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## Case Four Old Master Drawings – Feldmann Heirs and the British Museum

*Arthur Feldmann – British Museum – Artwork/œuvre d'art – Nazi looted art/spoliations nazies – Institutional facilitator/facilitateur institutionnel – Judicial claim/action en justice – Negotiation/négociation – Settlement agreement/accord transactionnel – Deaccession – Ex gratia payment/versement à titre gracieux*

*In May of 2002, the British Museum was confronted with a restitution claim by the heirs of the Second World War victim, Arthur Feldmann, regarding four Old Master drawings. The Commission of Looted Art Europe, who represented the claimant, and the British Museum, jointly sought guidance from the Spoliation Advisory Panel. The British Museum was advised by the Attorney-General as to whether the British Museum Act allows the restitution of an art object in order to meet a moral obligation. The Attorney-General deferred the issue to the High Court, which held that restitution was not possible without an act of the Parliament. Eventually, the British Museum's authorities followed the recommendation of the Spoliation Advisory Panel and compensated the family with an ex gratia payment.*

*I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.*

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## I. Chronology

### Nazi looted art

- Arthur Feldmann had a collection of about 750 Old Master Paintings. They had been seized by the Nazis after their occupation of Czechoslovakia **during the Second World War**. Uri Peled, grandson of Feldmann, found four of the paintings that had been looted at the British Museum: “The Holy Family” by Niccolò dell’Abbate, “St Dorothy with the Christ Child” by a follower of Martin Schongauer, “Virgin and Child adored by St Elisabeth and the infant St John” by Martin Johann Schmidt and “An Allegory on Poetic Inspiration with Mercury and Apollo” by Nicholas Blakey.
- **13 May 2002**: Claim submitted to the British Museum by the **Commission for Looted Art Europe** (CLAE) on behalf of the Feldmann heirs. The museum recognized the heirs’ moral claim.
- **October 2002**: Joint claim by the British Museum together with the CLAE to the **Spoilation Advisory Panel (SAP)**, both suggesting “compensation” as a preferred solution rather than the restitution of the paintings. The contested paintings were added to the British Museum’s “list of works identified as having gaps in their provenance”<sup>1</sup>.
- **August 2003**: The British Museum referred the matter to the **Attorney-General**.
- **27 May 2005**: The Attorney-General ultimately sought guidance from the **High Court**, which turned down the application for the restitution of the drawings<sup>2</sup>. The High Court held that the drawings may not be returned without an act of Parliament.
- **27 April 2006**: With the High Court’s decision, the Spoilation Advisory Panel ultimately recommended the following: the Feldmann heirs should receive an *ex gratia* payment from the government for the four drawings as the British Museum was barred by law to return them. The British Authorities subsequently agreed to reimburse the family.

## II. Dispute Resolution Process

### Institutional facilitator (CLAE, Spoilation Advisory Panel) – Judicial claim – Negotiation – Settlement agreement

- The Feldmann heirs addressed their concern to the CLAE, which acted on their behalf by submitting a restitution claim to the British Museum.
- The CLAE and the British Museum then operated jointly by contacting the Spoilation Advisory Panel, that operates as an advisory body for Nazi-looted art claims and hence is an alternative to litigation.

<sup>1</sup> The list is regularly updated and published on the National Museums Directors’ Conference website at <http://www.nationalmuseums.org.uk/spoliation>, accessed September 6, 2010.

<sup>2</sup> *Attorney-General v. The Trustees of the British Museum*, Chancery Division **Sir Andrew Morritt VC**, [2005] EWHC 1089 (Ch), (2005) Ch 397.

- Nevertheless, the Museum sought guidance from the Attorney-General, in particular regarding the question whether the paintings may be restituted in view of a moral claim, regardless of Section 3(1) of the British Museum Act 1963, stipulating “the duty of the Trustees of the British Museum to keep the objects comprised in the collections of the Museum” except for one of the few cases expressly permitted by the Act in Section 3. The Museum believes such a restitution to be possible without having to amend the British Museum Act.
- The Attorney-General in turn requested the High Court’s advice, whose decision<sup>3</sup> enlightened the Spoliation Advisory Panel on its recommendation.
- The parties reached a final settlement based on both the recommendation of the Spoliation Advisory Panel and the High Court decision, which excluded restitution of the drawings.

