Rio Tinto in Namibia: the *Connelly Case*

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Nuclear

Keywords

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- Rössing Uranium
- Connelly Case
- Legal instruments
- *Forum non conveniens* principle

This fact sheet reports the case of a uranium mine worker in Namibia who suffered health damages about two decades ago, and his legal battle against one of the largest mining groups in the world.

Factual background

At present, Namibia occupies the fourth position in the global market of uranium production, with an export of about 5,200 tons of uranium oxide in 2010. Two uranium mines are currently operating and a third one is planned to start in 2013. Since the first uranium mine was started by Rio Tinto in 1976, this sector has expanded considerably and it continues to do so. A total of 66 exclusive exploration licenses (EPL) and five mining license have been granted by the Ministry of Mines & Energy.

Uranium mining is bringing many health, environmental and socio-economic problems to the country. Important diseases such as as cancer have been detected in mine workers and residents. Most of these health problems originated in the initial stages when no safety measures were taken by the companies. As to the environmental and other socio-economic impacts, some of the main concerns are the abusive consumption of water in areas of water scarcity, water pollution, the loss of biodiversity, the impact on the landscape, the legacy the mines leave behind them, the loss of tourism, and the lack of sufficient infrastructures and services for the people in the areas where the mines are located[1].

Edward Connelly, a Scottish citizen, moved to South Africa in 1971 and worked, between 1977 and 1982, in a uranium mine in the current Namibia run by Rossing Uranium Ltd. (RUL).[2] Based in Namibia[3],RUL was a subsidiary company of Rio Tinto-Zinc Corporation Ltd. (RTZ). He returned to Scotland in 1983 and in 1986, when he was 36 years old, he was diagnosed as having a throat cancer. In September 1994, Connelly commenced proceedings before the English Courts against RTZ and RTZ Overseas Services Ltd. (one of its subsidiary companies) seeking compensation for damages. Both RTZ and RTZ Overseas were based in England.[4]

Map of Namibia
http://www.wordtravels.com/Travelguide/Countries/Namibia/Map

Although RTZ and RTZ Overseas never employed the workers in Namibia (RUL was their only employer), Mr. Connelly argued that these two companies were responsible for his cancer because, being in charge of setting the company's policies on health, safety and environment, they had failed 'to provide a reasonably safe system of work'[5] to protect their workers from the effects of uranium dust in the mine. Furthermore, the two companies at some point had taken part in the management of RUL's workers.

The claim presented a big challenge: the difficulty of proving causality between the cancer and uranium exposure in the mine. However, after three years of hearings up and down the English courts to make a decision on a jurisdiction issue, this question was never addressed. The action failed in a preliminary review of the substance because the action had been initiated outside the limitation period allowed by law. Thus the courts never entered into the question of whether the plaintiff was entitled to receive compensation from the parent company of the company he had worked at for four years.[6]

Nevertheless, important questions related to environmental justice were addressed in the course of these three years of proceedings. In the last instance, in the matter of jurisdiction that was discussed, the plaintiff's right to

[1] Information obtained from Earthlife, Namibia.

[2] Rössing Uranium mine commenced production in 1976 and for a long time was the only operating Uranium mine in Namibia. (WISE & SOMO Report, Uranium from Africa. Mitigation of uranium mining impacts on society and environment by industry and governments, Amsterdam 2011).

[3] Namibia belonged to South Africa until 1990

[4] Connelly vs RTZ Corporation and others. Court of Appeal, Civil Division [1996] QB 361, [1996] 1 All ER 500, [1996] 2 WLR 251, 24 July, 18 August 1995, 18 August 1995; Court of Appeal, Civil Division, The Times 12 July 1996, (Transcript: Smith Bernal), 2 May 1996, 2; [1997] UKHL 30, [1997] 4 All ER 335, [1997] 3 WLR 373; Queen's Bench Division, (Transcript), 4 December 1998.

[5] Connelly vs RTZ Corporation and others. Court of Appeal, Civil Division, [1996] QB 361, [1996] 1 All ER 500, [1996] 2 WLR 251, 24 July, 18 August 1995, page 1.

