



RETURN TO AN ADDRESS OF THE HONOURABLE THE HOUSE OF
COMMONS DATED 26 MARCH 2014 FOR THE

**REPORT OF THE SPOLIATION ADVISORY
PANEL IN RESPECT OF AN OIL PAINTING BY
JOHN CONSTABLE, 'BEACHING A BOAT,
BRIGHTON', NOW IN THE POSSESSION OF THE
TATE GALLERY**

The Honourable Sir Donnell Deeny



RETURN TO AN ADDRESS OF THE HONOURABLE THE HOUSE OF
COMMONS DATED 26 MARCH 2014 FOR THE

**REPORT OF THE SPOILIATION ADVISORY
PANEL IN RESPECT OF AN OIL PAINTING BY
JOHN CONSTABLE, 'BEACHING A BOAT,
BRIGHTON', NOW IN THE POSSESSION OF THE
TATE GALLERY**

The Honourable Sir Donnell Deeny

*Ordered by the House of Commons
to be printed 26 March 2014*



© Crown copyright 2014

You may re-use this information (excluding logos) free of charge in any format or medium, under the terms of the Open Government Licence v.2. To view this licence visit www.nationalarchives.gov.uk/doc/open-government-licence/version/2/ or email PSI@nationalarchives.gsi.gov.uk

This publication is available at www.gov.uk/government/publications

Any enquiries regarding this publication should be sent to us at enquiries@culture.gov.uk

Print ISBN 9781474100083

Web ISBN 9781474100090

Printed in the UK by the Williams Lea Group on behalf of the Controller of Her Majesty's Stationery Office

ID PO0214001 03/14 36885 19585

Printed on paper containing 75% recycled fibre content minimum

REPORT OF THE SPOILIATION ADVISORY PANEL IN RESPECT OF AN OIL PAINTING BY JOHN CONSTABLE, 'BEACHING A BOAT, BRIGHTON', NOW IN THE POSSESSION OF THE TATE GALLERY

Introduction

1. In this case the Spoliation Advisory Panel (the Panel) is considering a claim by the heirs (the Claimants) of a Hungarian art collector (the Collector) against the Tate Gallery (the Tate) in respect of an oil sketch currently in the possession of Tate Britain, a division of the Tate, under the title *Beaching a Boat, Brighton* (the Painting). The Claimants have asked to remain anonymous, and for the anonymity of the family name also to be preserved. The Panel is happy to accede to this request, having regard to the right of privacy enshrined in Article 8 of the European Convention on Human Rights. The Claimants assert that the Painting was the subject of looting during the Nazi era, following the German invasion of Hungary in 1944, as a result of antisemitic persecution. The Claimants seek the transfer of the Painting to themselves. The Tate contests the claim, opposing restitution and casting doubt on other aspects of the claim.

The Panel's task

2. The task of the Panel is to consider claims from anyone, or from 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, or in the possession of another UK museum or gallery established for the public benefit; and 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 (see the Panel's Constitution and Terms of Reference in the Appendix). If the Panel recommends the transfer of an object from a collection belonging to one of the bodies named in Section 1 of The Holocaust (Return of Cultural Objects) Act 2009 to the claimant and the Secretary of State approves the Panel's recommendation, the Museum is empowered to return the objects in question to the claimant. Section 1 of the Act applies to the Board of Trustees of the Tate.
3. In making this report, the Panel has considered a series of submissions by Klein Solicitors and latterly, the Commission for Art Recovery, acting for the Claimants, and from Mr Gilead Cooper QC, acting for the Tate, together with extensive files of supporting documents and subsequent exchanges. In view of the voluminous nature of the documentation, the Claimants withdrew their original request for an oral hearing.
4. The Panel has taken into account all these submissions and documents (whether expressly referred to in this Report or otherwise)

in order to determine the circumstances in which the Collector was deprived of the Painting; to evaluate the legal title; to weigh the moral strength of the Claimants' case; to decide whether any moral obligation rests on the Tate; and to advise the Claimants, the Tate, 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 Tate.