### III. Legal Issues

#### Deaccession

- **Relevant Provisions of the British Museum Act:**
  - **The British Museum Act 1963** explicitly prescribes in section 3 (1) the Trustees’ duty to “**keep the objects** comprised in the collections of the Museum within the authorised repositories of the Museum, except in so far as they may consider it expedient to remove them temporarily for any purpose connected with the administration of the Museum and the care of its collections”.
  - According to section 3 (4) of the Act, the disposal of any object part of the Museum’s collection has to meet the following requirements: should the Trustees want to “**exchange, sell, give away or otherwise dispose** of any object vested in them and comprised in their collection” (section 5) they may do so exclusively “if –
    - (a) the object is **duplicate** of another object, or
    - (b) the object appears to the Trustees to have been made not earlier than the year 1850, and substantially consists of printed matter of which a **copy made by photography** or a process akin to photography is held by the Trustees, or
    - (c) in the opinion of the Trustees the object is **unfit to be retained in the collections of the Museum and can be disposed of without detriment to the interests of students**”.
- **Considerations of the High Court London<sup>4</sup>:**
  - When the matter was referred to the Attorney-General, the museum was convinced it could offer a concession to Uri Peled without the necessity of amending the British Museum Act. The query was in the following brought to the High Court in London by the Attorney-General seeking advice.
  - The Vice-Chancellor, Sir Andrew Morritt, determined that neither the Crown nor the Attorney-General were empowered “to dispense with due observance of Acts of

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

Parliament” as “the courts and judges are committed to upholding the law, not sanctioning departures from it without lawful authority” and consequently each is obliged to apply the British Museum Act (37).

- A compromise may be found in circumventing any breach of section 3(4), based on the recognition that the drawings had never been part of the Museum’s collections (section 39).
- However, any **moral considerations** alone would neither allow a compromise nor qualify as an “implied exception” of the Act’s disposal rules (section 40). Solely a **statutory authority**, which is missing in the present case, could permit a divergence from **statutory obligations imposed on the trustees**. In any case would such an exception exceed the authority of the Attorney-General (section 42).

#### IV. Adopted solution

##### Ex gratia payment (by the UK Government)

- The Spoliation Advisory Panel rejected the remedy of a legal compensation given that the heirs were lacking a legal claim. An *ex gratia* payment would instead reflect “the strength of the claimants’ moral claim” and moreover allow the drawings to remain in the British Museum collection. The sum of £ 175,000 had been collectively determined by individual evaluations from Christie’s for the Museum, Sotheby’s for the claimants and by the eminent art consultant, Sir Jack Bear, for the Panel. The Panel suggested that the government should cover these costs “as no legal ability or moral blame rest[ed] with the British Museum”<sup>5</sup>.
- Ultimately, the Spoliation Advisory’s recommendations were followed: the drawings stayed at the British Museum and the Feldmann heirs received an *ex gratia* payment by the British government.

#### V. Comment<sup>6</sup>

- Challenging situation of the British Museum: although the museum already admitted its moral obligation to meet the claim of the Feldmann family, they were barred to return the painting under existing law. Only the authority of an Act of Parliament could allow the museum to carry out the restitution.
- The settlement of this case has certainly contributed to raise awareness about the problem of Nazi-looted art. For instance, in 2009, the UK Parliament had passed the Holocaust (Return

<sup>5</sup> British Museum Press Release, “Feldmann Drawings decision”, April 2006, accessed 15 March 2011, [http://www.britishmuseum.org/the\\_museum/news\\_and\\_press\\_releases/press\\_releases/2006/feldmann\\_drawings\\_decision.aspx](http://www.britishmuseum.org/the_museum/news_and_press_releases/press_releases/2006/feldmann_drawings_decision.aspx).

<sup>6</sup> For further reflections, see Anne Laure Bandle and Sarah Theurich, “Alternative Dispute Resolution and Art-Law – A New Research Project of the Geneva Art-Law Centre,” *Journal of International Commercial Law and Technology*, Vol. 6, No. 1 (2011): 28 - 41.

of Cultural Objects) Act.<sup>7</sup> As seen in Britain, various statutory provisions prohibit museums from removing any artwork from their collections, even if it is proven that an object have been stolen during wartime. This law enables national museums and galleries to deaccession and return art stolen during the Nazi era if so recommended by the Spoliation Advisory Panel. The Act expires 10 years from the day on which it is passed (Section 4(7)). Nevertheless, this allows a significant period of time for claims to be considered by the Panel.

- The High Court probably upheld the British Museum's intention to reach an amicable solution. It is however noteworthy that the Museum was "solely" invited to do so on ethical and moral grounds, and not in compliance with a court decision.

## VI. Sources

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### c. Legislation

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