[6] Meeran, R., Tort litigation against multinationals ("MNCs) for violation of human rights: an overview of the position outside the US, Busiess and Human Rights, 2011: http://www.business-humanrights.org/media/documents/richard-meeran-tort-litigation-against-mncs-7-mar-2011.pdf; Meeran, R., Liability of Multinational Corporations: A Critical Stage, Labournet, 1999: http://www.labournet.net/images/cape/campanal.htm.

Processing plant of the Rössing Uranium Project, Namibia

Source: Mining Technology (www.mining-technology.com)

access justice was at stake. In short, the courts were posed the question whether the fact that Mr. Connelly was unable to start proceedings in Namibia because of the lack of funding, otherwise available in the English courts, could override the principle of *forum non conveniens* alleged by the defendants in order to make the case be heard by Namibian Courts. The Courts, after several diverging decisions, which will be further analysed below, ended up deciding in favour of the plaintiff and granting him access to justice.

Despite having limited effects in the end because the action ended up being statute barred, the outcome of the case was noteworthy as it questioned the principles of "separation of corporation identity" and *"froum non conveniens*", which, applied together, very often serve multinational corporations to avoid being held liable in the parent company's domicile for the damages caused in other countries, enabling them to apply "double standards" in developing countries.[7] The courts only addressed the applicability of the principle of *"forum non conveniens*". However, by rejecting the applicability of this principle and recognizing the English courts jurisdiction, the principle of "separation of corporation identity" was, to some extend, also put under question. By accepting to judge the pattern company for the damages suffered by its subsidiary's workers in Namibia, the English Courts somehow assumed that in fact the two corporations (the pattern and the subsidiary) were not as independent as formally were. Nevertheless, the separation of corporation identity would have been fully questioned if the courts had addressed the substantive part of the case and had established the responsibility of RTZ for the defects in the health and safety arrangements at RUL's mine.

The Connelly case was not an isolated one. Right after one of the key decisions of Connelly's case, the widow of Peter Carlson, another RUL employee who worked at the mine in Namibia's during the same period as Connelly and died of oesophageal cancer, interposed a claim of compensation for damages against Rio Tinto before the English courts. This claim also ended up failing on limitation grounds.[8]

Current reports on the conditions of uranium mining in Namibia show that cancer and other diseases are still one of the main concerns of Rossing Uranium workers.[9] Many of the people who have died or are currently suffering health problems worked at RTZ, as Connelly and Carlson did, in the early years when no safety measures were taken and no information about the health impacts was provided by the company. These people should be entitled to compensation for damages. Some of the issues that will be addressed in this report may be useful for assessing the options currently available to obtain compensation in cases of this nature.

International legal framework

Jurisdiction issues

Although it is not mentioned in any of the decisions of the case, the rules applicable to the jurisdiction issue presented by this case were the ones set forth by the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.[10] The relevant provisions for the case were Sections 2 and 5. Section 2 provides the general rule for jurisdiction issues, as follows:

'Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.

Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.'

Besides the general rule of the defendant's domicile, Section 5 and the following sections provide several alternative jurisdictions that can be chosen by the plaintiffs in different types of matters. In this regard, paragraph 3 of Section 5 establishes that:

[7] Meeran, R.,1999

[8] Carlson v Rio Tinto [1999]CL551 (QB) Queen's Bench division, 4th december 1998. (Not available online). Mentioned in Meeran, R., 1999 and in Buggenhoudt C. and Colmant, S., Justice in a Globalised Economy: A Challenge for Lawyers Corporate Responsibility and Accountability in European Courts, Avocats Sans Frontier, Belgium, March 2011

[9] Labour Resource and Research Institute in 2008.