The Painting and its history

5. John Constable (1776-1837) composed the Painting as a sketch in oil on paper laid on canvas during one of his first visits to Brighton, in 1824. The dimensions are approximately 26 x 30 cm. He later used some motifs from it for a larger painting, the *Chain Pier*, also in Tate Britain.
6. The Painting was inherited by Constable's daughter Isabel, who died in 1888. It was sold at Christie's in 1892 to Walter Dowdeswell, a London art dealer. Dowdeswell sold it on to P. A. Chéramy in 1902, who brought it to auction at the Galerie Georges Petit in Paris in May 1908, when it was purchased by the Collector.
7. The Collector was a well-known Hungarian artist and connoisseur, whose family had amassed considerable wealth through banking and industrial activities in the nineteenth century. The Collector's life and work have been the subject of several scholarly articles, listed by the Claimants. His collection focused in particular on French artists of the nineteenth century.
8. The Collector, as noted, purchased the Painting at auction in Paris in 1908. The purchase was documented in an article in *Der Kunstsammler: Organ für den Internationalen Kunstmarkt*, 1908 by R.A. Meyer. It is not contested by the Tate. The Painting was briefly confiscated by the Hungarian state during the Communist revolution of 1919 but returned to the Collector after the revolution was suppressed. It was inventorized in 1924 and again in 1926.
9. The Collector, who was of Jewish origin but had converted to Christianity prior to his marriage, managed to preserve his possessions and his property, principally a palatial house in Buda and a castle in the countryside, during the increasingly antisemitic atmosphere in Hungary in the late 1930s. As an ally of Nazi Germany, Hungary began to be exposed to Allied bombing raids in 1942, and the Collector, like many others, deposited most of his artworks in bank vaults in Budapest. It is not clear, however, whether the Painting was among these artworks, or whether it remained at one of the Collector's properties, and if so, at which one.
10. In March 1944, when Hungary threatened to terminate its alliance with Nazi Germany, the Germans invaded, and the Collector, using false

papers, went into hiding in the countryside, where he remained until the Russian liberation of Hungary in February 1945. His properties were confiscated, and contemporary witness accounts noted German military trucks being loaded with effects from the castle and being driven away. Meanwhile, some 400,000 Hungarian Jews were deported to Auschwitz-Birkenau and met their deaths there.

11. On its conquest of Budapest in February 1945, the Red Army conducted widespread looting of private property in the city, and, with the aid of some of its inhabitants, opened the bank vaults and carried away numerous paintings, including, according to eyewitness accounts, at least two owned by the Collector. However, there is also testimony to the effect that the vaults had already been opened by the Germans before the Red Army arrived. In any event, when he came out of hiding in March 1945, the Collector found his properties and his bank vaults empty apart from one very large painting by Courbet.
12. Between 1946 and 1948 the Collector managed to repurchase a number of his works of art from a Soviet officer, not including the Constable Painting, which was still missing. The new Hungarian Ministry of Culture's Commission for Artworks Looted from Public and Private Art Collections, which operated between those years, listed the Painting as number 768 on its register and recorded that it had previously been owned by the Collector. Further crates of artworks located by the Commission did not include the Painting.
13. After the Communist takeover of Hungary in the late 1940s, the Collector and his family emigrated, taking some of their art collection with them. He died in 1958, after having sold some of his paintings in order to fund the family's living expenses. The Constable Painting was not recorded as being among these artworks, nor did it resurface in any of the Soviet collections containing looted artworks.
14. The Painting is recorded as being sold by a Mr. Meyer to the Leger Galleries in London in January 1962, who sold it on to the Broadway Art Gallery in Broadway, Worcestershire, where it was bought in February 1962 by Mrs. P. M. Rainsford. In 1985 she approached the Tate with a view to donating the Painting, and it was accepted by the Board of Trustees on 17 January 1986. Since that time it has been in the possession of the Tate.
15. On 16 April 2012 the Claimants notified the Tate of their intention to bring a claim for the restitution of the Painting. The Claimants' legal representative and a representative of the Commission for Art Recovery met with representatives of the Tate on 30 May 2012. The claim was submitted to the Panel on 18 April 2013.

