

The Jewish Claims Conference in Court?

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Is it possible to sue the JCC? And who would even think of such a thing? After all, the organization has been tirelessly working for the survivors of the Holocaust for the past 60 years.

In cases where the JCC has been assigned the rights to a property, or received compensation for a business, the entitled Jewish heirs have often asked whether the organization can be sued in a court of law. The answer to this question is no. The German Property Act does not provide for legal recourse in such cases. Nevertheless, there have been repeated attempts to sue the JCC. Several examples are presented here.

But first, let's go back to the beginning of restitution.¹

In a resolution by the German Bundestag (lower house of parliament) adopted on 27 September 1951, the Federal Republic of Germany (FRG) declared its willingness to pay compensation for Nazi injustice to the extent possible. One year later, on 10 September 1952, an agreement between Germany and the State of Israel² was signed in Luxembourg specifying that Germany would pay Israel DM 3 billion. This agreement included Protocols No. 1 and No. 2 that were agreed between the Federal Republic of Germany and the Conference on Jewish Material Claims Against Germany.

The Conference on Jewish Material Claims Against Germany (JCC) was founded in 1951 as a federation of 23 national and international Jewish organizations, including the Central Council of Jews in Germany.

¹ The following overview is from a publication by the German Ministry of Finance: *Entschädigung von NS-Unrecht. Regelungen zur Wiedergutmachung*, August 2011.

http://www.bundesfinanzministerium.de/nr_4394/DE/BMF_Startseite/Service/Broschueren_Bestellservice/Das_Ministerium/40144,templateId=raw,property=publicationFile.pdf

² BGBl.II 1953 p. 35

In Protocol No. 1, the Federal Republic of Germany agreed to enact the necessary reparation laws to supplement the Equalization of Burdens Act. This legislation was to be closely coordinated with the JCC.

Under Article 1 (b) of the Agreement, Germany created a DM 450 million fund and made it available to Israel for forwarding to the JCC. This money was to be handled by the JCC in accordance with Protocol No. 2 and distributed, based on the urgency of individual needs, to victims of Nazi persecution who lived outside of Israel.

Further negotiations were held over the next few decades and additional funds were created. Some of these funds are now closed to further applications, including the fund for forced laborers and other victims (e.g. of medical experiments) that was part of the Remembrance, Responsibility, and Future Foundation.

According to information from the JCC³, several funds still exist. These include the following:

Hardship Fund. This fund was created in 1980 by the Federal Republic of Germany for needy Nazi victims who were unable to submit an application in accordance with the Compensation Act before the deadline in 1965. The fund is administered by the JCC based on guidelines specified by the FRG. These guidelines stipulate that individuals are eligible for one-time payments of DM 5,000, or € 2,556. Some € 46.9 million was paid from this fund in 2009 and € 18.4 million was disbursed in 2010.

Article 2 Fund. This fund is based on Article 2 of the agreement between the German Democratic Republic (GDR) and the FRG to interpret and apply the Unification Treaty drawn up on 31 August 1990 and signed on 18 September 1990. The FRG has been contributing to this fund since 1992. The fund is used to pay pensions to persons who spent six months or more in a concentration camp, or lived for 18 months or more in a ghetto or were forced to live underground. It is available to those who received no compensation, or only a small amount of compensation. It also requires that their income does not exceed a certain level. More than € 199 million was paid out from this fund in each of the years 2009 and 2010.

³ <http://www.claims-conference.de> and <http://www.claimscon.org>

Central and Eastern European Fund (CEEF). This fund was created in 1998 by the Federal Republic of Germany for Holocaust survivors from Central and Eastern Europe. It is administered by the JCC based on the same criteria specified for the Article 2 Fund. € 31.7 million was paid out from this fund in 2009 and € 36.9 million was disbursed in 2010.

BMF Fund for household services. Since 2004, the German Federal Ministry of Finance has been contributing money to charitable organizations that provide home care to Jewish victims of Nazi persecution. € 30 million was paid from this fund in 2009, and € 55 million was paid in 2010.

Swiss Bank Funds. This fund is based on a 1999 agreement with Swiss banks and other organizations and is supervised by the U.S. Federal Court. The JCC is responsible for distributing the funds.

ICHEIC. This fund was created in 1998 by the International Commission on Holocaust Era Insurance Claims (ICHEIC) and has been administered by the JCC since 2007 based on the ICHEIC guidelines. The fund serves three main programs, a social welfare program, a Yad Vashem program, and a Jewish Agency program.

There are **other funds** for Hungary and Austria.