[10] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 was replaced in 2002 with the so-called Regulation Brussels II (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

The Rössing Uranium mine
Source: Mining Technology (www.mining-technology.com)

> '*A person domiciled in a Contracting State may, in another Contracting State, be sued:* (…) (3) *in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred*'

Until 2005, the English courts interpreted Article 2 of the Brussels rules 'as allowing dismissal of a case against a UK-domiciled defendant when there was a more appropriate forum located in a non European Union State'.[11] That was the *forum non conveniens* principle. However, in 2005, the European Court of Justice, in a decision on a preliminary ruling[12] submitted by the English Court of Appeal in the context of the Owusu v Jackson case, [13] established that the application of *forum non conveniens* in actions instituted against EU-domiciled defendants, where the alternative jurisdiction is in a country outside the EU, was not compatible with European Regulations on Jurisdiction. [14]

Furthermore, at a certain point, some provisions of public international law were taken into account by one of the courts in order to reinforce the outcome resulting from the application of *forum non conveniens rules*. [15]

The provisions invoked were Article 6(1) of the European Convention on Human Rights and Article 14(1) of the International Covenant of Civil and Political Rights. The former reads as follows:

> *'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice*'

Along the same lines, the later provision establishes that:

> '*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children*.'

Substantial issues

With a view to future claims, this report compiles international law concerning uranium mining and work safety and health that could be relevant in cases such as the present one.[16]

Conventions ratified by Namibia and the UK:

- Radiation Protection Convention, 1960
- Working Environment (air pollution, noise and vibration) Convention, 1977

Conventions ratified by Namibia:

- Occupational Cancer Convention, 1974
- Occupational Safety and Health Convention, 1981
- Occupational Health Services Convention, 1985

African regional conventions not ratified by Namibia:

- Southern Africa Development Community Protocol on Mining, 1997

[11] Meeran, R. (2011: 3)

[12] Case C-281/02 Owusu v. Jackson (2005) ECR I-1383

[13] Owusu v Jackson and Ors Case C-281/02 [2005] QB 801

[14] This means that nowadays cases such as the present one would not have been so controversial since the English Court would not have been allowed to apply forum non conveniens in order to find a more suitable jurisdiction.

[15] Connelly v RTZ Corporation plc and another, Court of Appeal (Civil Division), The Times 12 July 1996, (Transcript: Smith Bernal), 2 May 1996.

[16] Shindondola-Mote, H. (2009: 17).

Development of Connelly case before the national judiciaries.

Extrajudicial proceedings in Namibia

Before the case reached the English courts the plaintiff made some attempts to get extrajudicial compensation in Namibia. The first step was taken in 1988 when Scottish solicitors acting on behalf of the plaintiff wrote to RTZ asking for compensation. The parent company answered that the claim should be addressed to the Namibian subsidiary and forwarded the letter to RUL, whose insurers denied liability. [17] 'In February 1990, the Legal Assistance Centre of Windhoeck[18] brought a claim for compensation on behalf of Connelly under the Workmen's Compensation Act 1941 of South Africa and Namibia, before the Workmen's Compensation Commissioner.[19] This claim was rejected in 1992.[20]

Judicial proceedings in England

In September 1994, after he had obtained a legal aid certificate in 1993 to bring proceedings in England, Connelly interposed an action in this country against RTZ Corporation Plc (RTZ) and R.T.Z. Overseas Services Ltd ("RTZ Overseas"), one of its English subsidiaries. The defendants applied for an order staying the proceedings on the basis of *forum non conveniens*.[21]

On 28th February 1995, Sir John Wood, sitting as a judge of the Queens Bench Division, decided to grant the order staying proceedings, finding that for many reasons Namibia had the most real and substantial connection with the case. The African country, then, was where the case could be tried most suitably. [22]

Mr. Connelly appealed this decision. On 18 August 1995, the Court of Appeal, composed of Neill, Waite and Swinton Thomas LJJ, granted him leave to appeal but ended up dismissing it on the same grounds as Sir John Wood. [23]

However, Mr. Connelly still fought to make his case be heard by English courts and applied for the stay to be lifted on the grounds that the circumstances of the case had changed. In October 1995 Mr. David Steel QC, sitting as a Deputy Judge of the Queen's Bench Division dismissed the application.[24] This decision was appealed before the Court of Appeal, which, in May 1996, allowed the appeal and ordered the stay to be removed. [25]