Legal title

16. The Panel's Constitution and Terms of Reference require it to evaluate, on the balance of probability, the validity of the claimant's original title to the object, and also to evaluate, on the balance of probability, the validity of the institution's title to the object (paragraphs 15 (d) and 15 (f)), while noting that "it will not be the function of the Panel to determine legal rights, for example as to title" (paragraph 8).
17. The Claimants argue that the Collector had legal title to the Painting from 1908 until its disappearance in 1944 and that there is no evidence he had either sold it or given it away before then. They note that Mrs. Rainsford failed to make enquiries into provenance when she purchased the Painting in 1962. Finally, they assert that the Tate was aware of the gap in provenance of the Painting at the time when the gift was accepted, but failed to make any enquiries as to provenance prior to accepting the gift. They contend therefore that there is no evidence that Mrs. Rainsford bought the Painting in good faith, and that the Tate has not discharged its obligation to show it has good title in the Painting. Thus, they argue, the Tate does not have legal title to the Painting, which rests therefore with themselves as heirs to the original owner in 1944.
18. The Tate argues that there is no evidence that Mrs. Rainsford was not a *bona fide* purchaser when she bought the Painting in 1962. She bought it from a reputable gallery which had purchased it from a highly respected London dealer. In the early 1960s the art world was less alert to Holocaust issues than it is today. Mrs. Rainsford was in her seventies, and did not have the resources to conduct provenance investigations. There was nothing in the Painting's recent record to arouse her suspicions. The previous owners, including Mr. Meyer, could have been *bona fide* purchasers as well; there is no evidence to suggest that they were not. Finally, the Tate argues that in acquiring the Painting, it adhered to the standards of investigation of provenance of the time (1986) and that it is unreasonable to censure it for not doing so.
19. The Tate argues that whether or not the Painting was acquired in good faith either by Mrs. Rainsford or by the Tate, the Limitation Act 1939 would have extinguished the original owner's title six years after the purchase of the Painting by Mrs. Rainsford, in 1968. The Claimants have not advanced any substantial argument that any person or institution acquiring the Painting in any of the transactions relating to it was guilty of fraud or deliberate concealment within the meaning of the Limitation Act 1939, Section 26, which the Panel therefore concludes does not apply. Good faith is not relevant to the question of legal title, in this context, though it is relevant to the moral issues raised by the case. The Panel therefore concludes that the title of the successor of the original owner would have expired in 1968 (if not earlier) and that the Tate's legal title to the Painting is unassailable.

THE CLAIMANTS' CASE

General argument

20. The Claimants argue that on the balance of probabilities, the evidence is that the Painting remained in the possession of the Collector until it was looted, either by the Germans or by the Soviets, in the chaotic conditions of the last phase of the Second World War. On their contention, strong moral blame attaches to the Tate because it failed to make any proper enquiries into the provenance of the painting in the period 1933-45 at any time prior to or following its acquisition in 1986. The Painting is particularly significant to the Claimants from a sentimental and emotional point of view. The Collector and his family suffered grievously during the German and Soviet occupations of Hungary; they lost all their possessions, while several members of the family were subjected to acts of violence because of their Jewish ancestry. Some family members were murdered in Hungary by antisemites or murdered in Auschwitz-Birkenau. The return of the Painting would be an act of symbolic reparation for this suffering. Therefore on moral grounds the Painting should be restored to the ownership of the heirs of its original owner, the Collector.

Ownership and significance of the Painting

21. The Claimants provide very detailed documentation relating to the Painting's whereabouts in 1944/45. They concede that this documentation is ultimately inconclusive. They point out that there is no indication that the Collector disposed of the Painting before the German invasion of 1944. After this, the Painting may have been kept in either of his two principal residences, or lodged in a bank vault for safe keeping. It may have been looted from any of these locations by the Germans, or, possibly, by the Red Army, though the absence of any positive indication of the latter, and its later appearance in the west, point to the strong likelihood of the former. In any case, who actually unlawfully removed the Painting is of secondary importance; the crucial issue is that it was stolen.