Not all of the money for these funds comes from Germany. As a result of the programs mentioned above, the Federal Republic provided a total of €617 million in 2009 and 2010.

Most of the money made available to the JCC today does not come from the funds described above. Instead it comes from the sale of real estate returned in accordance with the German Property Act, or from compensation received for liquidated Jewish businesses.

According to § 2 paragraph 1 of the Property Act⁴, the JCC is not only the legal successor to non-inherited property, but also to property for which the rightful heirs have not filed a claim before the specified deadline, also referred to as unclaimed assets.

⁴ See Fritz Enderlein, "§ 2, para. 1, sentence 3 of the Property Act: Is it unconstitutional?"

Through no fault of their own, many Nazi victims or their heirs failed to file a claim before the deadlines specified in the Property Act: 31 December 1992 or 30 June 1993. These victims then turned to the JCC for assistance. To accommodate them, the JCC set up a Goodwill Fund⁵ in 1994. From this fund, they initially paid out about 50% of the money received (from the sale of property or other assets) to the applicants. This amount was later increased to 80% of the money received. The Goodwill Fund was discontinued in 1998. Applications received after this date were submitted to a committee for latecomers and payments were approved in some hardship cases.

The Goodwill Fund was reopened for a short time in 2003. In September 2003, the JCC published a list of former Jewish owners of property in the former GDR for which the organization had either received funds or had submitted applications that were still pending. The list contained 18,000 names, but did not show any of the assets. A new Goodwill Fund deadline was set for 31 March 2004.

The following reasons were given to justify the new, short-term deadline: (1) applications for assistance from the Goodwill Fund had already been accepted for a period of nine years [which was not quite correct], (2) the exact number of applications that would ultimately be received could not be accurately determined, (3) in many cases, claims were filed for assets that had already been received and spent, (4) a decision would have to be made on whether or not these funds could continue to be used for the social needs of Holocaust survivors.

A second – unsorted – list was published in 2008⁶. The addresses of the properties and the amounts of money received were listed on 193 pages – without the names of former owners. At the same time, a request to republish the first list, which had been deleted from the Internet, was rejected to prevent the submission of further Goodwill Fund applications.

The Goodwill Fund was to be closed for good as of 31 March 2004. Nevertheless, further applications were submitted and the press and Jewish survivor organizations continued to voice their criticism. This

⁵ See Fritz Enderlein, "What the guidelines and deadlines of the JCC Goodwill Program are all about", Jüdische Zeitung 8/2008

⁶ Recoveries by Claims Conference Successor Organization for which it has received funds. January 1, 1993 – April 30, 2008. July 31, 2008

eventually led to a "Goodwill Fund Announcement"⁷ published on 01 April 2009, which allowed further applications for a limited group of people, provided the eligible person was, for health reasons, unable to submit an application in the period immediately before the new deadline and could prove this with a medical certificate.

As a result of the announcement and the details outlined in the "Amendment to the Goodwill Fund" from 03 November 2010⁸, a number of applications were filed, and some cases were decided in favor of the victims. At the same time, it must be pointed out that the acceptance or rejection of the medical certificates was left entirely up to the discretion of the JCC. This resulted in the impression that some cases were being handled arbitrarily.

In my opinion, the reasons given for discontinuing the Goodwill Fund are not valid. Estimates indicate that perhaps no more than € 100 million would need to be paid out. This is equivalent to only about 10% of the money available (according to the annual report published in late 2010). This does not take into account the fact that some of the restitution claims submitted by the JCC are still pending. In other words, additional money is forthcoming.

How can the JCC be encouraged to reopen the Goodwill Fund? The German federal government has been repeatedly urged to exert pressure on the JCC.⁹ A proposal was submitted to the Bundestag requesting that the Property Act be amended so that the JCC would only serve as a trustee for properties that are not claimed within the prescribed time limit.¹⁰ So far, these efforts have been unsuccessful. The federal government has not responded to the appeals – probably out of fear that the JCC will request further assistance if it is unable to use the funds received in accordance with the Property Act for their approved programs.

The federal government, however, is unwilling to commit any additional funds, because the money is needed elsewhere: Afghanistan, Libya, Euro Assistance Fund, etc. On the other hand, compared to the

⁷ http://www.claimscon.org/?url=goodwill_announcement_04-22-09

⁸ http://www.claimscon.org/?url=goodwill_amendment100310

⁹ See Fritz Enderlein, "Restitution bypasses victims: Why the German government needs to take immediate action!", ZOV 4/2010

¹⁰ See Fritz Enderlein, "Is the Federal Republic of Germany responsible for the use of funds paid as compensation to the JCC?", Berliner Anwaltsblatt 10/2009

sums of money spent for the above purposes, the estimated € 100 million for additional Goodwill Fund payments to Jewish heirs expropriated by the Property Act¹¹ is negligible.

