Northern Ireland
Legal Quarterly
Winter Vol. 73 No. 4 (2022) 650–684
Article DOI: 10.53386/nilq.v73i4.927

Creative Equity in practice: responding to extra-legal claims for the return of Nazi looted art from UK museums

Charlotte Woodhead*

Warwick Law School, University of Warwick
Correspondence email: c.c.woodhead@warwick.ac.uk

ABSTRACT

Looted cultural objects taken from Jewish owners during the Nazi Era still reside in museums worldwide. The United Kingdom's Spoliation Advisory Panel (the Panel) recommends solutions based on the moral strength of the claim where the original owner's legal title is extinguished. Using the framework of Equity this article argues that the Panel's work represents a modern, creative form of Equity. The Panel's work plugs a gap left by the law, much as Equity aimed to do. Despite a wide discretion to recommend just and fair solutions, the Panel is developing settled principles rather than applying inconsistent concepts of morality. This article's reconceptualisation of this process as firmly grounded in Equity enables the Panel's work to be more fully appreciated as *sui generis*. It may also enable the Panel to serve as a model for resolving other disputes about cultural objects.

Keywords: looted art; Nazi Era; Equity; cultural objects; personal property; limitation.

INTRODUCTION

Museums and private collections house cultural objects, collected across the generations and originally acquired in a whole host of different circumstances. These range from punitive missions where loot was captured, objects collected as part of scientific or archaeological missions and objects acquired during colonial times to objects that

* The original idea for this article stemmed from a discussion that I had years ago with Professor Dawn Watkins; when I described the work of the Panel, she commented that it was reminiscent of the development of the Court of Chancery. Since then this article has taken many forms and so thanks are due to Professors Andrew Johnston and Jonathan Garton for comments and advice on aspects of the current paper, as well as to Professors Rebecca Probert, Fiona Smith and Hugh Beale for detailed comments on previous iterations. An earlier version of this research was presented at *The New Work in Property Law* event at UCL and thanks are due for the helpful comments at that symposium, in particular from Professor Charles Mitchell and Dr Alison Dunn. The article has benefited from detailed comments by reviewers, to whom I am immensely grateful. As ever, all errors and omissions rest with the author.

were taken during the Nazi Era as part of Hitler's persecutory aims, many of which entered the art market and where museums and private collectors acquired objects, often unaware of their tainted provenance.

Claims relating to all of these cultural objects and calls to respond to past injustice are ever-present themes in the media. Vocal arguments are made for retaining museum collections intact, in particular framed within the so-called culture wars; for that reason, if a system is to be introduced which could facilitate rather than mandate the transfer of such cultural objects to communities of origin (in appropriate circumstances) it needs to be based on rational and consistent criteria providing proportionate and principled responses. The Spoliation Advisory Panel (the Panel), set up to hear claims relating to cultural objects taken during the Nazi Era, provides such a model.[1]

Whilst statutes of limitation perform necessary policy roles in civil law, frequently serving justice,[2] in the context of Nazi Era dispossessions of cultural objects these statutes extinguish legal claims for return in circumstances recognised both nationally and internationally as meritorious and worthy of resolution. Heirs therefore have what are widely considered to be just claims but have neither a legal claim nor a remedy. For that reason in 2000, responding to its international commitments, the United Kingdom (UK) Government established the Panel. This independent panel of experts is tasked with hearing claims against UK museums and galleries based on moral rather than legal grounds. The Panel's primary aim is to recommend just and fair solutions to the claims which can lead to museums returning cultural objects[3] to the heirs of the original owners who lost them during the Nazi Era. Thus, like Equity before it, the Panel plugs a gap left by the law.[4] Equity – capitalised – is used here to refer to 'the doctrines and remedies that developed from the equity jurisdiction of the Court of Chancery before it was abolished by the Judicature Acts of 1873

1 Thus lending further support to the view that the Panel's work can serve as a model for the development of similar processes to resolve claims for other cultural objects of which the original owners, communities or nations were dispossessed: Charlotte Woodhead, 'The changing tide of title to cultural heritage objects in UK museums' (2015) 22 International Journal of Cultural Property 229, 246–248. See generally Evelien Campfens, 'Restitution of looted art: what about access to justice' (2018) 2 Santander Art and Culture Law Review 185.

2 Discussed below at text to n 50.

3 The Panel has not defined the term 'cultural objects' but it has considered claims for objects that might be considered as traditional artworks such as paintings and also porcelain, collections of clocks and watches, manuscripts and an ivory Gothic relief. On no occasion has the Panel discussed whether an object was actually a cultural object.

4 As to this gap, see pp 661ff below.

and 1875' whilst 'equity' is treated as having a 'broader meaning corresponding to natural justice and morality'.[5]

Previous work has focused on how the Panel has, over time, developed principles on which to base its recommendations[6] and how legal principles can assist in making moral determinations[7] or the general parallels between alternative dispute resolution (ADR) and Equity.[8] The link between a broad notion of equity used by the French Holocaust restitution panel has also been made;[9] however, that article focused on the overall principle of equity (in part translating fair and equitable from French into English).[10] Recent arguments have been advanced preferring to frame the Panel's work within concepts of justice rather than morality, pointing to the 'inadequate', 'opaque' and 'ad hoc' nature of morality.[11] However, through close analysis of the specific recommendations of the Panel, this article develops the scholarship by clarifying the nature and scope of the moral strength to claims that emerge from these recommendations. The article thus frames the Panel's work as a form of Equity, evolving outside the courts,

---

5 J McGhee (ed), *Snell's Equity* 35th edn (Thomson Reuters 2020) 4. Following the Judicature Acts of 1873 and 1875, Equity and the common law were administered together in the courts.

6 Charlotte Woodhead, 'Nazi Era spoliation: establishing procedural and substantive principles' (2013) 18 Art Antiquity and Law 167.

7 Norman Palmer, 'Spoliation and Holocaust-related cultural objects: legal and ethical models for the resolution of claims' (2007) 12 Art Antiquity and Law 1 and Evelien Campfens, 'Sources of inspiration: old and new rules for looted art' in E Campfens (ed), *Fair and Just Solutions? Alternatives to Litigation in Nazi-Looted Art Disputes: Status Quo and New Developments* (Eleven International Publishing 2015) 37.

8 Thomas O Main, 'ADR: the new Equity' (2005) 74 University of Cincinnati Law Review 329. For some interesting analysis of the role that Equitable interests might play in restitution claims in the courts, see Elizabeth Pearson, 'Old wounds and new endeavors: the case for repatriating the Gweagal Shield from the British Museum' (2016) 21 Art Antiquity and Law 201 and Luke Harris, 'The Role of trusts in cultural property claims' (2017) 22 Art Antiquity and Law 1.

9 Claire Estryn, Eric Freedman and Richard Weisberg, 'The administration of equity in the French Holocaust-era claims process' in Daniela Carpi (ed), *The Concept of Equity: An Interdisciplinary Assessment* (Universitätsverlag Winter Heidelberg 2007).

10 Specifically, it was critical of the way in which decisions had been reached for Holocaust claims but did not analyse the work of the CIVS (Commission pour l'indemnisation des victimes de spoliations) from the specific point of its wider role as an equitable forum and did not, understandably, situate it within the context of English Equity.

11 Debbie De Girolamo, 'The conflation of morality and "the fair and just solution" in the determination of restitution claims involving Nazi-looted art: an unsatisfactory premise in need of change' (2019) 26 International Journal of Cultural Property 357, 362.

but having at its heart the aim of achieving just and fair solutions by assessing the moral strength of claims.

Close parallels between the Panel and the justification for, development of, and remedies found in the early development of Equity exist.[12] Making these similarities visible and analysing their role in this article serves to legitimise this process as a *quasi*-legal one making use of Equitable principles. Rather than responding according to the caprice of its members, the Panel responds to claims in a measured and considered manner, developing principles – some of which share similarities with Equity, others which are *sui generis*, but all of which can serve as a model for future claims for cultural objects claimed by other communities and, in turn, legitimise those processes.[13] The strong public support for the Panel's work and its internal accountability based on situating it within a framework of a Creative Equity provides an external legitimisation which assists in transposing this process to other types of claim.[14]

The argument is not being made that the Panel's work is the same as Equity, but, instead, the central thesis of this article is that there are clear parallels and analogies that can be drawn with the role that Equity played in the development of Equitable principles to respond to a gap in the law and to deal with potential injustices. The Panel has developed a similar body of principles to Equity which it applies to these important intergenerational claims. The importance of drawing these analogies is to provide the normative justification for the existence of the Panel's process itself but also in terms of presenting a model to inform the process of return of other contentious cultural objects, such as those acquired during colonial times, as well as a result of punitive expeditions.[15] To this end, an interpretative analysis of aspects of the Panel's work through the lens of Equity is taken, drawing parallels

12 The primary focus is on the early development of the jurisdiction of Equity, from the petitions to the Chancellors to the Court of Chancery before the Judicature Acts.

13 Here the term 'communities' is used to refer to indigenous communities, cultural communities and nations which seek to claim cultural objects currently residing in museums.

14 With thanks to Professor Andrew Johnston for helping make visible this argument. Regarding matters of procedural legitimacy of the Panel and its European counterparts through the framework of Luhmann, see Matthias Weller, 'Key elements of just and fair solutions – the case for a restatement of restitution principles' in Campfens (n 7 above) 207.

15 As to which see Dan Hicks, *The Brutish Museums* (Pluto Press 2020).

between the two and constructing an image of Equity in a modern, *quasi*-legal setting.[16]

The first part of this article sets out the background leading to the Panel's establishment as a forum in which to hear claims based on moral as well as legal arguments. The second part analyses the Panel's role as a form of individualised justice which plugs a gap left by the law, drawing parallels with the reason why Equity found its place within the legal system. The third part explores the nature and scope of the claims heard by the Panel while the fourth focuses on the creativity of the Panel's remedies and its seemingly wide discretion, drawing parallels with Equitable remedies and the use of discretion when responding to claims.