22. The Claimants note that the Collector's family, with whom he had no contact while he was in hiding during the last phase of the war, from the German invasion to the Soviet liberation of Hungary, were variously tortured by the Gestapo in an attempt to reveal the whereabouts of their valuables, imprisoned in cellars, and placed in a ghetto under harsh and insanitary conditions, where they were again brutally assaulted. After they were released, they too went underground. The Collector's only son was murdered, and the Collector's sister and her husband were deported to Auschwitz-Birkenau and died there. The Collector's mother-in-law was killed by members of the Arrow Cross, the Hungarian fascist movement. By the end of the war, the surviving members of the family had lost virtually all their possessions. The

restitution of the Painting would thus constitute a significant act of symbolic reparation to the family for the sufferings it was forced to endure during the war because of its Jewish origin.

Provenance research

23. The Claimants assert that no provenance research of any kind was made by the Tate prior to its acceptance of Mrs. Rainsford's gift of the Painting in 1986. It was not until after it had acquired the Painting that the Tate obtained documentation of her purchase from the Broadway Gallery, and asked the Leger Gallery for details of its provenance; the Leger's response provided no detailed information of the Painting's fate between 1892 and 1962.
24. The Tate carried out a provenance review in 2001, according to an email dated 28 January 2013, but the Claimants charge that it failed to enquire further into the Constable Painting and failed, even as late as 26 February 2013 to include it on its *Lists of works with incomplete provenance during the period 1933-1945*.
25. The Tate is the leading national collection of British art and has long had an unrivalled familiarity with Constable's *oeuvre*. The Painting was listed in a reference work on Constable published in 1981, where it was stated that its location since the 1908 Paris auction was unknown. The Claimants assert that a degree of moral blame attaches to the Tate because despite knowledge of its provenance, up to and including 1908, it failed to undertake any proper enquiries as to the Painting's more recent history when it acquired it from Mrs. Rainsford in 1986. Since it knew that the Painting had been sold in 1908, the Claimants argue that it would not have been difficult for the Tate to have acquired a copy of the auction catalogue and thereby to have ascertained that it was sold to a prominent Hungarian Jewish collector whose collection, its spoliation during the war, and his subsequent efforts to reacquire it, were well documented and could, without too much difficulty, be traced.
26. The Claimants further assert that the Tate has refused to disclose its files in relation to the Painting in order to ascertain what steps, if any, it has undertaken recently to research its provenance.
27. The Witt Library, at the Courtauld Institute of Art in London, contained a record card confirming the Collector's ownership of the Painting, and library staff confirmed that the card had been there since before 1981. The Claimants assert that it would have been easy for the Tate to have consulted the library had it carried out "due diligence" on the Painting's provenance at any time.
28. The Claimants argue that the Tate should, in accordance with the International Council of Museums Code of Ethics, adopted in 1986 and revised in 2001, have carried out due diligence as to the Painting's provenance on the occasions, namely in 1991, 2002 and 2006, when it

was shown in major exhibitions, respectively in London, Paris and San Marino, California.

29. Finally, the Claimants point out that in 1998 the Hungarian National Gallery, on behalf of the Joint Restitution Committee at the Hungarian Ministry of Culture and Education, published a lengthy and detailed monograph by László Mravik, entitled *The "Sacco di Budapest" and depredation of Hungary, 1938-1949: works of art missing from Hungary as a result of the Second World War*, which provided detailed information on the Painting and its possible fate in 1944. At this point, at the latest, the Tate should have recognized that the Painting was the property of the Collector and had been looted from his collection towards the end of the war.

30. For these reasons, the Claimants consider that they have a strong moral claim for the return of the Painting to their ownership, and that the Tate has a strong moral obligation to return it.