The British Board of Deputies, a coalition of all Jewish communities in the UK, submitted an appeal to the JCC Board of Directors asking them to reopen the Goodwill Fund.¹² This move was initiated by the Gruder Report. The majority of JCC board members, however, are unwilling to reopen the Goodwill Fund. After all, they receive money from the JCC and fear that these funds could be cut.

What can frustrated heirs do? One option is to contact the Petitions Committee of the German Bundestag, which has already received more than thirty petitions. But so far, no action has been taken. The position statements from the respective government ministries to the Petitions Committee have been negative.¹³

As a result, some heirs are asking about ways to sue the JCC. What are the options for taking legal action? There basically aren't any – at least not based on the principles of the Property Act, which gives the JCC the legal footing for its reactions. Goodwill Fund recipients who contend that 80% is not enough don't stand a chance. Attempts to revise the declaration required by the JCC¹⁴ have failed.

One of the only remaining options would be to sue the Federal Republic of Germany on the grounds that § 2 paragraph 1 and §30a paragraph 1 violate Article 14 of Germany's Basic Constitutional Law.

If any attempt to sue the JCC in Germany would be destined to fail, perhaps the chances would be better in a U.S. court? Based on the attempts made so far, this doesn't appear to be the case.

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¹¹ See Fritz Enderlein, "Expropriation pursuant to § 30a of the Property Act", ZOV 5/2010

¹² See <http://www.thejc.com/news/uk-news/51996/claims-conference-turns-down-deputies>

¹³ See Fritz Enderlein, "Missed application deadlines – Correspondence with MP Siegfried Kauder" ZOV 5/2010

¹⁴ This declaration, which must be signed and notarized, includes conditions requiring applicants to respect all JCC decisions, refrain from challenging the organization's rights, or taking any legal action against the JCC.

There have been several attempts in the United States to sue the JCC (and the Federal Republic of Germany) in conjunction with the funds mentioned above or the German Property Act. The following examples provide insight into the situation.

The earliest court case was probably

Jewish Secondary Schools Movement v. Conference on Jewish Material Claims Against Germany, Inc.

Verdict of the Supreme Court, New York County 1958, 11 Misc. 2d 358, 174 NY 2d 560.

The plaintiff received financial support from the JCC for a period of time before it was withdrawn. The lawsuit sought a continuation of this support.

The court rejected the claim on the grounds that the plaintiff had no authority to challenge the behavior of the JCC.

The next attempt was the frequently-cited case

Tullio Revici v. Conference on Jewish Material Claims Against Germany, Inc.

Verdict of the Supreme Court, Special Term, New York County, Part III, dated 09 May 1958, 174 N.Y.S. 2d 825

The plaintiff referred to the agreement between Israel and Germany and to Protocol No. 2. He claimed to be one of the victims covered by the foregoing agreements.

He alleged that the JCC was obligated to serve as a trustee and charged the organization with breaches of its fiduciary duties. He claimed that the JCC had shown preferential treatment vis-à-vis the beneficiaries entitled to relief. He asked the court to determine the amount of money due to him and ensure that this sum be adjudged a lien on the funds recovered by the defendant from Germany.

The defendant moved to dismiss the complaint for failure to state a cause of action and maintained that the plaintiff was not a member of the JCC or any of its affiliated organizations and had no legal capacity to sue.

The court considered whether the agreement between Israel and Germany or the associated protocol would constitute grounds for complaint, but found no reasonable basis for the plaintiff's assertion of any right under either the Israel-Germany agreement or the protocol. The plaintiff's contention that he was a third-party beneficiary under these instruments was refuted. The claim was dismissed on the grounds that the plaintiff had no legal capacity to sue.

A court case heard several years later was

Wolf v. Federal Republic of Germany and the Conference on Jewish Material Claims Against Germany, Inc.

Verdict of the U.S. Court of Appeals, Seventh Circuit, from 01 October 1996. No. 93C 7499

Facts: Irving Wolf was born in the region that later became Czechoslovakia in 1915 and was a successful businessman in the Sudetenland, which was annexed by Nazi Germany in 1938. After Wolf's property was confiscated, he fled to Czechoslovakia and joined the Czech army. The Nazis invaded Czechoslovakia and Wolf became a prisoner of war. In the following years he was imprisoned in various labor and concentration camps, including Auschwitz and Mauthausen, which was liberated by American troops. Wolf's parents and sister were murdered in Auschwitz.

