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Case Pâté de Jambon – Anonymous German Heirs and Glasgow City Council

Glasgow City Council – Anonymous German Heirs – Nazi-Looted Art/spoliations nazies – Conciliation – Negotiation/négociation – Settlement agreement/accord transactionnel – Deaccession – Due diligence – Ownership/propriété – Ex gratia payment/versement à titre gracieux

“Pâté de Jambon”, a painting by Jean-Baptiste-Siméon Chardin, was the object of a forced sale in 1936. The owners, the Jewish shareholders of an art gallery, were forced to sell the artwork to meet an unfair Nazi tax demand. The painting ended up in the collection of Sir William Burrell, which was subsequently donated to the Glasgow City Council. The heirs of the Jewish shareholders approached the Glasgow City Council in 2001 demanding restitution or compensation. By mutual consent, the parties referred the case to the Spoliation Advisory Panel. This recommended restitution. However, the case was resolved in a different way, as the families accepted £10,000 from the Glasgow City Council for the painting to remain in Glasgow.

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I. Chronology

Nazi-Looted Art

- **1935:** The five Jewish shareholders of an art gallery in Munich (“the Gallery”) were forced by Nazi authorities to acknowledge and pay immediately a huge tax debt. In particular, they were threatened with criminal tax proceedings for fictitious fiscal offences and the prohibition to emigrate from Germany.
- **1936:** A **clearance sale** of the Gallery collection was organized to pay the taxes and penalties. It was conducted in Berlin by the auction house of Paul Graupe. The collection included the painting *Pâté de Jambon*, a 18th century still-life oil painting by Jean-Baptiste-Siméon Chardin.¹ This painting was bought by Julius Bohler, a Munich-based art dealer. A few days later, he resold it to **Sir William Burrel**.
- **1944:** Sir William Burrel **donated** his collection – including the painting *Pâté de Jambon* – to the **City of Glasgow**.²
- **1954:** The heirs of the Jewish shareholders of the Gallery presented a claim to the **German Compensation Authority** set up under the Federal Compensation Act. They received DM 75,000 as compensation for their loss on the forced sale of 1936. This compensation sum represented an overall payment for the entire loss. Hence, only a tiny fraction of the compensation would be attributable to the painting *Pâté de Jambon*.³
- **1991:** It was discovered that *Pâté de Jambon* was erroneously attributed to Chardin. As a result, its market value was decreased.⁴
- **2001:** *Pâté de Jambon* was listed by the **Cultural Property Advice**,⁵ an on-line advisory service, as an artwork with doubtful provenance. The heirs of the Jewish shareholders of the Gallery learned of the location of the painting through this website.
- **August 2001:** The **heirs** – which remained anonymous – sent a letter to the Glasgow City Council seeking **restitution of *Pâté de Jambon* or compensation**.⁶
- **2003:** The **Cultural and Leisure Services Committee of the Glasgow City Council**, which is dedicated to considering the repatriation of stolen art works, recognised that the painting was looted, therefore it accepted the validity of the claim as well as the convincing moral case for reparation of some kind. However, the Committee contended that it was legally barred from returning the painting. Consequently, with the consent of the claimants, the Committee referred the claim to the **Spoliation Advisory Panel** of the Department of Culture, Media and Sports of the United Kingdom Government.
- **24 November 2004:** The **Spoliation Advisory Panel recommended** the Glasgow City Council to **return** the painting to the anonymous claimants.⁷

¹ Spoliation Advisory Panel, Report in Respect of a Painting now in the Possession of Glasgow City Council (“SAP Report”), 24 November 2004, pp. 1-2, accessed 15 March 2012, http://webarchive.nationalarchives.gov.uk/+/http://www.culture.gov.uk/reference_library/publications/4604.aspx.

² Ibid., pp. 1-2.

³ Ibid., p. 8.

⁴ Ibid., pp. 2, 9. See also Tom Gordon, “Picture Sold ‘To Pay Nazi Tax Bill’”, *The Herald*, October 6, 2001, accessed March 15, 2012, <http://www.heraldscotland.com/sport/spl/aberdeen/picture-sold-to-pay-nazi-tax-bill-1.171648>.

⁵ See at: http://www.culturalpropertyadvice.gov.uk/spoliation_reports.

⁶ SAP Report, pp. 1-2.