Then the defendant addressed the House of Lords to ask for leave to appeal the Court of Appeal's decision. At the same time, the plaintiff also petitioned the House of Lords for leave to appeal out of time the decision of the Court of Appeal of 18 August 1995. The House of Lords allowed the plaintiff's appeal and dismissed the defendant's appeal. [26]

After this decision, in 1998, Peter Carlson's widow instituted an action against Rio Tinto before the Queen's Bench Division asking for compensation for damages.[27] RTZ applied to strike out, on different grounds, Connelly's claim before going into the full trial. The company also applied to stay Carlson's claim on the basis of *forum non conveniens*. On 4 December 1998, the Queen's Bench Division struck out Mr. Connelly's case on limitation grounds. However, the application for the proceedings to be stayed was dismissed on the same grounds as Mr Connelly's case. [28]

As pointed out at the beginning, the main question of the case was to determine whether the lack of financial aid in Namibia which would make it impossible for the plaintiff to sue the company could override the principle of *forum non conveniens*, according to which the case should be *prima facie* heard in Namibia.

Although all the different stages of the case basically dealt with the same question, the facts slightly changed during the course of the proceedings and different legal arguments were brought and discussed by the parties. We will review these different stages one by one.

[17] According to Connelly vs. RTZ Corporation and others [1997] UKHL 30, [1997] 4 All ER 335, [1997] 3 WLR 373 and Connelly v Rio Tinto plc and another, Queen's Bench Division, (Transcript), 4 December 1998.

[18] The Legal Assistance Centre (LAC) is a public interest law firm based in Windhoek. Its main objective is to protect the human rights of all Namibians. Thus it only takes on public interest cases. A public interest case is a legal case which will have a wider impact on the community than just assisting the individual concerned. It is funded by national and international donor organisations as well as individuals. Read more at: http://www.lac.org.na/

[19] The Workmen's Compensation Commissioner, which was a public body in the times Namibia belonged to South Africa, transformed into the Social Security Commission in 1995. This body was in charge of administering funds in order fulfil the obligations provided in Workmen's Compensation Act 1941. To find out more about it, see the Workmen's Compensation Act 1941 (not available online); Namibia's Social Security Act 1994; Social Security Commission (SSC) website: http://www.ssc.org.na/index.php?option=com_content&view=article&id=44

[20] Connelly vs. RTZ Corporation and others [1997] UKHL 30, [1997] 4 All ER 335, [1997] 3 WLR 373; 4 December 1998.

[21] Connelly vs RTZ Corporation and others. Court of Appeal (Civil Division), [1996] QB 361, [1996] 1 All ER 500, [1996] 2 WLR 251, 24 July, 18 August 1995; Court of Appeal (Civil Division), The Times 12 July 1996, (Transcript: Smith Bernal), 2 May 1996; [1997] APP.L.R. 07/24; Queen's Bench Division, (Transcript), 4 December 1998.

[22] Not reported decision. Mentioned in Decision of the Court of Appeal, Neill, Waite and Swinton Thomas LJJ, reported at [1996] 2 WLR 251.

[23] Decision of the Court of Appeal, Neill, Waite and Swinton Thomas LJJ is reported at [1996] 2 WLR 251

[24] Not reported decision. Mentioned at Court of Appeal (Civil Division), The Times 12 July 1996, (Transcript: Smith Bernal), 2 May 1996.

[25] Court of Appeal (Civil Division), The Times 12 July 1996, (Transcript: Smith Bernal), 2 May 1996.

[26] Connelly v. RTZ Corporation Plc and Others [1997] UKHL 30

[27] Carlson v Rio Tinto [1999]CL551 (QB) (Not available online). Mentioned in Meeran, R., 1999.

[28] Queen's Bench Division, (Transcript), 4 December 1998; Commented in Meeran, R. (1999); Meeran, R. (2011); Muggeridge, C. and Zagaris, B. (2011).

