

**Responses to Consultation on Restitution of Objects Spoliated in the Nazi Era
from J W LeM Scott, Withers LLP. 7 November 2006**

Preliminary

The following answers are of course merely views. There are unlikely to be wholly satisfactory answers to all the problems posed. These responses are highly coloured by the facts that

- (a) there is no proposal to widen the circumstances in which deaccessioning may be achieved, beyond those experienced during the Nazi era; and
- (b) there has been a wholly unexpected paucity of claims made to the Spoliation Advisory Panel.

Had either of these facts been otherwise, I would have wished to expand on these responses considerably. They are mine and do not necessarily reflect the views of my firm.

Responses:

Q1: Not exactly. I certainly agree that a suitable power should be given to national collections, subject to constraints. However, the scope of the treatment should remain the same as that provided for in the Spoliation Advisory Panel's current wide Terms of Reference. So far as I know, these have not resulted in any wildly inappropriate claims such as for items negligently lost anywhere in the world (as the consultation paper rightly points out they could); no doubt this is because the Terms of Reference plainly do not encourage such claims, not least because of the requirement to balance the moral positions of claimants and possessing institutions, and the Panel can be counted on to see off any claim merely resting on a negligent loss.

Framing a law to require a causal link to "Nazi actions" – whether direct or indirect - could, in my view, quite easily give rise to undesirable injustices. When not blindingly obvious, causation is a notoriously difficult concept to deal with in practice, and has given rise to manifold varying and philosophically contentious decisions in the courts of this country, frequently arrived at as a result of thinly disguised policy considerations which in themselves differ from time to time.

As the paper points out, the claim of the Archdiocese of Benevento referred to would, under the proposed power, presumably fail unless it could be argued that while the enormous destruction of Benevento was largely carried out by the Allies rather than the Germans it was occasioned (or 'caused') by the presence of occupying Germans in Benevento, and the act of spoliation was causally connected at one remove to that presence (which seems stretched). Is there any good reason why a claim similar to that of Benevento should be disallowed? Is a UK national collection to be exempt from liability under such a claim merely because (for

example) an act of spoliation was carried out by a British soldier or official, as opposed to a German (or Italian) one? If so, what is the basis for the exemption? Is it because a British soldier or official is to be regarded *per se* as morally superior to a German (or Italian) one?

More importantly, clear injustice may result from the requirement for an express causal connection. I can give one example of a near-injustice from a different but related field. Following not dissimilar pressures, in December 1998 the Government established the Enemy Property Compensation Advisory Panel (as it was initially called) – another *ad hoc* panel, having terms of reference which expressly required claimants (or their heirs) to have suffered from “Nazi persecution”. The remit of this panel was to consider claims to property that had been first frozen and then appropriated by the Government of the day under enemy property legislation introduced at the outbreak of World War II, where for one reason or another owners had not been able to make effective claims on the governments of their countries of origin following the settlements made after the War between Britain and the new governments of the countries previously considered enemies. A claimant for whom I acted is the elderly widow of an Austrian nobleman whose cash at an English bank was seized at the start of the War, and who was subsequently in no position to make a claim within the time originally limited, having been imprisoned in Hungary after the War on the ground (broadly) that he was an aristocrat; he eventually escaped during the 1956 uprising. During the last years of the War much of his and his family’s property was confiscated by the Nazi-influenced Hungarian authorities, and he notoriously risked his life over an extended period in giving shelter and other highly effective protection and means of escape to many members of Hungary’s persecuted Jewish population. His widow’s claim before the Panel was bedevilled by a protracted and deeply distasteful argument over whether he personally suffered Nazi persecution and what that meant (members of his family were eliminated, but he survived: they were not Jewish, the very fact of which, according to the Panel, would have sufficed to qualify the claim due to the racial laws adopted in Hungary), and whether the definitions of persecution elaborated in decisions of the European Court of Human Rights covered his situation or not. These difficulties prompted a threat of legal action against the Government, following the discovery of some highly compromising documents at the Public Records Office relating to a claim actually made by the deceased claimant shortly after his escape from prison in Hungary and rejected by HMG on dubious grounds. Eventually, after a long period of argument and the expenditure of considerable amounts of money and time by lawyers and historical researchers, supported by representatives of Jewish communities, the Panel was constrained to recommend an *ex gratia* payment in settlement of what had by the passage of time come to represent a very substantial claim. I should add that all the funds eventually recovered were immediately distributed to three charities, one of which is for the benefit of Hungarian Jewish communities. This part of the process was extremely unedifying, not to say shameful, but illustrates the kind of problem so far avoided by the width of the Spoliation Advisory Panel’s Terms of Reference.

It is impossible to envisage all circumstances in which claims might be made. For this reason alone, I believe that it would be desirable to leave the scope as wide open as at present.