- **2006:** The painting was not returned because the heirs accepted an **ex gratia payment** of £10,000 from the Glasgow City Council for the painting to remain in the Burrell collection in Glasgow.⁸

II. Dispute Resolution Process

Conciliation – Negotiation – Settlement agreement

- The heirs of the Jewish shareholders of the Gallery requested restitution or compensation for the painting. The essence of the claimants' case was that the liquidation of the Gallery's stock at the auction was forced on them in order to satisfy a tax demand and fiscal penalties. They also contended that their forebears were deprived of their freedom to retain or dispose of the painting.⁹
- The Cultural and Leisure Services Committee of the Glasgow City Council recognised that the painting was looted and the moral strength of the claim put forward by the heirs. In effect, the claimants did not dispute that the Glasgow City Council' legal title was impregnable under limitation law.¹⁰ However, the Committee was reluctant to jeopardise the integrity of the collection by transferring one of its components.¹¹ In addition, it pointed out that the return of the painting was barred by the terms of the memorandum of agreement of 1944 with which Sir Burrell donated his collection to the Glasgow City Council.¹²
- For these reasons, the parties agreed to submit the case to the Spoliation Advisory Panel. According to Article 2 of the Rules of procedure of the Spoliation Advisory Panel: "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 during the Nazi era (1933 to 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 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". .
- It can be submitted that, similarly to other non-forensic institutions created in the 1990s,¹³ the Spoliation Advisory Panel exercise conciliatory functions. **Conciliation** can be defined as the "process whereby, subject to their prior consent, the parties concerned submit their

⁷ Ibid., pp. 1-2.

⁸ Edd McCracken, "Museums Ready to Hand Back Nazi Loot," *The Herald*, June 13, 2009, accessed March 15, 2012, <http://www.heraldscotland.com/museums-ready-to-hand-back-nazi-loot-1.827004>.

⁹ SAP Report, p. 2.

¹⁰ Ibid., p. 1.

¹¹ Phil Miller, "Burrell Collection Painting Ruled Part of Nazis' Stolen Art Treasures," *The Herald*, April 9, 2003, accessed March 15, 2012, <http://www.heraldscotland.com/sport/spl/aberdeen/burrell-collection-painting-ruled-part-of-nazis-stolen-art-treasures-1.121818>.

¹² SAP Report, p. 3.

¹³ See the New York Holocaust Claims Processing Office, the French Restitution Committee, the Swiss Holocaust Claims Bureau and the Dutch Restitution Committee.

- dispute with respect to restitution or return of cultural property to a constituted organ for investigation and for efforts to effect an amicable settlement of their dispute”.¹⁴
- The Committee of the Glasgow City Council believed monetary compensation for the cost of the painting, paid by the government, was the best solution to the request.¹⁵ On the contrary, the Spoliation Advisory Panel unanimously concluded that the just and fair solution in the present case was the restitution of the painting to the claimants.¹⁶
 - In spite of this, the parties entered another round of **negotiation**. As a result, the claimants agreed to drop the claim in exchange of the payment of £10,000.¹⁷

III. Legal Issues

Deaccession – Due Diligence – Ownership

- This case was not centred on the legalities that typically feature restitution cases. As said, the claimants did not dispute the **legal title** of the Glasgow City Council as they were aware that a legal action would have been barred by the relevant **statutes of limitation**.¹⁸ For this reason, they only relied on the moral strength of their claim. Likewise, the claimants did not contest the **good faith** of Sir Burrell. Available evidence demonstrates that he was unable to ascertain the true provenance of *Pâté de Jambon*. Moreover, Bailie John Lynch, the chair of the Cultural and Leisure Services Committee of the Glasgow City Council, said that “there is no evidence whatsoever that Sir William knew of the circumstances of the Berlin auction that led to his acquiring *Pâté de Jambon*”.¹⁹ Nevertheless, it is important to discuss the following issues.
- The claimants’ case was that the liquidation of the Gallery’s stock at the auction was a forced sale and, hence, that their forebears were deprived of their freedom to retain or dispose of *Pâté de Jambon*.²⁰ Instead, they did not contend that the painting was sold at an unfair price.²¹ **The claimants reinforced their case by referring to the restitution principles** adopted by the Allies as a result of the Nazi looting. These principles are codified

¹⁴ Article 2 of the Rules of Procedure for Mediation and Conciliation in accordance with Article 4, Paragraph 1, of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation, CLT-2010/CONF.203/COM.16/7, October 2010.

¹⁵ Phil Miller, “Burrell Told to Return Painting Nazis Forced Family to Sell,” *The Herald*, November 24, 2004, accessed March 15, 2012, <http://www.heraldscotland.com/sport/spl/aberdeen/burrell-told-to-return-painting-nazis-forced-family-to-sell-1.69875>.

¹⁶ SAP Report, p. 11.

¹⁷ Edd McCracken, “Museums Ready to Hand Back Nazi Loot,” *The Herald*, June 13, 2009, accessed March 15, 2012, <http://www.heraldscotland.com/museums-ready-to-hand-back-nazi-loot-1.827004>.

¹⁸ SAP Report, p. 1.

¹⁹ Phil Miller, “Burrell Collection Painting Ruled Part of Nazis’ Stolen Art Treasures,” *The Herald*, April 9, 2003, accessed March 15, 2012, <http://www.heraldscotland.com/sport/spl/aberdeen/burrell-collection-painting-ruled-part-of-nazis-stolen-art-treasures-1.121818>.

²⁰ SAP Report, p. 2.

²¹ *Ibid.*, pp. 2, 9.

