficiency of the existing legislation of the Allied countries concerned for the purpose of invalidating transfers or dealings of the nature indicated in the Declaration in all proper cases. The Committee have also been asked to receive and collect available information upon the methods adopted by the enemy Governments and their adherents to lay their hands upon property, rights etc., in the territories which they have occupied or brought under their control. When a report is available from this committee of experts the whole question will be reviewed by the Governments making the Declaration and the French National Committee. The other Governments of the United Nations will be informed of the results of this enquiry.