Box 1 Spiliada rules on *forum non conveniens*

In the case Spiliada Maritime Corporation v Cansulex Ltd [1987] 1 AC 460, [1986] 3 All ER 843 the House of Lord sets forth the rules for applying *forum non conveniens,* which read as follow:

(a) The basic principle is that a stay will only be granted where the court is satisfied that there is some other available forum having competent jurisdiction which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(b) The general burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay, although the particular burden of proving any relevant factor rests upon the party advancing it.

(c) The burden resting on the defendant is not just to show that England is not the natural or appropriate forum but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum.

(d) Such appropriateness has to be demonstrated by pointing to connecting factors which make the other jurisdiction the natural forum, in the sense of being the jurisdiction with which the action has the most real and substantial connection.

(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay.

(f) If, however, the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions.

Once this question was solved, in 1998 the Queens Bench Division was asked to decide on preliminary substantive[29] issues that will also be briefly analyzed at the end of this section.

Forum non conveniens vs availability of legal aid

In the first stage, Sir John Wood, applying Spiliada rules on *forum non conveniens* (Box 1), granted an order to stay proceedings. His decision, later confirmed by the Court of Appeal on 18 August 1995, was based on the arguments below.

He was first persuaded by the defendant's arguments and reached the conclusion that according to many criteria, Namibia was the place with the closest connection to the case.

Once established that Namibia was *prima facie* the most appropriate jurisdiction to hear the case, Sir John Wood had to analyze whether there were other circumstances (not necessarily linked to the connecting factors) by reason of which a stay should nevertheless not be granted in order to make justice prevail. This was the point at which he had to consider the plaintiff's statement that the availability of legal aid in England but not in Namibia was a circumstance to take into account while analyzing the appropriateness of *forum non conveniens*.

In exercising his discretion, Sir John Wood opted for a legalistic position based on the Legal Aid Act 1988, the act that regulated Mr. Connelly's right to legal aid in England. Article 31 of the Legal Aid Act read:

> '*(1) Except as expressly provided by this Act or regulations under it . . . (b) the rights conferred by this Act on a person receiving advice, assistance or representation under it shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised*.'

Sir John Wood found that by virtue of this provision he was precluded from taking into account Mr. Connelly's right to legal aid in England in the exercise of his discretion to apply or not to apply the *forum non convinens* principle. This meant that the case had to be forwarded to Namibia, according to the defendant's petition. Both Sir John Wood and the Court of Appeal considered that although there were convincing humanitarian reasons to keep the case in England, the mentioned Legal Aid Act provision posed an insuperable obstacle for the plaintiff's claim to succeed.[30]

[29] Limitation (prescription) in the UK is considered a matter of substantive law, by virtue of the Foreign Limitation Periods Act 1984.

[30] Connelly vs RTZ Corporation and others. Court of Appeal, Civil Division, [1996] QB 361.

Rio Tinto workers
Source: Rössing (www.rossing.com)

Forum non conveniens vs a conditional fee agreement [31]

In the second stage, which first came before Mr. Steel and then the Court of Appeal, the circumstances of the case had changed because the plaintiff had gone into a conditional fee arrangement with his solicitors with the view to conducting the proceedings. The conditional fee arrangement is an agreement by which the solicitors agree not to charge the plaintiff for their services unless the case is won. This Agreement was authorized by section 58 of the Courts and Legal Services Act 1990 and by the Conditional Fee Agreements Order 1995. Thus the plaintiff had at his disposal another way of obtaining legal aid which would allow him not to depend on the aid subjected to Section 31 (1) (b) of the Legal Aid Act 1988.

For Mr. Steel, the agreement between the plaintiff and his solicitors was not sufficient to consider that the plaintiff was not relying on legal aid anymore. He considered that the agreement was a mere subterfuge. He pointed out that the conditional fee agreement was very limited and only covered the application for the stay to be lifted and did not cover later stages of the proceedings. He also noted that the solicitors' intention to extend the agreement to later stages was not realistic, given the magnitude and high costs of the case and that legal aid was still available for the plaintiff. Thus, Mr. Steel found that it was almost inevitable that an application for legal aid would end up being made and so Legal Aid Act would be applicable again.