THE PROBLEM: NAZI ERA DISPOSSESSIONS

Art and cultural objects were displaced during the Nazi Era on an unimaginable scale.[17] The circumstances in which the dispossessions took place were various, including direct seizure,[18] forced sales to fund exit visas,[19] or to pay tax bills demanded purely because their owners

16 The notion of *quasi*-legal is explored below at text to n 95. It is acknowledged that, as Lord Simon of Glaisdale observed in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, 944, modern-day Equity is administered in a fused system. See also J H Baker, *An Introduction to English Legal History* 4th edn (Butterworths 2002) 114; it therefore has a secondary or supplementary role to law (*Dudley v Dudley* (1705) Prec Ch 241, 119; F W Maitland, *Equity: A Course of Lectures* (Cambridge University Press 1936) Lecture II, 19). Nevertheless, in the context of the Panel's work, Equity is clearly at the heart of both its process and substantive recommendations and thus has an enhanced, rather than supplementary role as found in the fused system of the modern-day courts. To adopt the metaphor used by Worthington to describe the integration of Equity into the law (S Worthington, *Equity* 2nd edn (Oxford University Press Clarendon Law Series 2006) 32), here Equity has been integrated into the fabric of the Panel which in turn derives much from the law. For that reason, the focus in this article is firmly placed on the usefulness of drawing on concepts from Equity.

17 Seventh Report of the Select Committee on Culture, *Media and Sport, 'Cultural Property: Return and Illicit Trade* (HC 1999–2000 371-I 000) para 169.

18 Eg Report of the Spoliation Advisory Panel in respect of three pieces of porcelain now in the possession of the British Museum, London, and the Fitzwilliam Museum, Cambridge (11 June 2008) (2008 HC 602) (*Rothberger* claim), Report of the Spoliation Advisory Panel in respect of three drawings now in the possession of the Courtauld Institute of Art (24 January 2007) (2007 HC 200) (*Courtauld/Feldmann* claim) and Report of the Spoliation Advisory Panel in respect of four drawings now in the possession of the British Museum (27 April 2006) (2006 HC 1052) (*British Museum/Feldmann* claim).

19 Recommendation regarding Berolzheimer, RC 1.166, Dutch Restitutiecommissie, 4 September 2017.

were Jewish.[20] Other transactions appeared legal on their face but concealed sales necessitated by the circumstances of persecution.[21] In some situations persecuted owners sold valuable art or cultural objects whilst fleeing the Nazis,[22] or once they had reached safety in non-occupied countries (but would have been unlikely to have sold them but for the persecution).[23] During the war the Allies confirmed their commitment to untangling these varied transactions.[24] After the war significant efforts were made to return the displaced cultural objects;[25] in many cases the objects were returned to the countries from which they originated rather than directly to the individual owners – often because they could not be identified.[26] Some claimants received post-war compensation through the German claims process.[27]

The scale of the problem of dispossessed cultural objects was less in the UK, not having been an occupied country, and so the state was not in receipt of large collections of art and cultural objects of unknown ownership at the end of the war. Nevertheless, both national and non-national museums, as well as private collectors, purchased objects

20 Report of the Spoliation Advisory Panel in respect of a painting now in the possession of Glasgow City Council (24 November 2004) (2004 HC 10) (*Glasgow City/attrib Chardin* claim) and Report of the Spoliation Advisory Panel in respect of a painted wooden tablet, The Biccherna Panel, now in the possession of the British Library (12 June 2014) (2014 HC 209) *(British Library/Biccherna* claim).

21 These sorts of transactions were envisaged as early as 1943 in the Inter-Allied Declaration against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control, London, 5 January 1943.

22 Eg Report of the Spoliation Advisory Panel in respect of a painting now in the possession of the Tate Gallery (18 January 2001) (2005 HC 111) (*Tate/Griffier* claim).

23 Report of the Spoliation Advisory Panel in respect of fourteen clocks and watches now in the possession of the British Museum (7 March 2012) (2012 HC 1839) (*British Museum/Koch* claim). These are known as *Flughtgut*.

24 Inter-Allied Declaration (n 21 above). Although this document informed the time-limited military laws in the different sectors, it was not incorporated into English law.

25 Robert M Edsel with Brett Witter, *The Monuments Men: Allied Heroes, Nazi Thieves, and the Greatest Treasure Hunt in History* (Preface 2009).

26 These became the MNR collection in France: Musées Nationaux Récupération: and the NK in the Netherlands: Nederlands Kunstbezit collection.

27 See, for example, the cases of Report of the Spoliation Advisory Panel in respect of eight drawings now in the possession of the Samuel Courtauld Trust (24 June 2009) (2009 HC 757) (*Courtauld/Glaser* claim) and 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 (26 March 2014) (2014 HC 1016) (*Tate/Constable* claim) [54].

after the war which had a tainted Nazi Era provenance.[28] Standards of provenance research undertaken when acquiring works in the 1950s and 1960s (when many objects entered museum collections) were less stringent than nowadays.[29] Whilst there is now a widespread appreciation of the potential for an object to have a tainted provenance where there are gaps in information between 1933 and 1945, previously this would not in itself have been a red flag dissuading the museum from acquiring the object.[30]

For several reasons the late 1990s saw renewed efforts to resolve claims against current possessors.[31] First, Holocaust restitution had become a more widespread topic, with class action claims and the establishment of the Jewish Claims Conference to deal with claims for lost life insurance policies, slave labour claims and for gold, primarily held by Swiss banks.[32] Claims for art did not lend themselves to class actions given the individual nature of works[33] and the ability to identify them in museum collections or at auctions. Yet, the claims for cultural objects were situated within this renewed interest in restitution, and were aided by the opening of previously sealed Eastern European archives[34] and the academic research which set out the scale of the

28 For the scale of the objects in museums with unknown provenance between the years 1933–1945, see the Collections Trust: Spoliation Research by UK Museums.

29 *Rothberger* claim (n 18 above) [14].

30 In its recommendations the Panel has not criticised omissions by museums relating to provenance during the 1950s and 1960s. However, the Panel adopted a different approach where an object was acquired in the 1980s (*Tate/Constable* claim (n 27 above)), although in claims after 2016 the actions of the museum when acquiring the object are unlikely to be subjected to such scrutiny since any moral obligation on the museum is now only considered if the Panel 'finds it necessary to do so to enable it to arrive at a fair and just recommendation' (Spoliation Advisory Panel Constitution and Terms of Reference (SAP ToR) [16]) rather than as one of the factors that the Panel should consider when determining a claim (as was the case under para 7(g) on the original Terms of Reference: *Spoliation Advisory Panel Constitution and Terms of Reference*, Hansard vol 348 col 256W (13 April 2000) [7(g)]).

31 Select Committee Seventh Report (n 17 above) [179]–[183].

32 Conference on Jewish Material Claims Against Germany.

33 See M Dugot, 'The Holocaust Claims Processing Office: New York State's approach to resolving Holocaust era art claims' in M J Bazyler and R P Alford (eds), *Holocaust Restitution: Perspectives on the Litigation and its Legacy* (New York University Press 2006) 279.

34 Select Committee Seventh Report (n 17 above) [179]. See generally 'The barbarians of culture' in S E Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor and the Unfinished Business of World War II* (Public Affairs 2003) ch 9.

issue.[35] Additionally, there were strong international commitments to dealing with these claims including the Principles with Respect to Nazi-Confiscated Art concluded at the Washington Conference on Holocaust-Era Assets in 1998[36] and the Council of Europe's Resolution 1205.[37] Clear political support for returning these objects to their original owners was also made at the national level.[38] At this time, many museums in the UK and abroad engaged in detailed collections research and identified objects with gaps in their ownership history between 1933 and 1945.[39]

Despite this renewed interest, there was no flurry of litigation in the UK or across Europe because legal claims were unlikely to succeed. Although there are statements of English law indicating that the courts will refuse to uphold a transfer effected through foreign confiscatory legislation,[40] this has not been tested in the context of claims for Nazi Era dispossessed cultural objects. In *Oppenheimer v Cattermole* Lord Cross said 'what we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state

35 Eg Lynn Nicholas, *The Rape of Europa* (Macmillan 1994); Hector Feliciano, *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art*, T Bent (trans) (Basic Books 1997); and Jonathan Petropoulos, *The Faustian Bargain: The Art World in Nazi Germany* (Allen Lane 2000). See also Eizenstat (n 34 above).

36 Washington Conference Principles on Nazi-Confiscated Art.

37 This is particularly strong where the objects are in publicly funded institutions, where return is prioritised to avoid perceptions that the public are benefiting from tainted cultural objects: Council of Europe Resolution 1205 On Looted Jewish Cultural Property (November 1999), principle 12.

38 Eg the creation of the Mattéloi Mission working party on spoliation in France which was established by the French Prime Minister in 1997, the Origins Unknown Committee (the Ekkart Committee) in the Netherlands which was established by the Dutch Government in 1998, the Spoliation Working Group established by the UK's National Museum Directors' Conference in 1998 and in Austria the enactment of the 1998 restitution law, BGB1 Nr 181/1998, amended in 2009.

39 See n 28 above and Statement of Principles and Proposed Actions on Spoliation of Works during the Holocaust and World War II Period (National Museum Directors' Conference, London 1998). See Jacques Schumacher, 'British museums and Holocaust-era provenance research' in Ruth Redmond-Cooper (ed), *Museums and the Holocaust* (IAL Publishing 2021).

40 *Oppenheimer v Cattermole* [1976] AC 249 (HL) 276 and 268 (Lord Cross) *obiter*. This is set within the context of the Radbruch formula: Gustav Radbruch, 'Statutory lawlessness and supra-statutory law (1946)' (2006) 26 Oxford Journal of Legal Studies 1, 7.

passing the legislation can lay its hands on'.[41] That case involved taxation and the removal of German citizenship from Jewish people during the Nazi Era. This principle has not been applied to private transactions involving individual property rights or where there have been subsequent property transfers. Certainly, where an innocent third party has purchased the object, courts would be reluctant to unravel later transactions particularly where the current possessor had legal title and the original owner's claim and title were extinguished by the Limitation Act 1939.[42] Under this Act, time starts to run even in favour of a thief, whereas the reforms brought about by the Limitation Act 1980 mean that for theftuous conversions time only starts running from the first good faith purchase unrelated to the theft,[43] and never in favour of a thief or a convertor related to the theft.[44] A further shortcoming of both common law and Equity (until 2010)[45] was that the governing statutes of many national museums[46] restricted transfers from their collections,[47] even if justified on moral grounds.[48] However, Parliament intervened and the trustees of the national museums now have the power to transfer objects of which the owners lost possession during the Nazi Era where the Panel has recommended return and the Secretary of State has approved it.[49]

---

41 *Oppenheimer* (n 40 above) 268 (Lord Cross) *obiter*. See also F A Mann 'The present validity of Nazi nationality laws' (1973) 89 Law Quarterly Review 194, 205, referring to the existence of situations where it would be 'contrary to the judicial conscience, authority and dignity to give effect to an enactment which shocks one's sense of propriety and morality'.