Q 2: (a) See above.

Q 2: (b) Yes, though I declare an interest having acted for the Archdiocese in that case.

Q 2: (c) I believe the legislation should follow the Spoliation Advisory Panel's current Terms of Reference, and that a Code of Practice is too uncertain.

Q 3: (a) No. If the decision in the Benevento case had been left to the British Library the claim would have been rejected.

Q 3: (b) No. I believe that it is desirable to remove the burden of taking such a decision from the shoulders of the institution, not least so as to preclude it from acting as defendant, judge and jury, and to protect it from pressure; and in a case where the institution were desirous of acceding to a claim, the involvement of the Panel would operate to protect it from accusations of having acted wrongly. The maintenance of the Panel in existence is a relatively small price to pay (though I do not underestimate the administrative burden of doing so).

Q 3: (c) No. Objections would have been made to and considered by the Panel.

Q 3: (d) Yes.

Q 3: (e) No. It should not be a matter of consent, but of direction – see (f) below.

Q 3: (f) Yes. That is to say, I believe the decision should rest with the Secretary of State or the relevant Minister – whether or not he or she would wish to submit exercise of the power to parliamentary scrutiny, by affirmative or negative order. In practice the Secretary of State will already have been ‘advised’ on the claims via the recommendations of the Panel. As the consultation paper points out, this would ensure that the decision was taken by someone independent of any dispute. I do not understand the point that it could be seen as compromising the independence of the institution: the institution would have been able to make its views known to the Panel, and if it considered that restitution should be made but the Panel disagreed, then it is likely that the Panel will have taken into consideration factors missed by the institution. Further, a predisposition to favour restitution of the object rather than the payment of compensation coincides closely with the overriding objective of the exercise – which is restitution rather than compensation. I believe that the human rights issue is possibly a red herring – if the procedure is judicially reviewable, the requirements of the HRA are unlikely to be more onerous than those of the ordinary public law.

Q 4: (a) Yes, in the sense of responding to a direction, but only if it is a “national” or “public” collection, and subject to the same constraints as suggested above in the case of institutions

having statutory restrictions on disposal. For this purpose national or public collection could include those listed in paragraph 3.44 (a) to (f). I do not believe that the power or the procedure in general (which would override the general property law of the land) should be imposed on private collections, or private individuals. It is one thing for the Government to hold and exercise the conscience of the nation in relation to items which the nation has a public right to enjoy, quite another to disturb private property rights in this one discrete area. This would certainly give rise to serious human rights problems. If the Government were prepared to elevate cultural property in general to a special legal status (and, for example, ratify the UNIDROIT Convention), the case might be different, but until such a day I can see no imperative in favour of (and considerable dangers in) extending the exceptions into the very fabric of personal property law.

Q 4: (b) If the institution were national or public in the sense outlined above, all non-statutory restrictions should be capable of being overridden. I can think of no proper exceptions.

Q 5: It follows from what I have said above that I believe that the Panel should be retained and should play an essential role in these claims. I am not wholly convinced that Article 6 of the ECHR would be engaged in a case where (and solely because) the Panel simply made no recommendation, or that *H v France* (relating to the failure of the Strasbourg Administrative Court to hear a case within a reasonable time) is good authority for the proposition that it would be: arguably the Panel would not be determining a claimant's civil rights; it is virtually axiomatic that the envisaged procedure has been devised so as to supply redress where there is **no** right (especially where there was a right but it has been extinguished under the domestic law of limitation). However that may be, at present it seems that decisions of the Panel itself may be judicially reviewable, and of course so would be decisions of the Secretary of State, and this ought to be enough to satisfy the requirements of the Article; further, the Panel invites representation and its procedures otherwise satisfy the Article 6 requirements. In any event, I would not be in favour of transforming the Panel into a statutory body unless it could not be helped.

Q 6: I would prefer not to try to answer questions 6 (a) and (b). I can see arguments both ways, and am not a tax expert. However, I would support the suggestion that donors should not lose the tax benefits of donations, but that an exception might be made where the donor was or should have been aware of the history of the item.

Q 7: I would also support the suggestion that the proposed legislation should be limited in time. One solution might be to tie it to the continued life of the Panel, so that if no claims came before it for a number of years the Panel could be wound up after a reasonable period of public notice, somewhat after the example of the Enemy Property Compensation Advisory Panel. It is difficult simply to put a fixed time limit on it. Alternatively, provision might be made for the possible substitution of this Panel with another, to cater for the possibility of some other series of ghastly events calling for a similar response of conscience.

Q 8: Certainly I would agree that an institution should be protected from any further claim, but only if it had transferred an object at the direction of the Secretary of State or other Minister following a recommendation of the Panel.

J W LeM Scott