THE TATE'S CASE

General argument

31. The Tate argues that it is unreasonable to demand that it should have carried out provenance research at a time when Holocaust issues were not prominent in the art world. It denies that it has withheld relevant documentation from the Claimants. Far from being of major emotional significance to the Collector and his heirs, the Tate argues that the Painting was, as an English work of art, an anomaly in his otherwise almost exclusively French collection. For this reason, indeed, the Tate considers that it is possible that the Collector disposed of it voluntarily through sale or donation in his lifetime, as he did with some other works from his collection. The Tate adds that the fact that the Claimants have sold another important painting that was returned to them suggests that the value they place on the Painting is financial, not emotional. Other items from the collection would be more appropriate as symbolic reparation for the family's sufferings during the war, which in any case, the Claimants pointed out, were not as severe as those of other Hungarian Jews until a late stage of the war. On the other hand, the Painting is of particular importance to the Tate as the major national repository of Constable's work. On the basis of this argument, the Tate contends that even if the Panel does consider some form of redress to be appropriate, that redress should take the form of a money payment or commemoration of the history of the Painting, rather than the restitution of the Painting itself. The Painting therefore should remain in the possession of the Tate.

Ownership and significance of the Painting

32. The Tate points to the fact that the last positive evidence that the Painting was in the possession of the Collector dates from the mid-

1930s. After that, its fate is a matter of conjecture. The Claimants themselves have conceded that subsequent evidence relating to its whereabouts is inconclusive. They are unable to say that they ever saw it themselves. They cannot even state firmly where it was kept. It is known that the Collector donated art from his collection, and the fact that the Painting was an anomaly in his collection, the sole example of English art in the collection of a man whose passion was 19th-century French painting, suggests in the Tate's view that the Painting might well have been one of these items, because it fitted neither his collection nor his taste.

33. The Tate argues that it would be inappropriate to treat the Painting as "symbolic restitution" for the sufferings endured by the Collector and his family during the war. Arguments such as those put forward by the Claimants as to the general nature of antisemitic persecution in Hungary are irrelevant; what is relevant is the experience of this particular family and its members. The Tate points out that because of their wealth and social prominence, they were "to some degree insulated from the very worst excesses" of the persecution of the Jews in Hungary, "at least until a late stage in the war".
34. The Tate rejects the Claimants' assertion that the return of the Painting would be significant from a sentimental and emotional point of view; indeed, since it was untypical of the collection, other items would be more important in this respect. This argument is underpinned by the fact that the Claimants immediately sold another restituted painting from the collection, by Courbet, that occupied a place far closer to the central collecting theme. The fact that they did not sell another restituted painting, by Hans Canon, is beside the point, since it was a minor work that (the Tate implies) was unlikely to have fetched a significant sum at auction.
35. On the other hand, the Painting is of particular importance to the Tate as the leading national and indeed international repository of Constable's work, and in particular because of the fact that it was a preparatory sketch for another painting, *Chain Pier, Brighton*, a major work, also in the Tate's collection, so that hanging it near the larger work demonstrates its relationship with Constable's other Brighton paintings and to the *plein air* and marine work of other British painters also displayed in the Tate, including Turner. In this respect the Tate argues that it has a moral obligation towards the public, and it has indeed displayed the Painting through almost all of the time during which it has been in its possession.

Provenance research

36. The Tate argues that it is anachronistic to demand of its staff in 1986 that they should have pursued the possibility of a Holocaust connection or to have done so immediately after the Painting's acquisition. Indeed, its primary purpose in enquiring after the Painting's provenance

eighteen months later was simply to enable the Tate to publish as complete a catalogue as possible. It is unfair to demand of the Tate higher standards of provenance research than those applied to other institutions in 1986.

37. The Witt Library is an image resource and the Tate argues that it would not have occurred to anybody to use it as a research tool for provenance unless, like the Claimants' representatives, they had already been alerted to the possible Holocaust connection of a particular item.
38. The Claimants' argument that the Tate should have checked the Painting's provenance before lending it out for exhibitions abroad is unsound in the view of the Tate; the obligation lies on the receiving, not the lending institution.
39. The Tate denies it has withheld relevant material from the Claimants.
40. The Tate concedes that in 2001, a researcher noticed the gap in the Painting's provenance, including World War II, but "a decision was taken to prioritise other cases on art historical grounds". The reason why the Painting was not included in the Tate's *List of works with incomplete provenance during the period 1933-1945* is that research on works dating from the period 1780 to 1860 had not yet been carried out, though it was in train.
41. The Tate concludes therefore that the Painting should remain in its possession.