42 Limitation Act 1939, s 3(2), or Limitation Act 1980, s 3(2). See Ruth Redmond-Cooper and Charlotte Dunn, 'Original but not enduring title: issues of space and time' in Ruth Redmond-Cooper (ed), *Museums and the Holocaust* 2nd edn (IAL Publishing 2021) 18.

43 Limitation Act 1980, s 4(2).

44 Ibid s 4(3).

45 When the Holocaust (Return of Cultural Objects) Act 2009 came into force; this provides an exception in the case of Nazi Era dispossessions to the prohibitive statutory provisions.

46 That is museums governed by statute in receipt of direct government funding: *Loans between National and Non-National Museums: New Standards and Practical Guidelines* (National Museum Directors' Conference, London 2003).

47 Eg British Museum Act 1963, s 3(4)), and Museums and Galleries Act 1992, ss 4(3), (4), (5) and (6).

48 These restrictive governing statutes even prevented the use of the principle in *Re Snowden* [1970] Ch 700 (Ch) which allows the payment of an *ex gratia* sum from charity property with the permission of the Attorney General: *AG v Trustees of the British Museum* [2005] Ch 397 (Ch) [45] (now see Charities Act 2011, s 106).

49 Holocaust (Return of Cultural Objects) Act 2009, s 2. This power is now an indefinite one: s 4 (as amended by the Holocaust (Return of Cultural Objects) (Amendment) Act 2019, s 1).

Statutes of limitation have important policy justifications,[50] including the desire to avoid potential injustice to defendants[51] and the risks involved with relying on stale evidence.[52] In the context of the former justification, it has been said that 'Long dormant claims have often more of cruelty than of justice in them.'[53] Nevertheless, leaving unresolved claims that occurred in extreme circumstances, often coupled with genocide and where the objects are of importance to modern-day claimants, may have more of cruelty than of justice in them and justify circumvention of these rules; certainly this is supported by international commitments.[54] Given the potential legal difficulties of retroactively imposing laws which would have had the practical effect of reviving otherwise extinguished property rights and, in turn, interfering with the property rights of the current possessors, more creative solutions were required.

JURISDICTION AND PROCEDURE: A NEW FORUM AND A NEW CLAIM

The UK Government was clearly committed to responding to this problem, but did not introduce legislative changes to extend or disapply the limitation periods; instead, it appointed an independent panel of experts to hear claims from those who lost possession of cultural objects during the Nazi Era (or from their heirs) which are now in a national museum or other museum or gallery established for the public benefit.[55] The Panel can also advise parties where an object is owned by a private collector at the joint request of both parties.[56] Claims from people whose legal claims would otherwise be time-barred therefore have a forum within which to be heard. Although the Panel does not determine legal title it investigates the original title of the owner and the museum's current title.[57] The Panel's 'paramount purpose' is to 'achieve a solution which is fair and just both to the claimant and the

50 *Board of Trade v Cayzer, Irvine and Company Ltd* [1927] AC 610, 628 (Lord Atkinson) and the Law Commission, *Limitation of Actions: Consultation Paper* No 151 (2013) paras 1.22–1.38.

51 *Abdulla and Others v Birmingham City Council* [2013] 1 All ER 649 (SC), 666 (Lord Sumption).

52 Ibid.

53 *A' Court v Cross* (1825) 3 Bing 329, 332–333 (Best CJ).

54 Eg Council of Europe Resolution (n 37 above) principle 13.1.

55 *Spoliation Advisory Panel Constitution and Terms of Reference*, Hansard (n 30 above); revised SAP ToR (n 30 above) [1].

56 SAP ToR (n 30 above)[6]. To date no such claims have been considered by the Panel.

57 Ibid [8].

institution'.[58] This underlying principle, derived from the Washington Conference Principles,[59] is mirrored in the approaches of similar panels established across Europe.[60] The approach taken here is to focus on the work of the UK's Panel through the lens of Equity in order to demonstrate the internal consistency of the process and with a view to framing specifically the nature of the claim and the remedies.[61] The Panel responds to the moral imperative to right historical wrongs and to return cultural objects to their 'rightful owners'.[62]

Although the Panel's recommendations have no legal force[63] and its proceedings are not a process of litigation,[64] claimants who accept the Panel's recommendations are expected to do so in full and final settlement of the claim.[65] The Panel's recommendations have been followed by the parties, save for a few isolated situations where particular legal impediments to the proposed solutions existed.[66] In part, museums may follow the recommendations because of the risk otherwise of professional embarrassment.[67]

Equity may be described as 'an instrumentality by which the adaptation of law to social wants is carried on'[68] and can mean 'any body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil

58 Ibid [14].

59 Above n 36.

60 Eg Die Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter, insbesondere aus jüdischem Besitz (Germany); Commission pour l'indemnisation des victims de spoliations (France); the Adviescommissie Restitutieverzoeken Cultuurgoederen en Tweede Wereldoorlog (Netherlands); and Der Kunstrückgabebeirat (Austria).

61 There are similarities in the approach of the committees across Europe and at times inconsistencies of outcome of claims involving the same claimants outside the scope of this article, which seek to use the UK Panel's process as a case study for conceptualising of the role, procedure, nature of the claim and the remedies as having close parallels with Equity. These differences are being explored by the 'Restatement of Restitution Rules for Nazi-Confiscated Art' Research Project.

62 Select Committee Seventh Report (n 17 above) [193].

63 SAP ToR (n 30 above) [10].

64 Ibid [9].

65 Ibid [11]. Palmer suggested that where the parties have accepted the recommendations of the Panel then this should act as an estoppel: Norman Palmer, 'The best we can do? – Exploring a collegiate approach to Holocaust-related claims' in Campfens (n 7 above) 179.

66 See Charlotte Woodhead, 'Putting into place solutions for Nazi Era dispossessions of cultural objects: the UK experience' (2016) 23 International Journal of Cultural Property 385, 396–397.

67 Ibid 395.

68 Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (Cambridge University Press [1816] 2012) 28.

law in virtue of a superior sanctity inherent in those principles'.[69] This wider approach reflects the moral origins of equity but also the supplementary nature of Equity's relationship with the common law.[70] The Panel's work is clearly a mechanism to achieve the social wants of achieving just and fair solutions for Nazi Era victims. Where the parties follow the recommendations, the civil law rights of the respondent are superseded; if a national museum upholds the Panel's recommendation and transfers an object this has the significant effect of acting as an exception to the statutory prohibition on transfers from their collections.[71] The Panel's underlying ethos is to provide a means of resolving disputes for losses during genocide, recognised as both a national and international imperative.[72] Achieving justice (through just and fair solutions) is the superior sanctity inherent in the principles applied by the Panel.

Plugging a gap left by the law[73]

The Panel provides the only realistic forum in which to hear claims for Nazi Era dispossessions given the restrictive effect of limitation periods.[74] In all claims heard by the Panel to date the respondent has always had the best legal title to the object since the original owners' title and claim have been extinguished by the Limitation Act 1939. Therefore, all claims have been firmly based on moral considerations. As a separate forum from law, the Panel mirrors the work of the Chancellor and later the Court of Chancery where petitions were made by plaintiffs unable to fit claims within the prescribed forms of common

69 Ibid.

70 As to which see above n 16.

71 See above n 45.

72 See above at text to n 36 and n 37.

73 Watt describes the equity gap as the gap 'between the general law and more pleasing justice': Gary Watt, *Equity Stirring* (Hart 2009) 10. Miller also observes that Equity 'supplements the law by filling gaps that, for one or reason or another (and perhaps purely by chance), have not been filled otherwise': Paul B Miller, 'Equity as supplemental law' in Dennis Klimchuk, Irit Samet and Henry E Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press 2020) 102.

74 See discussion above at text to n 42. A claimant would only have an arguable case if fraud or concealment were established which might disapply the effect of the limitation period: Limitation Act 1939, s 26.

law writ,[75] such that Chancery was thus 'to soften and mollify the Extremity of the Law'.[76] Whilst the early Court of Chancery mitigated the harshness of the common law, the Panel mitigates the harshness of both the common law and Equity. For without the Panel's intervention even the discretion permitted by Equity to forego charity property would not facilitate a transfer from a national collection.[77] Not only would legal claims have little chance of success, but resorting to ADR would not be possible in a claim against a national collection[78] as the power to transfer only arises where the Panel recommends return and the Secretary of State approves this.[79] Therefore, even if the parties had agreed to a mediated settlement to transfer an object, transfer would not be permitted unless the Panel first recommended it.[80] The Panel therefore provides a *substitute* process in a new forum (with a wholly different form of claim), rather than an *alternative* process to formal adjudication to resolve an extant legal claim. In practice, it overcomes the problem of the claimant's lack of legal title to the object but also, since 2010, plays a vital role in circumventing the problem of restrictive governing statutes of the national museums. The Panel's work therefore reflects the way in which Equity was conceived of as 'a moral virtue' which 'qualifies, moderates and reforms the rigour,

75 Given that the actions of men 'are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances' (*Earl of Oxford's Case in Chancery* (1615) Rep Ch 1 (1615) 21 ER 485) – the case described by Ibbetson as 'not really a report of a decision at all, but rather a justificatory essay on the nature of the Chancery's jurisdiction by the Lord Chancellor' (D Ibbetson, 'A house built on sand: equity in early modern English law' in E Koops and W J Zwalve (eds), *Law and Equity: Approaches in Roman Law and Common Law* (Brill 2013) 56). Baker (n 16 above) 102.

76 *Earl of Oxford's Case in Chancery* (n 75 above).

77 *AG v Trustees of the British Museum* (n 48 above).

78 Their governing statutes curtail transfers from their collections. Eg British Museum Act 1963, the Museums and Galleries Act 1992 and the National Heritage Act 1983. It is likely that forms of ADR would be suitable where claims are made against private individuals. The work of the Art Loss Register and Art Recovery International in recovering art for the victims of Holocaust dispossessions demonstrate that compromise of claims can be achieved and presumably methods of ADR could be used. Both Christie's and Sotheby's auction houses have restitution policies and seek to resolve claims: see Christie's Restitution Services and Sotheby's Art Restitution.