In the late 1950s Wolf tried to obtain compensation from Germany in accordance with the Federal Compensation Act, but obviously had the wrong lawyers. His case was presented to the District Court of Appeals but was dismissed by a default judgment due to failure by his attorney.

At this point, Wolf turned to the JCC and submitted a request for payment from the Hardship Fund in 1986. The JCC rejected his application because Wolf had received, according to the Restitution Office Saarburg, compensation of DM 1,800 in 1960 and therefore had no right to receive payment from the Hardship Fund. Wolf denied having ever received payment – to no avail.

In a second attempt, he submitted an application to receive compensation from the Article 2 Fund in 1993. A decision on this was still pending at the time his case was heard.

In December 1993 he filed suit against the Federal Republic of Germany claiming that he should have been granted a pension under the Hardship Fund. The court ruled against Wolf. It found that Germany was immune from legal action under the Foreign Sovereign Immunities Act. Although, in line with modern international law the Foreign Sovereign Immunities Act distinguishes between sovereign acts of a state (*jure imperii*) and commercial acts (*jure gestionis*), Germany's commitment to restitution could not be regarded within the scope of commercial activity.

It was also indicated that the plaintiff had no right to sue the JCC. This can be attributed to the "act of state doctrine" as well as to the fact that the plaintiff was unable to prove a breach of duty on the part of the JCC as defined by the Luxembourg Agreement or Hardship Fund guidelines.

One year later, a verdict was reached in the following case:

Jacob Sampson v. Federal Republic of Germany and the Conference on Jewish Material Claims Against Germany, Inc.

Verdict of the United States District Court, N.D. Illinois, Eastern Division, 10 September 1997. 975 F. Supp. 1108

Sampson was a Holocaust survivor. He was first held captive in the Warsaw ghetto and then imprisoned in the Auschwitz concentration camp, where the Gestapo murdered sixty (!) of his family members.

Sampson filed a claim for compensation from Germany in 1948 and another claim in 1981 for payment from the Hardship Fund. He never received a reply to these requests. However, his application for payments under the Article 2 Fund was approved. He received a one-time payment of DM 5,000 and monthly payments of DM 500 retroactive to August 1995.

The plaintiff sought a declaratory judgment asserting that he had not been adequately compensated for his imprisonment in Nazi concentration camps and claimed damages of \$10 million plus costs. He raised other allegations against the JCC, which are not further commented in this context.

The court once again focused in detail on sovereign immunity and dismissed the case against the Federal Republic of Germany. The case against the JCC was also dismissed. Although the Hardship Fund is administered by the JCC, the organization's role is merely to determine whether someone meets the criteria specified in the German guidelines. These guidelines explicitly rule out the possibility of a lawsuit against the fund. The situation with the Article 2 Fund is similar in that a lawsuit is ruled out. The court debated the question of admissibility of the lawsuit (standing to sue) by Sampson and denied this. The statute of limitations was also discussed in detail.

While all of the court cases outlined so far have to do with the various compensation funds, the following verdict has to do with the Property Act.

Sigmunt Rottenberg v. Conference on Jewish Material Claims Against Germany

Verdict of the Supreme Court of the State of New York, County of New York on 16 February 2005, 1as Part 56, Index No. 110615/04.

This complaint concerns the property located at Isländische Straße 17 in Berlin-Prenzlauer Berg. The plaintiff is the sole heir to his father, Samuel Rottenberg, who owned the property together with other family members. The property was heavily indebted and placed in receivership on 02 October 1934. It was sold at a court-ordered auction on 19 March 1935 following foreclosure on the shares owned by Samuel Rottenberg and Jacob Birnbaum.

The property was sold at auction to Ernst Oschinski, who was Jewish. Oschinski owned the Property until 1939, when he sold it to Rudolf Glauert, who was not Jewish. The property was registered as a

former Jewish property in 1945 and placed in the trusteeship of the local housing administration. In 1957, it was returned to Glauert, who relinquished his rights to the property on 18 November 1980 due to reasons of age. On 17 December 1980, it became nationalized property.

The plaintiff filed a claim for return of title within the time limit specified by the Property Act, however, he apparently identified the property with an incorrect address. He submitted a claim with the correct address on 05 October 1995. This claim was rejected because the deadline had since expired. He later filed an appeal and followed through until the case was presented to the Federal Administrative Court, to no avail.