- in the **London Declaration of 1943**²² and in the **Military Government Regulation No. 59**.²³ The London Declaration warned all States, thus both enemy States and neutral nations, that the Allies intended “to do their utmost to defeat the methods of dispossession practiced” the Nazis and reserved the right to annul transfers or dealings which took the form of open looting or seemingly good faith transactions. The objective was to avoid that museums or individuals could profit from the suffering of victims and hence that the gross wrongs committed by the Nazi regime could be condoned. The restitution principle embodied in the Declaration was incorporated in the Military Government Law No. 59. This provided a presumption in favour of a claimant that any transaction entered into between January 1933 and May 1945 involving any transfer or relinquishment of property was considered as an act of unlawful confiscation carried out with persecutory measures and motivated on racial grounds. The law under consideration also provided that such a presumption could be rebutted by showing that the transferor was paid a fair purchase price, provided the transferor was not denied the free right of disposal of the purchase price on *inter alia* racial grounds. The claimants contended that they fell into the latter category.²⁴
- Upon receiving the restitution demand of the German heirs, the Cultural and Leisure Services Committee of the Glasgow City Council affirmed that it was “legally debarred from returning the painting to the claimants under the terms of the gift”.²⁵ In effect, the memorandum of agreement with which Sir Burrell donated his collection to the Glasgow City Council states that “the donees shall not be entitled on any pretext whatever to sell or donate or exchange any item or part of the Collection once it has formed part of the Collection”. The Committee contended that this stipulation had the status of a contractual term binding upon them, thereby impeding the **deaccessioning** of *Pâté de Jambon*. The Spoliation Advisory Panel dealt with this issue by verifying that there is no statutory impediment²⁶ and by consulting with Scottish lawyers. The Panel concluded that restitution did not fall within the scope of the prohibited transactions (sale, donation or exchange). It also affirmed that restitution is necessary because the painting was lost as a result of Nazi oppression and is in accord with the spirit of the 1943 London Declaration.²⁷
 - It is understood that the Spoliation Advisory Panel concluded that the claimants provided a sufficiently strong case that an **ex gratia payment** was not suitable in the light of a number of factors: the price achieved at the 1936 auction, the devaluation of the painting, the compensation received from the German Government, the cost incurred by the respondents. As a consequence, the Panel recommended the **restitution** of the painting to the claimants.

²² *Declaration of the Allied Nations against Acts of Dispossession Committed in Territories under Enemy Occupation or Control*, 5 January 1943 (8, Department of State Bulletin 21), signed by seventeen governments and by the Comité National Français.

²³ Military Government for Germany, US Area of Control, Law No. 59, Restitution of Identifiable Property, Military Government Gazette, No. 10, November 1947.

²⁴ SAP Report, p. 2.

²⁵ *Ibid.*, p. 3.

²⁶ Unlike the principal national collections, the Burrell Collection does not come within the terms of the Museums and Galleries Act 1992, or of the associated statutes governing the British Museum and the British Library, which prohibit disposal of objects vested in them. *Ibid.*, pp. 9-10.

²⁷ *Ibid.*, p. 10.

IV. Adopted Solution

Ex gratia payment

- The Spoliation Advisory Panel recommended restitution, but the parties settled the dispute through a compromise solution: the painting was not returned because the heirs accepted an ex gratia payment of £10,000 from the Glasgow City Council for the painting to remain in the Burrell collection in Glasgow. The text of the agreement has remained private.

V. Comment

- It follows from the analysis set out above that the views of the parties were not irreconcilable. It also emerges that they had a perspective of mutual gain. The claimants did not insist on restitution as they were aware that they had no legal claim. The Glasgow City Council recognised that the painting could be acquired by Sir Burrell because of financial persecution of the families by the Nazi regime. Such cases are regarded as “forced transactions”, in which the victims have a clear right to the painting, or at least financial compensation.²⁸ However, Glasgow City Council also wished to preserve the collection’s integrity and to avoid reputational harm. Therefore, this case exemplifies the conditions to achieve a negotiated settlement of a Holocaust-related case.
- Noticeably, the parties and the Spoliation Advisory Panel referred to some of the most important initiatives adopted to reverse the evil of the Holocaust, that is, the London Declaration of 1943 and the Washington Principles adopted in 1998 at the Conference on Holocaust-Era Assets. In effect, the members of the Panel affirmed that their deliberations were guided by the “Principles with respect to Nazi-confiscated art” laid down by the Washington Conference. As for the latter, these non-binding principles impose upon nations a moral commitment to identify and publicize artworks that had been confiscated by the Nazis and not subsequently restituted, to assist their return to their original owners and to encourage pre-war owners and their heirs to make claims for these artworks. In particular, Principle 8 states that “[i]f 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”.

²⁸ Phil Miller, “Burrell Collection Painting Ruled Part of Nazis’ Stolen Art Treasures,” *The Herald*, April 9, 2003, accessed March 15, 2012, <http://www.heraldscotland.com/sport/spl/aberdeen/burrell-collection-painting-ruled-part-of-nazis-stolen-art-treasures-1.121818>.

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