79 Holocaust (Return of Cultural Objects) Act 2009, ss 2(2) and (3). Governing bodies will not necessarily rubberstamp the recommendation, although they may be under professional and public pressure to do so.

80 It would only be in the case of a genuine compromise of a legal claim that the trustees might be able to transfer an object without recourse to the Panel: *AG v Trustees of the British Museum* (n 48 above) [28]. This would depend on the claimant having an enduring legal title to the object: see generally Pearson (n 8 above) 212.

hardness, and edge of the law'[81] where 'such as have undoubted right are made remediless'.[82]

Yet, the establishment of the Panel demonstrates something more than simply an alternative place to hear an existing category of claim – instead, it is a new place to hear a different type of claim.[83] The claims heard by the Panel include claims that would likely have succeeded in law were it not for the fact that the Limitation Act had extinguished title and prevented the claim; such examples would be where there has been theft[84] and there would be a civil action in the tort of conversion.[85] These are therefore in some sense legal claims that are resurrected as moral claims and are seen in the context of seizure of cultural objects by the Gestapo – for example in the *Rothberger* and *Feldmann* claims.[86]

A second category of claims relates to sales that were forced by duress; here there is again a legal basis to the original loss, but the fact that the current possessors are innocent third parties would mean that a legal claim in duress against them would not succeed (irrespective of the extinction of a claim because of the passage of time).[87] Therefore, the Panel's jurisdiction works not to give a second life to an extinguished legal claim, but rather to circumvent a bar on recovery that would have occurred and to facilitate a direct claim against a third-party museum.

The final type of claim that the Panel considers is *Flughtgut* or flight goods, as seen in the *British Museum/Koch* claim.[88] These moral claims considered by the Panel do not have an equivalent legal claim because these involve legitimate transfers of property that occurred in third countries but which were necessitated by the financial difficulties of the original owners. The factor that makes them susceptible to challenge before the Panel is that the original owners were in financial difficulties and had to sell their cultural objects because of Nazi persecution and were unlikely to have sold those objects but for the persecution that they suffered. These represent an entirely new type of claim within this moral jurisdiction.

In considering these three types of claims, it is possible to observe parallels between those claims in Equity which were capable of being

81 *Dudley and Ward (Lord) v Dudley (Lady)* (1705) Prec Ch 241, 244.

82 Ibid.

83 Specifically, a moral rather than a legal one.

84 Under the laws in the country where the loss happened.

85 A successful claim in conversion could happen where the original act of conversion was abroad; the Panel has considered claims where losses took place in Austria or the then Czechoslovakia: *Rothberger,* and *Courtauld/Feldmann* and *British Museum/Feldmann* claims respectively (n 18 above).

86 Above n 18.

87 See *White v Garden* (1851) 10 CB 918 and Lord Cairns LC in *Cundy v Lindsay* (1878) 3 App Cas 459, 464.

88 Above n 23.

legal, but for certain formalities,[89] and the entirely new creatures of Equity such as restrictive covenants.[90] Thus, like the Court of Chancery which was a forum able to hear a new type of claim – an Equitable one – the Panel can hear a new claim based on the moral strength of the claim, seeking a just and fair solution. In both situations law fails the justice of the case, but in turn, Equity and the Panel provide new doctrines which permit justice to be done, for 'judges of equity have always been ready to address new problems, and to create new doctrines, where justice so requires'.[91] Similarly,

> [t]he Panel is not an attempt to resurrect the law and the full, unbending panoply of legal process; nor should it be seen as such or judged as such. Rather, it is a unique and imaginative response to uniquely dreadful events.'[92]

Like Equity, it thus provides a 'second doorway to justice'.[93]

Unfortunately, whilst a doorway exists for all claimants for objects held in national museums and other museums and galleries established for the public benefit, it does not always lead to justice. Thus, in some ways the plug used to fill the equity gap is not fully watertight, for, in the case of objects held in private collections, the claim is only heard if the possessor, as well as the original owner (or their heirs), agree.[94]

Closer to Equity than equity

The Panel's work can be situated within a framework of a *quasi*-legal process, with Equity at its heart. This approach is justified on several bases. Despite the lack of legal force, the Panel's recommendations are *quasi*-legal in nature because they have a significant effect on matters of title to cultural objects which are held for the public benefit.[95] In practice, the Panel's recommendations have been followed and can result in a transfer of what is, in practice, part of an otherwise *de facto*

89 For example, Equitable leases as seen in *Walsh v Lonsdale* (1882) 21 Ch D 9.

90 *Tulk v Moxhay* (1848) 2 Ph 774.

91 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 696 (Lord Goff).

92 Sir Paul Jenkins KCB QC, *Independent Review of the Spoliation Advisory Panel* (DCMS 2015) [6.6].

93 A phrase used by Lord Neuberger to describe Equity in 'Equity, ADR, arbitration and the law: different dimensions of justice' (Fourth Keating Lecture, Lincoln's Inn 19 May 2010) [31].

94 The notion of claimants having a *de facto* claim against a national collection or other museum established for the public benefit is discussed in the next part since the agreement of the respondent museum is unnecessary in such claims. In the case of private owners there is therefore a greater role played by the auction houses and the art recovery companies in reaching settlements between previous owners and the current owners. See above n 78.

95 See Woodhead (n 6 above) 189.

inalienable collection. Here an analogy is drawn with the terminology of *quasi*-legislation found in both secular[96] and canon law which has a supplementary role, filling 'gaps in formal law'.[97] Supplementing the law is the key purpose of the Panel as it provides the only realistic forum, with the only type of claim with a realistic chance of success. Equity's supplementary role has been identified as threefold – filling gaps left by the common law, modifying or adjusting the common law by providing more appropriate remedies and adding distinctive legal forms.[98] These three features of Equity are closely mirrored by the Panel in terms not only of plugging the gap left by the law, but also in the creation of a new type of claim based on the moral strength of the claim as well as the more nuanced remedial responses provided by the Panel.

Furthermore, the Panel is more closely aligned to Equity as administered by the courts, rather than any broad notions of morality covered by the term 'equity' (in lower case),[99] for over time the Panel has developed its own procedural and substantive principles which have avoided applying unwieldy moral concepts or subjective and inconsistent recommendations.[100] It has effectively created its own processes and procedures akin to developing a limited form of precedent and, although not legally binding,[101] in a similar way to Equity it has set its processes within the context of English legal principles and processes.[102] It therefore has a *quasi*-legal nature within which Equity plays a significant role. In adopting a limited form of precedent, not only in terms of procedural matters, but also substantive ones, the Panel's development has mirrored that of Equity which initially took account

96 R E Megarry, 'Administrative quasi-legislation' (1944) 60 Law Quarterly Review 125, 126.

97 Norman Doe 'Ecclesiastical *quasi*-legislation' in N Doe, M Hill and R Ombres (eds), *English Canon Law: Essays in Honour of Bishop Eric Kemp* (University of Wales Press 1998) 95.

98 Miller (n 73 above) 102.

99 See discussion at n 5 above.

100 See generally Woodhead (n 6 above). Oost recognises that the structure of a legalistic paradigm is needed in addition to a moral paradigm for Nazi Era restitution committees (focusing on the UK and Dutch committees) to provide 'a certain predictability of proceedings': Tabitha Oost, 'Restitution policies on Nazi-looted art in the Netherlands and the United Kingdom: a change from a legal to a moral paradigm?' (2018) 25 International Journal of Cultural Property 139, 173.

101 SAP ToR (n 30 above) [10].

102 Report of the Spoliation Advisory Panel in respect of a painting held by the Ashmolean Museum in Oxford (1 March 2006) (2006 HC 890) [25].

of the 'course of Chancery'[103] and later developed into precedent with the advent of law reporting.[104]

Conceptualising the Panel as a *quasi*-legal process dispensing Equitable principles is more appropriate than situating it within ADR (which is the framework usually used). The Panel does not neatly fit into any of the usual categories of ADR.[105] However, using the terminology of ADR presupposes that there is an extant legal claim for which the court would be a possible forum for the resolution of the dispute but where an alternative method (outside litigation) is sought. Yet in all claims so far the claimants have had no extant legal rights; the Panel thus provides an entirely different system in which to hear a very different type of claim.[106]

A further point of divergence from ADR is that rather than being a consensual means of resolving a dispute, the Panel has a *de facto* jurisdiction in certain situations. Specifically, where a claim is made for an object in a national museum or other museum established for the public benefit, a panel is convened to hear the claim and the respondent

---

103 *Barkley (or Berkley) v Markwick and Others* (1617) Ritchie 14, 15.

104 In *Gee v Pritchard* (1818) 2 Swanston 403; 36 ER 670, 674 Lord Eldon LC said: 'The doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case.' For the development of the use of precedent and law reporting, see M Macnair, 'Arbitrary Chancellors and the problem of predictability' in Koops and Zwalve (n 75 above) 98; and W H D Winder, 'Precedent in Equity' (1941) 57 Law Quarterly Review 245.

105 Roodt suggests that it 'offers advisory mediation': Christa Roodt, 'State courts or ADR in Nazi-era art disputes: a choice "more apparent than real"?' (2013) 14 Cardozo Journal Conflict Resolution 421, 436. It has also been described as a 'neutral third-party facilitator', at best it is an 'innominate category': Palmer (n 65 above) 183. However, this does not take into account the status of the facilitator, not as one agreed to by parties, but as an independent, government-appointed panel. Perhaps the closest analogy can be drawn between the work of the Panel and the Financial Service Ombudsman (FSO). Thanks are due to Sarah Nield for suggesting the similarity here. Specifically, the FSO has a jurisdiction to consider claims on the basis of a test of what is fair and reasonable with a view to resolving the matter in a just manner: Financial Services and Markets Act 2000, s 228.

106 Most national museum collections (those governed by statute and in receipt of direct government funding) are prevented from transferring objects from their collections except in very limited circumstances and charities are restricted in their powers to sell objects from their core collection without appropriate authority from their regulator. Museums which are accredited under the Arts Council Scheme and which, as members of the Museums Association, are bound by its Code of Ethics are subject to ethical standards governing disposals from their collections.

in effect submits to its jurisdiction.[107] Contrastingly, where an object is in the possession of a private collection, agreement of both parties is needed, demonstrating a similarity with other methods of consensual dispute resolution, albeit in the absence of an extant legal claim.