THE PANEL'S CONCLUSIONS

Ownership and significance of the Painting

42. Although there are gaps and contradictions in the documentary record, the likelihood is that the Painting remained in the Collector's possession until it was looted by the Germans in 1944 or early 1945. If it had been looted by the Red Army, it would more likely have come to light in the Soviet Union rather than being brought onto the Western European art market. The Tate itself concedes that there is no positive indication that the Collector disposed of it voluntarily, and, in connection with the issue of legal title, also makes the valid point that such issues have to be decided not on the provision of documentary proof that would provide certainty, but on the balance of probabilities. The Panel's Constitution and Terms of Reference require it to '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'. The documentation cited by the Claimants is extensive. All of the Collector's donations are well documented and none includes the

Painting. Nowhere is there any suggestion that the Painting was not in the Collector's possession at the beginning of 1944. The Panel concludes that the balance of probability comes down on the side of the Collector having been in possession of the Painting until it was looted following the German invasion of Hungary in 1944.

43. The Panel accepts the evidence presented by the Claimants as to the persecution and maltreatment of the Collector and his family following the German invasion of Hungary in 1944. However, neither the general persecution suffered by the Jewish community of Hungary in 1944/45 nor the particular suffering of the Collector and his family is directly relevant to the issue before the Panel, whose Constitution and Terms of Reference require it to give weight to the moral strength of the Claimants' case on the basis of the circumstances under which they were deprived of the Painting, whether by theft, forced sale, sale at an undervalue, or otherwise. The Panel is not empowered to make recommendations for "symbolic restitution" on the sole grounds of the suffering of former owners.
44. After carefully examining the art historical significance of the Painting, the Panel concludes that it was not an anomaly in the original collection. Constable was regarded as a forerunner of the Impressionists, and his paintings have been exhibited alongside theirs. The Tate's own catalogue description of the Painting stresses this relationship, thus suggesting why the Collector acquired it as "one of the finest oil sketches by Constable then on the Continent, at a time when he was being hailed as a father figure of modern painting". It anticipated Courbet's marine paintings and gave "indications of everything that Manet brought into the same domain". There is no particular reason, therefore, why the Collector should have disposed of the Painting before 1944; rather the contrary.
45. The Panel accepts the Tate's argument that the Painting does not possess in and of itself a particular emotional and personal significance for the Claimants, except as part of the original collection. However, the emotional significance of an object to a claimant is only one factor to be taken into account in determining whether or not to recommend restitution, though it might be relevant to the moral strength of the claim. The central issues are the strength of the moral claim and the moral obligations of the institution.
46. Similarly, the importance of a spoliated object to a national collection is not a paramount consideration in the Panel's view. If it were, the very principle of the restitution of important works would be called into question.

Provenance research

47. The Panel has carefully considered the arguments of the Claimants and of the Tate as to whether a moral obligation rested on the Tate to

investigate the provenance of the Painting and the possibility that it had been looted during the war, both at the time of its acquisition in 1986 and subsequently. It is certainly the case that Holocaust-related issues of provenance did not achieve the prominence they have today until the 1990s. On the other hand, the Panel recognises that the Tate possessed special knowledge and expertise in the works of Constable, and that Holocaust-related provenance issues were not ignored in the 1980s to the extent that they had been in the 1950s or 1960s¹. The identity of the purchaser at the 1908 sale had been published in a German-language art journal shortly afterwards but the Panel accepts that this was not easily obtainable, and that the Hungarian language documents of 1919 and 1935 were very difficult to access. The Tate did know, however, both of the lengthy gap in provenance, including the Nazi era (1933-1945) and that the Painting was sold on the Continent in 1908.

48. The German invasion of Hungary in 1944 and the consequent maltreatment, spoliation and murder of the majority of the country's Jewish population were matters of general knowledge. In addition, the Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation of Control issued in London on 5 January 1943 were, or should have been, well known to museums and their directors; similarly, the International Council of Museums Code of Ethics, adopted in 1986.