Then 'the plaintiff applied ex parte to the Court of Appeal (Millett and Ward L.JJ) for leave to appeal Mr. Steel's order. He offered undertakings that he would not apply for legal aid and that his solicitors would continue the conditional fee agreement until the conclusion of the trial or earlier order'[32]. On 29 January 1996, the Court of Appeal granted the leave to appeal and on 2 May came out with a decision.

This time, the Court did not question the plaintiff's *bona fides* by entering the agreement and decided to apply to the new circumstances the *forum non conveniens* rules settled by the House of Lord in the Spiliada case (Box 1).

Taking into account that there was no provision like article 31 (1) b of the Legal Aid Act concerning conditional fee agreements, the Court found that the availability of legal assistance in the form of a conditional fee agreement in England and the impossibility accessing justice in Namibia through lack of funds was a sufficient reason not to grant the stay to the forum that *prima facie* was the most convenient. Furthermore, in support of his opinion the Court invoked article 6 (1) of the European Convention on Human Rights, which recognizes people's rights to 'a fair and public hearing within reasonable time by an independent and impartial tribunal established by law' and article 14 (1) of the International Covenant of Civil and Political Rights, also concerning the right to a fair and public hearing.

On the basis of these arguments, the Court finally decided to allow the plaintiff's appeal and remove the stay, upon certain conditions.

House of Lords' review of previous courts' interpretation of the Legal Aid Act 1988 [33]

After this decision two appeals were brought before the House of Lords. First, the defendant applied for leave to appeal the Court of Appeal's decision of 2 May 1996. Then the defendant petitioned for leave to appeal out of time the decision of the Court of Appeal of 18 August 1995 which confirmed Sir John Wood's decision granting an order to stay proceedings mainly on the grounds of article 31 of the Legal Aid Act. The plaintiff's petition was followed by some minor complications. However, both leaves were eventually granted and reviewed together.

The House of Lords supported the plaintiff's position, allowing his appeal and dismissing the defendant's. The reasoning given by the House of Lords to support the plaintiff was slightly different from the reasoning given by the previous Courts.

[31] Court of Appeal, Civil Division, The Times 12 July 1996, (Transcript: Smith Bernal), 2 May 1996, 2

[32] Connelly vs RTZ Corporation and others. [1997] UKHL 30, [1997] 4 All ER 335, [1997] 3 WLR 373.

[33] Connelly vs RTZ Corporation and others 2 MAY 1996, 2; [1997] UKHL 30, [1997] 4 All ER 335, [1997] 3 WLR 373.

The House of Lords started by reviewing Sir John Wood's interpretation of subsection 31 (1) (b) of the Legal Aid Act 1988, according to which proceedings were stayed. Lord Goff of Chieveley, supported by the rest of the members of the House, stated that the provision that the receipt of legal aid '*shall not affect* (…) *the principles on which the discretion of any court or tribunal is normally exercised*' should not have the effect of preventing judges from taking into account the availability of legal aid while deciding on an application for a stay of proceedings on the principle of *forum non conveniens*. He supported his position with three reasons.

He argued that an interpretation such as the one proposed by Sir John Wood was not compatible with the purpose and spirit of Article 31(1)(b), which is to prevent legal aid from being used to distort legal proceedings. He also found support in Scottish Legal Aid Legislation which did not contain a provision such as Article 31 (1) (b). This was relevant to the extent that it meant that in Scotland, the native home of *forum non conveniens*, there is nothing to prevent courts from taking into account legal aid receipt while applying *forum non conveniens* rules. Finally he noted that Sir John Wood's subsection 31(1) (b) interpretation led to the absurd outcome that a conditional fee arrangement could be taken into account while applying *forum non conveniens* rules, but the availability of legal aid could not.

Once this had been settled, the question at issue was to determine whether English courts had jurisdiction over the case according to Spiliada *forum non conveniens* rules. Lord Goff considered that there were sufficient reasons to keep the case in England.