Individualised, responsive justice

The Panel provides individualised justice, focusing on the circumstances of the claim in a similar way to Equity's original aim of responding to individual petitioners whose claims fell outside the scope of the common law writs.[108] It adopts Equity's initial dislike of excessive formalism but, unlike Equity's ultimate path, has not 'lost its useful exuberance' or 'freedom, elasticity, and luminance'.[109] Even though the Panel's starting point is the application of a broad, seemingly moralistic principle, the Panel's work has not treated claims subjectively or inconsistently. The argument is not made here that the early form of Equity administered by the Courts of Chancery is an ideal which the Panel should emulate. Instead, the Panel is conceptualised as a place in which a creative form[110] of Equity is practised which is responsive to the justice of the case. Nevertheless, there are clear parallels between the reasons for the creation of both fora and their nature as new types of claims plugging gaps left by the law.[111]

---

107 Similarly, under the Financial Services and Markets Act 2000, s 226, there is a compulsory jurisdiction for a matter to be heard by the FSO. For that reason the Spoliation Advisory Panel could be described as being, in practice, a comparable process. However, there are fundamental differences in the functions of the two processes. The FSO system was established to facilitate the quick resolution of, often relatively straightforward, claims. In most situations these would be based on legal claims that continue to exist although it is clear that the FSO can make decisions 'which do not necessarily reflect the strict legal position': *R (on the application of Bluefin Insurance Services Ltd) v Financial Services Ombudsman Ltd* [2015] Bus LR 656, 661. Contrastingly, the Panel, rather than providing swift resolution of relatively straightforward claims, provides the only forum in which claims of a moral rather than legal nature can be considered because there is no longer a legal claim to the objects. Also, the Panel has to deal with difficult evidential issues from many years earlier. For these reasons the nature of the forum is quite different and so the Panel's work justifies special consideration within the framework of Equity.

108 See Baker (n 16 above) 102–103.

109 Main (n 8 above) 384.

110 Watt describes Equity as 'a creative means to close the gap between the progress of society and the conservatism of law': Watt (n 73 above) 245. Here the creative nature of the process is based on it circumventing the injustice of applying limitation statutes to worthy cases, recognised nationally and internationally, but without undermining the need to avoid imposing retroactive laws which would interfere with property rights.

111 For a criticism of the application of equitable principles to French Holocaust claims, see Estryn et al (n 9 above) 21–51.

Furthermore, there is a close analogy with Equity when it comes to the substantive principles applied by the Panel and the remedies that it can recommend.[112]

The Panel's starting point was that of a very broad remit of dealing with claims of those who lost possession of their cultural objects during the Nazi Era. As part of this notion of individualised justice, the Panel necessarily had to deal with a varied array of factual situations, complicated by the extreme circumstances of the time, which are also affected by the passage of time which makes piecing together the evidence to construct a picture of the facts a difficult one. The Panel started with no prior cases and so had to respond to individual circumstances and determine whether these justified a conclusion that there was sufficient moral strength to the claim to, in turn, recommend a just and fair solution.[113] The Panel has received seemingly clear-cut cases of spoliation in the form of direct seizure by the Nazis,[114] although even these 'straightforward' circumstances of dispossession require careful consideration of whether the object was actually in the collection at the time of the seizure, which can be difficult to show. For example, in the *Rothberger* claim, even in the absence of categorical evidence showing the object's presence in the collection immediately before the seizure, art historical evidence showed that the collecting habits of wealthy Jewish owners meant that it was unlikely that Rothberger would have sold it.[115] In another case of seizure of a collection by the Gestapo, objects from the collection had been consigned for auction years earlier to improve the financial position of the original owner, but many objects were returned unsold, including the drawings in question and the assumption was made that given the relatively low value of the drawings they were unlikely to have been sold elsewhere prior to the seizure of the collection.[116]

The Panel has had to analyse a variety of situations involving sales of cultural objects to determine whether those sales were forced by persecution. The way in which the Panel has approached these questions

112 Support is taken here from the description of Equity (in light of the approach taken in case law) that 'equity's conscience is the interplay of an objective morality and its application to specific facts, where parties are assessed not only on what they did but on what they ought to have done': Richard Hedlund, 'The theological foundations of Equity's conscience' (2015) 4 Oxford Journal of Law and Religion 119, 139.

113 Until 2016 an additional consideration by the Panel was whether a moral obligation rested on the institution, based primarily on the actions of the museum at the time of acquisition. This now has a diminished importance (see above n 30).

114 Eg *Rothberger* claim (n 18 above) [13].

115 Ibid [10].

116 *Courtauld/Feldmann* claim and *British Museum/Feldmann* claim (n 18 above).

is dealt with below in the context of the content of claims, and the strength of the moral claims is considered in the context of decisions regarding remedies. Given its wide jurisdiction (to hear claims from anyone who *lost possession* of cultural objects *during* the Nazi Era), the Panel has also needed to determine the extent of its jurisdiction and the circumstances that amount to spoliation; it accepted that it had jurisdiction to hear a claim for an object lost during the Allied occupation of Italy in circumstances not directly attributable to the Nazis and concluded that this amounted to spoliation.[117]

In *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd*[118] Lord Haldane used the metaphor of elasticity to refer to the flexibility and responsiveness of Equity's jurisdiction which was otherwise absent from an application of rigid common law rules.[119] The Panel provides a more elastic jurisdiction than the courts in procedural terms[120] and an elasticity with the scope of the claim – for it hears otherwise debarred claims on their merit. Although the Panel is not a legal tribunal tasked with hearing revitalised legal claims that have been time-barred, it provides a means of circumventing the strictures of the limitation periods. There are echoes here of the limited situations in which Equity would allow a claim even though the common law claim was time-barred. Equity can apply limitation statutes by analogy,[121] but there were some limited circumstances where Equity would depart from applying the limitation period in the case of fraud.[122] Further, although a common law action for a debt was extinguished under the common law, Equity would allow recovery of the sum owed where, for example, a testator had created a trust for the purpose of paying any debts.[123] This seems to be on the basis that, whilst the common law remedy was

117 Report of the Spoliation Advisory Panel in respect of a twelfth-century manuscript now in the possession of the British Library (23 March 2005) (2005 HC 406) (*British Library/Benevento* claim). The jurisdiction of the other four European restitution committees would not extend to these circumstances.

118 [1914] AC 25 (HL).

119 Ibid 38 and 40 (Lord Haldane). Obviously, this was in the context of the Equitable jurisdiction within the combined system.

120 Discussed in the context of providing a forum for hearing otherwise time-barred legal claims on moral grounds.

121 See Limitation Act 1980, s 36. See generally Mark Lemming, '"Not slavishly nor always" – equity and limitation statutes' in Paul S Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (Hart 2018).

122 Ultimately, this was reflected in the Limitation Acts, most recently in the Limitation Act 1980, s 32.

123 Eg in *Lacon v Briggs* (1844) 3 Atkyns 105. Although, as Macnair points out, the doctrine proved controversial: Mike Macnair, 'Length of time and related equitable bars 1660–1760' in Harry Dondorp, David Ibbetson and Eltjo J H Schrage (eds), *Limitation and Prescription: A Comparative Legal History* (Duncker & Humblot 2019).

barred, the right was not.[124] However, the work of the Panel goes far further than providing an alternative remedy in a situation where the right remains extant. The effect of the Limitation Acts of both 1939 and 1980 is that, where a claim is made in the tort of conversion, the right is extinguished as well as the remedy,[125] thus the Panel permits the hearing of an extra-legal claim which could result in the retransfer of a legal title which has previously been extinguished. The Panel can hear claims from anyone who lost possession of objects during the Nazi Era (where those objects are now in a national collection or other museum or gallery established for the public benefit) and the forum is available to anyone who falls within this wide category. However, the Panel restricts the circumstances in which remedies (which at its most favourable would be a re-transfer or in effect the revitalisation of that previously extinguished legal title) can be awarded by looking carefully at the moral strength of the claim to determine whether there is, in substance, a claim.

The strength of claims brought before the Panel are assessed in moral terms by focusing on the claim's *substance* (here, a claim based on circumstances of loss occasioned by systematic stripping of property as part of widespread genocide), much as the focus of Equity was on the reality of beneficial owners in trusts or on the nature of transactions which looked to be outright conveyances, but which were actually mortgages. The Panel's jurisdiction thus circumvents the *form* of the limitation statute which has extinguished both the legal right and the remedy.[126]

The Panel, in looking at the substance of the claim is required under its Terms of Reference, as part of performing its functions, to make relevant factual and legal enquiries about the cultural object with a view to assessing 'the claim as comprehensively as possible', to examine relevant evidence (assessed on the balance of probabilities) and information, to make assessments relating to the title to the object, to consider any legal restrictions and to 'give due weight to the moral strength of the claimant's case'.[127]

124 Macnair (n 123 above) 351. See also Limitation Act 1980, s 29, where, on the acknowledgment of title or payment towards a debt, the cause of action accrues again, albeit that once a right of action is barred under the Act (as it would be under section 3(2)) the cause of action cannot be revived by any subsequent acknowledgment, or payment towards a debt: s 29(7).

125 Limitation Act 1939, s 3(2) and Limitation Act 1980, s 2.

126 For, as discussed above at text to note 42, unlike most other causes of action, in the case of a conversion the Limitation Acts 1939 and 1980 extinguish both the claim and the right under section 3(2). Thus the Panel may potentially be 'conniving in the evasion of legal formalities' – a phrase used in the context of Equity: J Cartwright, 'Equity's connivance in the evasion of legal formalities' in Koops and Zwalve (n 75 above) 109.