The JCC filed three claims for the property before the deadline expired. These claims listed both Samuel Rottenberg and his co-owners, as well as former owner Ernst Oschinski. Rudolf Glauert's son Walter also filed a claim for return of title in accordance with § 1 para. 2 of the Property Act.

The Property Office rejected the claims filed by Rottenberg pointing out that the presumption of persecution-related loss does not automatically apply to a compulsory auction and in this case, there was no proof of individual persecution on racial grounds.

The claim filed by Glauert was also rejected, because his father relinquished his rights to the property due to reasons of age, and not because of over-indebtedness.

The claim filed by the JCC for the property lost by the Rottenberg family was rejected for the reasons already mentioned. However, the sale of the property by Oschinski was recognized as a result of persecution.

The U.S. court dismissed Rottenberg's lawsuit and agreed with the line of argument presented by the Property Office and the German Administrative Court with regard to his family's loss not being a result of persecution. Apart from this, the court dealt with the plaintiff's other allegations. It generally denied the plaintiff's right to file suit and rejected the allegation that the JCC acted as trustee for the plaintiff. The plaintiff's claim for return of title with a detailed account, and his allegation of a trustee relationship, failed in this case due to the fact that the claim filed by the JCC for the Rottenberg property was also rejected by the Property Office. The question remains as to whether the court would have issued the same verdict had the JCC been granted return of title on behalf of Rottenberg, the former property owner.

The following is another interesting case that did not directly involve the JCC, but focused on German property law and the Goodwill Fund:

Nordwind et al v. David Rowland, et al.

Unites States Court of Appeals for the Second Circuit, 16 October 2009.

The plaintiffs accused their former lawyer of betrayal of a client, legal malpractice, breach of fiduciary duty, and unjustified enrichment. This is what transpired:

Gustav Kirstein, a renowned art collector and publisher, and his wife Clara lived in Leipzig. The persecution of this Jewish family started immediately after the Nazi takeover. Gustav Kirstein was forced to sell his publishing house and died in 1934. His widow sent the two daughters, Gabrielle and Marianne, to the United States. She planned to go to the U.S. herself, but not before she had a chance to sell the family's remaining art collection. The Nazis confiscated Clara's passport and denied her permission to leave Germany. Clara committed suicide the same day and the family's remaining assets were seized.

The plaintiffs are nieces and nephews of Clara Kirstein who believed they were the sole heirs of the Kirstein estate valued at several million dollars. They hired David Rowland on 01 October 1998 to claim compensation from the JCC Goodwill Fund on their behalf.

The attorney informed his clients that only direct heirs are eligible to apply. And according to his research, the rightful heirs to Marianne, who died in 1986, were her daughter Miriam Reitz Baer and the University of Chicago Oriental Institute, as well as Christel Gauger the testamentary heir to Godfrey Jacobsen, son of the late Gabrielle who died in 1957. While Marianne's heirs agreed to surrender their claims, to the benefit of the Northwind plaintiffs, Christel Gauger refused to do likewise.

Rowland submitted an application to the Goodwill Fund for Miriam Baer and Christel Gauger, since the JCC does not accept proxy assignment of Goodwill Fund claims. The JCC accepted the claims and Baer and Gauger were each awarded half of the Kirstein estate.

For the reasons mentioned, the plaintiffs filed a claim against Rowland for \$ 25 million in damages. The suit was dismissed in both cases.

This ruling deals extensively with the Property Act and the German laws of succession, and more specifically with the problem that there were no proprietary rights to the estate of the Kirstein heirs, Marianna and Gabriele. Instead, these rights were manifested by the enactment of the Property Act in 1990. The discussion also focused on the differences between American and German laws of succession, from which the plaintiffs drew incorrect conclusions. It could not be proven that the defendant acted contrary to the interests of the Kirstein heirs, nor could he be regarded as guilty of legal malpractice. Whether or not Gauger received compensation from the Goodwill Fund did not matter. The Kirstein heirs were not in any case eligible to receive more than a 50% share.

This ruling is discussed here because the issues relating to the Property Act and the German law of succession could also play a role in a lawsuit against the JCC.

Lawsuits against the JCC have also been filed in other countries. For example, in late 2010 a similar case was pending in Tel Aviv in which the JCC was accused of providing insufficient information about application options.

To date, no known verdict has been issued against the JCC. This may be because the JCC would rather settle out of court than risk a verdict that could be used as a precedent against them. Evidence suggesting this include the annual report published at the end of 2010 that indicates the JCC is engaged in litigation involving their activities and will need to provide up to € 4.5 million by 2025 to satisfy potential claims from certain heirs.