He rejected basing the refusal of the stay on the sole fact that no legal assistance was provided in Namibia whereas in England it was. According to him, the essential issue in the case was not the availability of legal aid but the fact that 'the nature and complexity of the case was such that it could not be tried without the plaintiff having the benefit of financial assistance, both in the form of professional legal assistance and in the form of expert scientific witnesses'.[34] That is, the main issue was not the availability of legal aid but the evident impossibility of accessing justice unless legal aid was provided.

Preliminary substantive issues

In its claim before Sir J. Wright of the Queen's Bench Division, RTZ tried to bring the litigation to an early end alleging that there was no reasonable cause of action; that the claim was bound to fail and so continuing with the trial constituted an abuse of process; and, finally, that the claim was statute barred.

The judge did not accede to the defendants' application on the first two issues. In the assessment of whether the cause of action was too weak to succeed, the judge drew an important conclusion that played a relevant role in the assessment of the limitation issue. The judge considered that diverging scientific opinions presented by the parties made it impossible to strike out the case without trying it. However, the judge also made it clear that since it was scientifically very difficult to prove the causes of a cancer, the plaintiff's case on causation was extremely weak.

The judge first examined the issue under the English Limitation Act 1980. Taking into account article 14 of this Act, he concluded that the moment at which the plaintiff had knowledge of the defendants as potential targets for litigation—the moment at which prescription should start counting—was within 18 months of 23 September 1988.

[34] Connelly vs RTZ Corporation and others. [1997] UKHL 30, [1997] 4 All ER 335, [1997] 3 WLR 373, para. 31.

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Vilaseca, I. (CEDAT, Universitat Rovira I Virgili), 2012. *Rio Tinto in Namibia: the Connelly Case*, EJOLT Factsheet No. 39, 8 p.

Thus according to Article 11, which establishes a prescription period of 3 years, he concluded that the plaintiff was *prima facie* statute barred. Then, he proceeded to consider whether in the exercise of the discretion allowed by article 33 of the same Act, the time limit could be excluded. He weighed the prejudice that the plaintiff would suffer if the claim were to be dismissed, the prejudice that the defendant would suffer if the case were to be tried and the weakness of the cause action and reached the provisional conclusion that the time limit should not be excluded.

To reach a definitive conclusion the judge still had to make further assessments. He then addressed the question of whether by virtue of Section 1 (2) of the Foreign Limitation Act 1984, he was bound to take into account the South Africa and Namibia Prescription Act 68 of 1969. For that purpose, he had to determine first which laws were applicable to the action. To do so, he took into account the common law rule of 'double actionability' concerning tort cases, according to which, when certain requirements are met, the two systems of law involved in the case must be taken into account. In the present case the applicability of the 'double actionability' rule depended upon where the damage was considered to have been committed. If England was considered to be the only place where the tort had occurred, the 'double actionability' principle would have been ignored. However, this was not the case. The judge considered that the torts had taken place both in England (where the decisions were taken) and Namibia (where the decisions were implemented). Thus, he concluded that Namibia's Prescription Act 68 of 1969 was also applicable. Once he had made sure that no hardship or public policy reasons prevented him from doing so, he applied Namibia's Act, which establishes the same prescription period as the English Act. Thus, he ended up confirming that the action was statute barred.

Finally, we should mention here the position of the judge when analysing whether there were public policy reasons to prevent the English courts from applying Namibia's Law. He had to address the question whether the fact that Namibia's Act had been imposed by a regime that had been declared illegal under International Law[35] could be considered in breach of public policy. He rejected that the application of Namibia's Law could be considered contrary to public policy on the basis of these considerations. He based his opinion on a House of Commons statement of 1974 in which the United Kingdom had recognized South Africa as the *de facto* administering authority in Namibia and on Section 140(1) of Namibia's Constitution, which recognizes the validity of the laws that were in force before the Independence.

[35] After the purported annexation of Namibia by South Africa in 1949, the General Assembly and thereafter the Security Council of the UN adopted resolutions declaring the continued presence of the South African authorities in Namibia and all acts taken by the Government of South Africa after termination of the mandate to be illegal. This state of affairs continued until Namibia gained its independence from the Republic of South Africa in 1990.

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