127 SAP ToR (n 30 above) [15].

THE CONTENT AND SCOPE OF A CLAIM

The Panel's paramount purpose of seeking to achieve a just and fair solution is essentially the remedy, yet to reach that just end one first needs to analyse the scope and content of the Equitable-style claim. These matters form the focus of this part which seeks to address head-on criticisms suggesting that the 'entitlement to restitution remains unclear'[128] and that the moral claim is 'a nebulous and shape-shifting concept'.[129] Instead, it is argued that there are clear principles derived from the recommendations which show how the Panel recognises the content of a claim based on its moral strength.[130] By recognising this new form of claim the Panel is putting into practice the Equitable maxim that 'Equity will not suffer a wrong to be without a remedy'.[131]

Unlike Equity, the Panel is seeking to act on the conscience of the museum, rather than on the conscience of the original perpetrator. In only two of the 20 claims heard by the Panel has it indicated that the museum ought to have done more in the circumstances to investigate the provenance of the cultural object.[132] In only one was this clearly determinative of the final outcome.[133] The Panel's approach is,

128 De Girolamo (n 11 above) 362.

129 Ibid 381.

130 Whilst it is acknowledged that, in the case of three claims involving the same claimants, the Dutch committees have reached different conclusions from the UK Panel, nevertheless the consideration in this article is not on the inconsistency across the jurisdictions, but rather is focused on considering the internal coherence of the Panel's approach and the way in which it recognises claims and the strength of the moral claim. A discussion of those claims is outside the scope of this article (see, generally, the 'Restatement of Restitution Rules for Nazi Confiscated Art' (n 61 above)).

131 *Snell* (n 5 above) 93.

132 *British Library/Benevento* claim (n 117 above) and *Tate/Constable* claim (n 27 above). In the *Cecil Higgins/Budge* claim there appeared to be a suggestion that even where there was an inadequacy of resources, the museum was still under a moral obligation to the heirs although there was no direct criticism of the museum itself: Report of the Spoliation Advisory Panel in Respect of Four Nymphenburg porcelain figures in the possession of the Cecil Higgins Art Gallery, Bedford (20 November 2014) (2014 HC 775) [31]. In one claim the Panel indicated that further research on acquisition in the 1980s perhaps ought to have been carried out, but that the museum 'candidly concedes' that present knowledge indicated that it could have been a forced sale: Report of the Spoliation Advisory Panel in respect of three Meissen figures in the Victoria and Albert Museum (10 June 2014) (2014 HC 208) [24].

133 *British Library/Benevento* claim (n 117 above). In that claim the loss of the object, rather than being attributable to the actions of the Nazis, was due to loss occurring during the confusion of war when the Allies were in Italy. The fact that the museum had suspicions about the provenance of the object led the Panel to conclude that a moral obligation fell on the museum and for that reason ultimately recommended return of the manuscript under consideration.

therefore, overall akin to unconscionability in Equity in that there is 'an objective value judgment on *behaviour* (regardless of the state of mind of the individual in question)'[134] which necessitates action in the form of transfer of the object. Therefore, the circumstances of loss and the museum's continued retention of a cultural object of which its original owner was dispossessed means that as in Equity where 'it is appropriate to go outside the normal adversarial character of common law judicial procedure'[135] it is also appropriate to do so in the context of the Panel to give effect to its international commitments and the need to right historical wrongs.

One interpretation of the way in which the Panel has approached the claims that it hears is to interpret them as first establishing whether, *prima facie*, there is a minimum strength to the moral claim. This gives rise to a consideration of what response would represent a just and fair solution and so more nuanced factors will then determine whether the moral strength to the claim is sufficient to justify return of the object rather than one of the alternative remedies available to the Panel.[136] A minimum moral strength to a claim is established either where loss of possession was directly or indirectly at the hands of the Nazis through persecution and is thus based in the first instance on causation. There are two situations in which this arises. The first category is where the original owner was permanently deprived of their cultural object, either through force or at least direct interaction from the Nazis or their collaborators with no compensation. The second category where a minimum moral strength arises is where but for persecution the owner would not have transferred their cultural object.

An example of the first category is direct seizure – here the Panel treats such circumstances as clearly establishing a sufficient minimum moral strength to the claim. The claim has a recognisable moral strength akin to that arising where the owner of property is the victim of theft, which is reflected in legal form both in criminal and civil law.[137] The Panel seemingly accepts that there is as a clear divergence between strict legal entitlement and doing a more pleasing justice.[138] It treats the moral strength of such claims as particularly strong.[139]

134 *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 (HL), 1788 (Lord Walker).

135 Mike Macnair, 'Equity and conscience' (2007) 27 Oxford Journal of Legal Studies 659, 681.

136 This is dealt with under the heading of 'Remedies' below.

137 Where the moral strength to the claim is so strong, the *prima facie* response is return of the object, unless legally barred from doing so.

138 This concept of Equity performing a more pleasing form of justice is set out by Watt (n 73 above) 10, discussed above at n 73.

139 *Rothberger* claim (n 18 above); *Courtauld/Feldmann* claim (n 18 above) and *British Museum/Feldmann* claim (n 18 above).

Thus, in both the *Rothberger* and *Feldmann* claims where the Gestapo seized the cultural objects in question the act of spoliation justified a response. The needs of justice are clearly far-removed from the strict entitlement[140] and so, by recognising the moral strength of the claim as sufficient for action, the Panel acts in an Equitable manner.

As De Girolamo acknowledges, 'the act of returning an item that does not belong to you, but belongs to the person who has suffered greatly by its loss, can be easily understood',[141] but she proceeds to point out that 'simplicity is not a characteristic of cultural property disputes'.[142] The Panel has, therefore, had to deal with various complicated factual situations raising nuanced moral circumstances, but it is argued that through analysis of the content of these recommendations it can be disputed that 'The most that can be gleaned is the answer – it depends',[143] and it is argued here that the Panel has developed reasoned approaches based on developing principles. This leads to the second category of circumstances raising a minimum moral strength to a claim. The Panel's basic principle here is to recognise a minimum moral strength where the original owner's transfer was caused, at least in part, by persecution by the Nazis – but this is not determinative of the extent of the moral strength to the claim, as this, as well as the appropriate way in which to respond to this to achieve a just and fair solution, depends on further factors. This means that a minimum moral strength can be established,[144] even if the sale was not at an undervalue, where the owner may have had free use of the proceeds or compensation had been paid, for these are factors that are taken into consideration when assessing the full moral strength of the claim. A determination of these then influences the decision of the most appropriate remedy to respond to the circumstances to achieve a just and fair solution for the parties.

Sales, forced by the fact of being persecuted, have been identified as satisfying the minimum threshold for establishing a strength to a moral claim. These include sales which were forced by the need to satisfy extortionate tax demands[145] or fictious debts which were levied on a person because they were a member of a persecuted group, to fund exit visas to escape further persecution, to fund the flight across Europe to escape Nazi persecution[146] or to overcome impecuniosity

140 Here the museum's legal title.

141 De Girolamo (n 11) 365.

142 Ibid.

143 Ibid.

144 Described in the *British Museum/Koch* claim as 'the minimum threshold for finding that [it] was a forced sale' (n 23 above) [19].

145 See *Glasgow City Council/attrib Chardin* claim (n 20 above) and *British Library/Biccherna* claim (n 20 above).

146 *Tate/Griffier* claim (n 22 above).

caused by fleeing that persecution.[147] By establishing one of these circumstances of loss, causation would be established. Indeed, even in the case of mixed motives for sale, the minimum threshold could be established, as was the case in the *Courtauld/Glaser* claim.[148] Here, the Panel determined that Curt Glaser sold his collection within the context of persecution (and found this to be the dominant factor for the sale) but also because of his desire to free himself of his possessions following the death of his first wife.[149] Contrastingly, where there is no causal link between Nazi persecution and a forced sale the Panel will not uphold the claim. For example, claims were unsuccessful where an object had actually been transferred by the original owner as security for a loan and was sold when the loan was called in by the bank and could not be repaid,[150] where a cultural object was sold to repay debts owed to a creditor[151] or where the sale of a cultural object took place to cover losses attributable to commercial reasons.[152] Similarly, the claim will be unsuccessful where the Panel takes the view that persecution was 'a subsidiary or causally insignificant factor' in a decision to sell a cultural object.[153]

147 *British Museum/Koch* claim (n 23 above).

148 *Courtauld/Glaser* (n 27 above).

149 Ibid [16]. Whether or not the minimum threshold for a forced sale was established in either the *Oppenheimer* claim (Report of the Spoliation Advisory Panel in Respect of an oil painting by Pierre-Auguste Renoir, 'The Coast at Cagnes', now in the possession of Bristol City Council (16 September 2015) (HC 440)) or the *Silberberg* claim (Report of the Spoliation Advisory Panel in Respect of a Gothic Relief in Ivory, now in the possession of the Ashmolean Museum, Oxford (10 February 2016) (2016 HC 777)) is less clear; in these two claims the Panel determined that any sale was forced by financial reasons, rather than by persecution, even though the original owners suffered persecution as well. In the *Oppenheimer* claim the Panel described the moral strength as being weakened by the fact that the sale was to satisfy a debt, rather than because of the persecution to which 'the Oppenheimers were undoubtedly subject' [82]. In both claims the Panel recommended that the museums display accounts of the objects' histories with the objects.

150 Report of the Spoliation Advisory Panel in respect of three Rubens paintings now in the possession of the Courtauld Institute of Art, London (28 November 2007) (2007 HC 63) [29].

151 Report of the Spoliation Advisory Panel in respect of a painting held by the Ashmolean Museum in Oxford (1 March 2006) (2006 HC 890) [35].

152 Report of the Spoliation Advisory Panel in respect of an oil sketch by Sir Peter Paul Rubens, 'The Coronation of the Virgin' now in the possession of the Samuel Courtauld Trust (15 December 2010) (2010 HC 655) (*Courtauld/Gutmann* claim), para 83. Here the Panel concluded that the sale was because of debts accrued in light of the owner's financial speculation rather than as a result of a forced sale; this conclusion was reached even though Gutmann had been arrested during the Night of the Long Knives and had suffered from loss of earnings because of Nazi anti-Semitism: [12], [73] and [75].

153 Ibid [84].

REMEDIES AND RESPONSES – 'FAIR AND JUST' SOLUTIONS

This part analyses the way in which both the nature of the Panel's remedies and the way in which it chooses the most appropriate ones to achieve 'fair and just' solutions for both parties[154] have similarities with Equitable remedies. As discussed in the previous part, the circumstances of claims brought before the Panel can differ – ranging from evidentially clear-cut seizures by the Gestapo[155] to sales of objects by owners in exile, in relative safety and in receipt of the reasonable market value with the proceeds fully at their disposal.[156] It is therefore important that the Panel has the remedial tools to respond to these different circumstances in a just and fair manner.