49. The Panel concludes, in the light of the evidence, that the Tate was under a moral obligation to pursue the possibility, that the Painting had been the object of spoliation during the war but notes the Tate's submissions that its connection with the Collector was overlooked by two selling galleries, the Yale University Press catalogue raisonné of 1984 and by four institutions to which it was later lent.

¹ Art periodicals published during the decade show a concern for the institutional challenges posed by Nazi-related dispersals of art: for example Andrew Decker, 'A Legacy of Shame' (*ARTnews*, December 1984, p 56); John Dornberg 'The Mounting Embarrassment of Germany's NAZI TREASURES' (*ARTnews*, September 1988, p 130); and for an earlier discussion Jonathan Steele 'Prussia's Orphaned Art Treasures' (*ARTnews*, November 1975, p 28). Legal sources also reflect a mounting interest in the subject, even before the start of the decade: for example Barnett Hollander, *The International Law of Art* (1959) *passim* and comment by Viscount Radcliffe, *Not in Feather Beds: Some Collected Papers* (1968) p 119. Lord Radcliffe, a Lord of Appeal in Ordinary, was Chairman of the Trustees of the British Museum from 1963 to 1968. At least two US decisions during the 1980s dealt with claims for the restitution of Nazi-dispossessed art: *Kunstsammlungen Zu Weimar v Elicofon*, 678 F 2d 1150 (2d Cir. 1982); *De Weerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056, 108 S. Ct. 2823, 100 L. Ed. 2d 924 (1988); and see the earlier decision in *Menzel v. List* 267 N.Y.S 2d 804, 808 [Sup Ct 1966]. An article in the *Museums Journal* in 1977 discussing the newly-formulated Museums Association *Code of Practice for Museum Authorities*, while not referring specifically to spoliation inflicted between 1933 and 1945, dwells at length on the ethical obligations of members of the Association to refrain from acquiring cultural objects in circumstances where the responsible officer is not satisfied that the museum can acquire a valid title and that the objects have not been unlawfully removed from a former country of location: Patrick Boylan, 'Museum Ethics: Museums Association Policies' (*Museums Journal*, December 1977, pp 106, 108).

50. The Panel also concludes that the Tate could have researched the Painting's provenance on subsequent occasions as the opportunity arose, particularly after its mention in Mravik's monograph in the English-language in 1998 (referred to in paragraph 29 above). Even if it is not reasonable of the Claimants to demand that the Tate's experts should have consulted the catalogues of the Witt Library, there were other sources available that could have established the likelihood that the Painting had been spoliated during the war. It would not have been difficult to have made enquiries of the Hungarian Government, who had included the Painting on its official list of looted art from the late 1940s (see paragraph 12 above).
51. The Painting was lent abroad three times between 2002 and 2007. The Tate argues that the obligation to research provenance rests on the borrowing institution, not the lending institution, and that it should not, therefore, have been expected to research the provenance before such loans. Even in terms of the Tate's self-interest, the Panel finds it surprising that the Tate was prepared to send overseas and expose to the risk of a claim in another country a work of such incomplete provenance, which any reader of Mravik's work of 1998, would know was believed to have been owned by a Hungarian of Jewish origin.
52. The Tate notes that a decision was taken in 2001 not to investigate the provenance of the Painting but "to prioritise other cases which were considered, on art historical grounds, to warrant greater scrutiny with regard to their provenance". Thus the cases that fall into the period of the Painting have not yet been investigated, though research is now in train. The Panel agrees that art historical research should indeed include provenance but in particular the possibility or likelihood of spoliation during the Nazi era. It seems surprising that Tate did not examine this work in that light as it had been included in Tate's *Lists of Works with incomplete provenance during the period 1933-1945*, published in 2000. The Tate has clarified that the Painting was in the category of British works and thus not a priority in spoliation terms and that it was one of 30,000 works in that category.
53. The Tate is equivocal in its response to the charge that it has withheld information from the Claimants. It argues that full legal disclosure of the kind customary in litigation is "not appropriate in the context of an application to the Panel". It asserts that it had "provided the Claimants with all the material relating to the specific issues they had raised" but this makes it clear that there is material with which it has not provided them. If the Claimants wished to see it, they should surely have been able to do so. However, in the end, this issue is not of major importance. The documentation available to the Panel is sufficient for it to reach an informed conclusion and make the appropriate recommendation.