Creativity of remedies

Although discussions about Nazi Era looted cultural objects are frequently framed in the language of restitution (thereby focusing on the remedy rather than the claim), in the UK return is not automatic for successful claimants. Consequently, like the discretionary nature of Equitable remedies, no one particular remedy is available as of right as it would be under the common law.[157] The range of remedies that the Panel may recommend is creative in scope and can be creatively administered to best respond to the relative moral strength of the claim. The Panel can recommend return of the object, payment of compensation, an *ex gratia* payment or the display of an account of the object's history and provenance.[158] Like Equity, the Panel's remedies can focus on action and thus do a more perfect form of justice[159] rather than the, often, second-best outcome of common law damages. Monetary awards are described as ill-placed in the context of providing redress for dispossessions of culturally important (and

154 SAP ToR (n 30 above) [14].

155 Eg the *Rothberger* claim (n 18 above).

156 Eg *British Museum/Koch* claim (n 23 above).

157 Eg the Equitable discretionary remedy of specific performance depends, *inter alia*, on the inadequacy of damages, which would otherwise be available as of right for a breach of contract: *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 11.

158 As well as that negotiations to implement the recommendation should be conducted as soon as possible: SAP ToR (n 30 above) [17(a)]–[(e)].

159 See Watt (n 73 above) 113 and Miller who points to Equitable remedies perfecting 'the law *interpersonally*' and '*systematically* by providing society with a set of remedies better suited to protection of important interests': Miller (n 73 above) 94 (original emphasis). In the context of Nazi Era dispossessions, return of the cultural object has been described as essential for restorative justice: T O'Donnell 'The restitution of Holocaust looted art and transitional justice: the perfect storm or the raft of Medusa?' (2011) 22 European Journal of International Law 49, 51.

financially valuable) objects within a context of systematic persecution and genocide.[160] For 'Art restitution is a painful exercise for everyone involved and requires creative thinking by all parties and a willingness to craft solutions that at first glance may appear highly unusual.'[161] Return is usually the Panel's starting point when considering remedies,[162] but alternative remedies may be recommended instead where the Panel deems the moral strength of the claim to be lower.[163]

The remedy of the display of an account of the object's history is particularly creative and allows the story of the object's wartime history to be told and the claimant's interest in the object to be acknowledged,[164] although it is unclear whether this is sufficient as a standalone remedy.[165] It reflects one aspect of restorative justice – the telling of the narrative of loss and the horrors that befell the original owners.[166] It thereby acknowledges the importance of education and remembrance of the Holocaust and Nazi crimes 'as an eternal lesson for all humanity'.[167]

Exercising a wide discretion

It has already been seen that the circumstances in which claimants lost possession of cultural objects vary significantly between the different claims heard by the Panel. These range from seizure by the Gestapo, forced sales and flight goods. When determining how to respond remedially to these situations the Panel exercises its discretion.

Discretion, as H L A Hart observes, 'occupies an intermediate place between choices dictated by purely personal or momentary whim and those which are made to give effect to clear methods of reaching clear aims or to conform to rules whose application to the particular case is obvious'.[168] In the case of the Panel, its clear aim, set out in its Terms of Reference, is to recommend appropriate action in response to a claim and to achieve a solution which is fair and just

160 O'Donnell (n 159 above) 55. See also Select Committee Seventh Report (n 17 above) vol II, Minutes of Evidence, Memorandum submitted by the Commission for Looted Art in Europe.

161 Dugot (n 33 above) 279.

162 See, for example, *Tate/Griffier* claim (n 22 above) [51].

163 See below at text to nn 198–200.

164 SAP ToR (n 30 above) [17(d)].

165 See the reservations expressed in Seventh Report of the Select Committee on Culture, *Media and Sport, 'Cultural Property: Return and Illicit Trade* (HC 1999-2000 371-II) Minutes of Evidence, Memorandum submitted by the Commission for Looted Art in Europe [47].

166 See generally O'Donnell (n 159 above).

167 Terezin Declaration on Holocaust Era Assets and Related Issues.

168 H L A Hart, 'Discretion' (2013) 127 Harvard Law Review 652, 658.

to both parties.[169] The discretion is exercised within the confines of the procedural requirements set out in the Panel's Terms of Reference, regarding the inquiries to be made, the assessment of evidence and other relevant information, the moral strength of the claimant's case and the laws that affect the respondent institution.[170] The discretion is therefore exercised following the establishment of the moral claim, discussed above and is subject to procedural matters. These represent what Dworkin describes as the 'surrounding belt of restriction' around the discretion which is left as the hole in a doughnut by that belt of restriction.[171] Whilst the term discretion can be 'easily overstated', 'it consists principally in the need to make what are sometimes fine judgments in order to apply more or less settled principles to the factual circumstances of particular cases'.[172]

The Panel's Terms of Reference set out the aim of recommending just and fair solutions, as an avowed discretion of the Panel. It is impossible to foresee every possible permutation of loss of cultural objects that the Panel will need to consider, and so therefore situations which represent borderline cases are likely to arise because it is impossible to anticipate all possible factual scenarios.

At times, exercising a discretion may include determining what is 'the fair and just thing to do or order in the instant case'.[173] It is clear that there are parallels between the court's broader powers of discretion found not only in Equity,[174] but in other statutes, when determining, for example, whether it is just and convenient to award an injunction.[175] A common theme to these various judicial pronouncements about such a discretion is that it should not alter depending on the caprice of the judge in question. In a similar vein, over time the use of the Panel's discretion to recommend just and fair solutions has developed along the lines of more settled principles which are set out below.

Simply because a variety of awards is available does not automatically mean that a jurisdiction is discretionary.[176] Instead, it is discretionary because 'more than one judicial response can legitimately be made

169 SAP ToR (n 30 above) [6] and [14].

170 Ibid [15].

171 Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury 1977) 48.

172 *Snell* (n 5 above) 444.

173 Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (Oxford University Press 2000) 35.

174 See *Gee v Pritchard* (1818) 2 Swanston 403; 36 ER 670, 674 (Lord Eldon LC) and Lord Blackburn's speech in *Doherty v Allman* (1878) 3 App Cas 709, 729.

175 *Beddow v Beddow* (1878) 9 Ch D 89, 93.

176 Simon Gardner, 'The remedial discretion in proprietary estoppel' (1999) 115 Law Quarterly Review 438, 443.

to any given acts'.[177] Gardner argues, in the context of proprietary estoppel, that 'It is inherent in the very idea of a discretion that the outcome is ultimately settled by men, not laws',[178] but that this can be justified providing that three conditions are satisfied. First, 'the aim of the discretion must be fixed by law';[179] secondly, 'the discretion must be necessary', and it will be necessary 'where the law properly seeks to react to multiple considerations';[180] and thirdly, 'decisions taken under the discretion must be susceptible to audit'.[181] Whilst the Panel's discretion is not fixed by law *per se*, it is set by a clear statement of policy from an international soft law instrument[182] and governed by terms of reference that have been laid before Parliament. The discretion's aim is clearly to achieve just and fair solutions for Nazi Era dispossessed owners through consideration of the moral strength of claims. Secondly, the discretion is necessary since the Panel's jurisdiction clearly seeks to react to the multiple considerations that are involved in claims regarding Nazi Era cultural objects. Thirdly, the Panel's recommendations are susceptible to audit through publication of its reports which are fully reasoned and laid before Parliament by the Secretary of State.

H L A Hart suggests that whether decisions involving discretion are rational depends on the manner in which they are made. He takes 'manner' to include not only 'narrowly procedural factors', 'the deliberate exclusion of private interest' and 'prejudice', but also 'the use of experience in the field' and also 'the determined effort to identify ... the various values which have to be considered and subjected in the course of discretion to some form of compromise or subordination'.[183] This can be seen very obviously in the case of the Panel where the Panel's recommendations draw on the experience of its varied membership to reach just and fair solutions.

A central part of the discretion is therefore the compromise between these different values and how far guiding principles assist until a point is reached where it is necessary to move beyond those guiding principles because they either do not account for the relative ignorance of facts or the relative indeterminacy of the aim.[184]

177 Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 Law Quarterly Review 492, 504–505.
178 Ibid 502.
179 Ibid 505.
180 Ibid 507.
181 Ibid 509.
182 Washington Conference Principles (n 36 above).
183 Hart (168 above) 664.
184 Ibid 665.

Where flexibility exists in Equitable doctrines it must be exercised in a 'disciplined and principled way'.[185] It is argued here that the Panel's approach to recommending just and fair solutions for the parties (in the guise of one of the remedies of return, compensation, *ex gratia* payments or the display of an account of the object's history) is developing in a disciplined and principled way. Thus it has developed into what is described in Equity as more 'settled principles'.[186] Specifically, the Panel has sought to temper an otherwise wide discretion of 'just and fair solutions' by constraining this further than simply considering the factors set out in the Terms of Reference (discussed above in the context of establishing the moral claim).[187] This can be seen by the Panel's refusal to award 'symbolic restitution'.[188] Despite any sympathy the Panel has for the losses suffered by a claimant's family at the hands of the Nazis, the Panel's role is not to provide redress for this.[189]

The Panel has further restricted its discretion by refusing to award compensation unless claimants have continuing legal title to the claimed object.[190] In all other situations where monetary payment is appropriate it recommends *ex gratia* payments. The very nature of *ex gratia* payments is that they are paid in the absence of any legal obligation, at the beneficence of the payor or 'by favour'.[191] This approach therefore more closely reflects the moral rather than legal nature of the award. Given this moral status there is arguably an inherently wide discretion in choosing the appropriate level of award to recommend. Nevertheless, one can observe the development of settled principles applied by the Panel when quantifying *ex gratia* payments through reference to factors considered in earlier claims.[192]

The Panel has adopted a series of principles relating to the way in which it uses its discretion to achieve a just and fair solution for the

185 *Cobbe* (n 134) 1775 (Lord Walker) and *Jennings v Rice* [2003] 1 P & CR 8, 112 (Robert Walker LJ).

186 Peter Jaffey, *Private Law and Property Claims* (Hart 2007) 116.

187 The notion of decision-makers constraining their own discretion was observed by Lempert in his empirical research: Richard Lempert, 'Discretion in a behavioral perspective: the case of a public housing eviction board' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press 1992) 228.

188 *Tate/Constable* claim (n 27 above) [43].

189 Ibid. Instead, return will only be recommended where the circumstances of loss give a sufficiently strong moral strength to the claim (ibid).

190 *Tate/Griffier* claim (n 22 above) [53] and *British Museum/Feldmann* claim (n 18 above) [39]. Such circumstances have not yet arisen as all respondents have had prescriptive legal title; nothing in the Panel's Terms of Reference indicate that its jurisdiction is only engaged when a claimant's legal title has been extinguished – although as discussed above it is highly unlikely that legal title would have endured.

191 '*ex gratia*, adj, and adv' OED Online.

192 Woodhead (n 6 above) 190–193.

parties. To this end the Panel considers the particular circumstances of the loss and also in a bid to avoid double recompense: whether a fair value was achieved at the sale, whether the original owner had free use of the proceeds of that sale and whether appropriate compensation has already been paid for the object's loss.

The severe circumstances of loss occasioned by direct seizure have been described as 'gross acts of spoliation'[193] and in the two claims involving such circumstances, return (where legally permissible at the time) was justified.[194]

Return is the likely recommendation where the proceeds from a forced sale were less than the object's market value and where the original owner was unable to freely dispose of those proceeds;[195] these may have been placed into blocked accounts,[196] spent on exit visas or used to pay exorbitant taxes imposed on the Jewish population.[197]

Return would also be recommended where a sale was forced by the circumstances of escape from persecution and the owner had to spend those meagre proceeds on the necessities of life.[198] Contrastingly, in the *British Museum/Koch* claim the sale in the relative safety of London at a major auction house for a fair and substantial market value was treated as a forced sale at the lower end of the gravity of such sales.[199] The Panel therefore recommended the display of an account of the objects' history.[200]

In the *Courtauld/Glaser* claim, discussed above in the context of the notion of the minimum moral strength,[201] a key factor for the Panel in reaching the recommended solution of the display of an account of the object's history rather than return or a monetary response was the need to avoid double recompense. Thus, in that case both the modest compensation received by the original owner's heirs as well as the prices achieved at the auction which Dr Glaser was able to make use of all contributed to the Panel's recommendation of a commemorative remedy.[202]

---

193 *Rothberger* claim (n 18 above).

194 At the time of the claim return was not possible in the *British Museum* element of the claim, but would have been recommended had it been permissible (n 18 above).

195 Eg *Cecil Higgins/Budge* claim (n 132 above).

196 Ibid.

197 See *Glasgow City* claim (n 20 above) and *British Library/Biccherna* claim (n 20 above).

198 *Tate/Griffier* claim (n 22 above) [11]; although an *ex gratia* payment was recommended because of the Tate's then statutory bar on return.

199 *British Museum/Koch* claim (n 23 above) [25].

200 Ibid [27].

201 *Courtauld/Glaser* claim (n 27 above)[43].

202 Ibid.

Both the *Koch* and *Glaser* claims demonstrate that discretion can be used to recommend remedies that reflect the moral strength of claims which, in the case of forced sales, can be more difficult to assess than losses by seizure. However, by being able to award return in certain cases, or an account of an object's history, these provide significant scope for responding in a nuanced way to the differing moral strength of claims.

Avoiding double recompense has also been a factor when the Panel assesses the appropriate amount to award as an *ex gratia* payment. For this reason deductions have been made to the market value to reflect the costs of insurance or seller's premium that the claimants would otherwise have had to pay as well as the value of any conservation work that the museum had undertaken.[203] In a shift in practice, in one of the Panel's later claims, a claimant has been required, on return of the object, to repay the compensation that was received from the German Government after the war.[204] On the return of an object a respondent has not been required to pay anything to the claimant to reflect the public benefit derived from the cultural object whilst it was in the museum,[205] but where an *ex gratia* payment has been made an allowance to reflect the public benefit derived from the object's display in the museum has been made.[206]

Whilst the circumstances in which the original owners lost possession of the cultural object have been considered as relevant to the Panel's discretion to find a just and fair solution, the Panel has refrained from making assessments either about the uniqueness of an object or its importance to the claimant[207] when choosing remedies.[208]

What is clear, though, is that the Panel looks beyond equity between the parties. Even when the Panel is faced with the parties' preferred remedy, it will depart from this where there is no public interest in making an award of money by the taxpayer, such as where the objects are of poor quality and the public benefit to be derived from them would be low.[209] Here the more perfect form of justice for the parties (ie their preferred solution) is subordinate to the public interest.

---

203 For a general discussion of this, see Woodhead (n 6 above).

204 *Tate/Constable* claim (n 27 above) [55].

205 Ibid [60].

206 *Tate/Griffier* claim (n 22 above) [64].

207 This was compared with the relative importance of the painting to the respondent.

208 Note the Panel's reluctance to consider the public benefit of retaining the object: *British Library/Biccherna* claim (n 20 above) [32], *British Library/Benevento* claim (n 117 above) [71] and *Tate/Constable* claim (n 27 above) [46].

209 *Courtauld/Feldmann* claim (n 18 above) [28]. Instead, return was recommended.

CONCLUSION

The work of the Panel has significant parallels with the rationale for, the jurisdiction and nature of the claims and the remedies which developed in Equity. The Panel's establishment was aimed at redressing one of the gaps left by the law when dealing with Nazi Era claims and it provides a forum in which claims based on moral, rather than legal, grounds can be heard, considered and responded to. The Panel's work circumvents excessive formalism and gives effect to the substance of the claim based on broad principles. The remedies that have been recommended by the Panel have responded to the nuances of the cases, showing how it exercises its discretion to recognise circumstances with differing moral strengths in the search for just and fair solutions. Whilst on paper the Panel has a seemingly unfettered discretion to deal with claims, it has tempered this by developing principles which are akin to those found in Equity. Similarly, the Panel has developed principles to apply to deal with the substantive elements of claims that arise in a diverse range of circumstances to assess the moral strength of claims. The principles that it has adopted allow it to balance the difficult moral considerations and these approaches can be used in other claims dealing with cultural objects. By framing the claims heard by the Panel in the context of Equity in a *quasi*-legal setting, the Panel's work serves as an important model for other claims involving cultural objects in the future taken in other troubling times, for it provides legitimacy to a process that could be transposed to other situations. The recommendations are not knee-jerk reactions to claims but involve the forensic and considered treatment of historical information in an Equitable manner for all concerned.

Other contentious cultural objects lost in a variety of circumstances remain in museums with claimants having no extant legal claim and museums being unable to transfer them, even in response to a moral compunction to do so.[210] Well-known examples include the cultural objects taken from Maqdala and the Kingdom of Benin during punitive military expeditions, cultural objects taken from Aboriginal communities as well as the *cause célèbre* of the Parthenon Marbles. These situations represent similar equity gaps to the one found in the case of Nazi Era dispossessions.[211]

---

210 *AG v Trustees of British Museum* (n 48 above).

211 It is acknowledged that these different types of claims raise particular issues regarding identifying current claimant groups, the patriae to which repatriation should be made and cultural rights. Nevertheless, a forum in which to hear the claims and a process by which to assess the claims would fill the equity gap.

Frequently, strong calls for action to facilitate transfers to communities or nations from whom these objects were acquired[212] are at odds with firmly articulated arguments for retention,[213] often resulting in deadlock. The work of the Panel has shown that restitution is one of several available remedies, but that claims can be heard on moral bases in an objective manner and receive Equitable responses. Using a *quasi*-legal process applying Equitable principles as the foundation for hearing such claims has the potential to legitimise the process that is weighted neither in favour of the claimant nor the respondent.[214]

The principles used by the Panel could be adopted as a model for those other types of claims and developed accordingly. Adopting a *de facto quasi*-legal process in respect of these other claims can be justified, for, as with Nazi Era dispossessions, these same museums are in receipt of public funding and hold objects on trust for the public. These institutions are therefore similarly accountable and the circumstances vindicate comparable action to plug the gap between strict law and that 'more pleasing justice'.[215]

The focus on restraining injustice within the Equitable concept of unconscionability in these other claims is even stronger where the museums, rather than acquiring objects unaware of the gap in provenance, may have known that the objects had been obtained in campaigns of plunder or during colonial times with unequal power relations.

The creative remedies discussed above could be developed even further and might include cultural exchanges or other civil society solutions such as collaborations between museums and communities or long-term loans.[216] The development of a framework within which to exercise a *quasi*-legal discretion when seeking to achieve just and fair solutions provides an ideal model within which to assess other claims, albeit that additional categories of relevant considerations

---

212 Jeanette Greenfield, *The Return of Cultural Treasures* 3rd edn (Cambridge University Press 2007); Geoffrey Robertson, *Who Owns History?* (Biteback Publishing 2019) and Hicks (n 15 above).

213 See James Cuno, *Who Owns Antiquity? Museums and the Battle over our Ancient Heritage* (Princeton University Press 2008) and Tiffany Jenkins, *Keeping their Marbles: How the Treasures of the Past Ended Up in Museums* (Oxford University Press 2016).

214 Criticisms have been levied at situations where unequal power relations remain because repatriation decisions rest with the museums.

215 As described by Watt (n 73 above) 10.

216 Woodhead (n 1 above) 247 in the context of an application of the concept of moral title (identified in the Panel's recommendations) to other cultural heritage disputes.

may need to be added.[217] The work of the Panel therefore provides a structure and process to serve as a model for similar claims processes for other cultural heritage objects. The additional considerations as to the substance of the claim, expanded categories of remedies and the relevant considerations to take into account when recommending a remedy could populate this framework. The Equitable nature of the process and the principles it applies, as familiar and trusted ones, can serve to plug these important gaps and resolve other historical injustices involving cultural heritage objects.

Whilst Equity may not be past the age of childbearing,[218] here it has an adopted child in the form of the Spoliation Advisory Panel. It responds in an Equitable manner in the twenty-first century to claims originating over 70 years ago in circumstances beyond the comprehension of many people.

217 Eg a community's desire to allow the decay rather than preservation of it (ibid) and the relevance of the public benefit when assessing appropriate remedies.

218 *Eves v Eves* [1975] 1 WLR 1338, 1341 (Lord Denning MR) and Mark Pawlowski, 'Is Equity past the age of child bearing?' (2016) 22 Trusts and Trustees 892.