German compensation to the Claimants

54. The Panel has on previous occasions taken into account the issue of whether or not a claimant has been compensated already by the German government for the loss of an object or objects under consideration. In this case, the Collector's heirs filed a compensation claim with the West German government in 1962 and included the Painting in the claim. The family was awarded a lump sum payment of 35 million DM, but this was reduced by agreement to 17.6 million DM in 1974. This latter agreement provided that if any of the artworks included in it should later be recovered, the heirs had either to hand over the work in question to the German government, or to reimburse it with the purchase value of the work as on 1 April 1956.
55. The Claimants acknowledge that the Painting falls within the scope of the 1974 agreement and have notified the German Federal Restitution Office that a claim for restitution of the Painting is being made. They state that "agreement has been reached with the German government as to the amount of the compensation that should be reimbursed in the event that the Constable Painting is restituted to the Claimants". The Panel accepts the terms of this agreement and their implementation following a recommendation for restitution.

Assessment of the moral strength of the claim

56. The Panel concludes that John Constable's *Beaching a Boat, Brighton* was in the ownership of the Collector in 1944 at the time when the Germans invaded Hungary and that it was taken in the course of antisemitic persecution of the Collector and his family by the German occupying forces either from one of his homes or from a bank vault where he had deposited it. The Painting subsequently found its way on to the art market, where it was sold on before being gifted to the Tate in 1986. As heirs of the Collector, the Claimants therefore have a strong moral claim for the restitution of the Painting to their ownership.

Additional and alternative remedies

57. The Claimants ask that if the Panel recommends an *ex gratia* payment instead of restitution of the Painting, and deducts from it any expenditure the Tate may have incurred in consequence of its stewardship of the Painting and its insurance and preservation, the resulting sum should be adjusted upwards to take account of any income the Tate may have derived from licensing of image rights, merchandising, catalogue sales, fees for loans, or other sources deriving from its possession of the Painting.
58. The Tate submits that if the Painting is returned to the Claimants, it would be fair to require them to reimburse the Tate for expenditure on insurance, preservation and similar items that would in effect have been incurred for the Claimants' benefit. It adds that income from

licensing fees is not known except in respect of £5,000 including VAT derived from postcard sales during a 2006 exhibition, and that the effort involved in computing income from loan fees would be disproportionate to the issue.

59. The Panel's view that the Painting should be restored to the ownership of the Claimants renders unnecessary further consideration of the issue of the amount at which an *ex gratia* payment should be assessed.

THE PANEL'S FINAL CONCLUSION

60. Taking into account all the above circumstances, the Panel concludes that the moral strength of the Claimants' case, and the moral obligation on the Tate, warrant a recommendation that *Beaching a Boat, Brighton*, by John Constable, should be returned by the Tate to the Claimants as they desire, in accordance with the provisions of The Holocaust (Return of Cultural Objects) Act 2009 and subject to the conditions outlined in paragraphs 54 and 55 above. The Panel recommends accordingly. In accordance with its earlier decisions the Panel considers that no reimbursement is due from the Claimants to the Tate for its expenditure as that is broadly balanced by income received and by the benefit that Tate and the public have derived from the work over the last four decades.

26 March 2014

The Honourable Sir Donnell Deeny – Chairman
Professor Sir Richard J Evans – Deputy Chairman
Sir Terry Heiser
Professor Peter Jones
Martin Levy
Peter Oppenheimer
Professor Norman Palmer
Professor Liba Taub
Baroness Warnock

Appendix: Constitution and Terms of Reference

**SPOILIATION 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 fromon for in the collection of("the claim").
3. The Secretary of State has designatedas 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

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

- (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.
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 4(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.

ISBN 978-1-4741-0008-3



9 781474 100083