

1988 December 31

[A. LOIZOU, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

1. MICHALAKIS STERGIDES,
2. EMMANOUELLA ENTERPRISES LTD. ,

*Applicants.*

v.

1. THE IMPROVEMENT BOARD OF AYIA NAPA,
2. THE DISTRICT OFFICER FAMAGUSTA, AS  
CHAIRMAN OF THE IMPROVEMENT BOARD OF AYIA NAPA,

*Respondents.*

*(Case No. 551/86).*

*Abuse of power—An act taken for an extraneous purpose other than the one which the Law intended to serve—It presupposes the existence of discretion—Inquiry into this ground of annulment involves an inquiry as to the motive for which the sub judice act was taken—The burden of proof lies on the applicant.*

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In 1979 the applicants applied for a building permit for the erection of a Hotel at Ayia Napa. At the time, it was, under the then in force bye-laws, the practice of the respondents to charge for water supply £10.— per bed and require applicants to secure the relevant water supply permit, pay the fees, and secure the approval of the Cyprus Tourism Organization. Following satisfaction of these requirements, the respondents proceeded with the examination of the issue of the permit.

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Bye-Law 113, enacted in 1984, fixed the water supply fee at "up to £100 per to bed". The respondents required the applicants to pay £100 per bed. The latter paid the amount under protest. They eventually filed Re-course 653/85.

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The fee of £100.— per bed was collected on instructions by the Minister of Interior. The respondents decided that henceforward the fees would be paid simultaneously with the issue of the building permit. They then decided to return to the applicants the sums paid as aforesaid by them and inform

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them that the connection fees should be paid to the Board after the completion of the project.

Hence this recourse.

Held, annulling the sub judge decision: (1) The expression in the new bye-law 113 "up to £100,— per bed indicates discretion". In the exercise of such discretion and until the sub judge decision was taken the respondents fixed the fee at £50.— per bed. 5

(2) It is a general principle of administrative Law that abuse of power consists of an act or decision which starts with a lawful decision of the administration but which was given for an evidently extraneous purpose other than the one for which the law was enacted. This of course happens when the act complained of is the result of the exercise of discretion. Needless to say, however, that the inquiry into this ground presupposes an inquiry into the inside motives for the act claimed to have been taken in abuse of power, and that the burden of proof when such ground is invoked is always on the applicant alleging same. 10 15

(3) In this case the applicants discharged the burden. Indeed, when the respondents originally demanded and collected the £100 per bed, they did not exercise any discretion, but they obeyed the Minister of Interior. Hence the revocation of such decision. They then changed their decision to collect £50 and decided that as from 16.9.85 the fee would be £100. Then, they changed their practice to collect the fee before examination of the application for the building permit. In that way the law and administrative practice governing the issue of the connecting fees would not be the one in force at the time of the making of the application which was the material time as far as the present applicants are concerned but the new practice and increased fees. 20 25

*Sub judge decision annulled.*

*No order as to costs.*

### **Recourse.**

Recourse against the decision of the respondents to claim from applicants the amount of £100.— per bed as water supply fees in respect of the erection of a hotel. 30

*G. Triantafyllides, for the applicants.*

*P. Angelides, for the respondents.*

*Cur. adv. vult.* 35

A. LOIZOU P. read the following judgment. The applicants in this recourse pray for the following relief:

5           "(a) A declaration of the Court that the act and/or decision of the respondents to claim from the applicants the amount of £100 per bed as water supply fees i.e. a total £10,000 is null and void and of no legal effect whatsoever.

10           (b) A declaration of the Court that the act and/or decision of the respondents dated the 7th July, 1986, to collect the amount of £10,000 i.e. £100 per bed as water supply fees is null and void and of no legal effect whatsoever."

The facts, so far as relevant, are as follows:

15           In 1979 the applicants applied for a building permit for the erection of a hotel at Ayia Napa. At the time of the submission of the application the question of the water supply fees was governed by the Ayia Napa Villages (Administration and Improvement) Bye-Laws 1975. Moreover the fees fixed by the Board were ten pounds per bed and it was the practice of the respondent Board  
20           that before any further examination of an application for a building permit would be done, an applicant had to secure a permit for the water supply and that he should pay the prescribed fees so that his plans would be entitled to be submitted for approval by the Cyprus Tourism Organisation. It was then only after the approval by the Cyprus Tourism Organisation that the building permit applied for, would be issued.  
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30           By virtue of Bye-Law 113 of the Villages (Administration and Improvement) (Amendment) Bye-Laws 1984, published in Supplement No. 3 to the Official Gazette of the Republic dated the 17th February, 1984 the amount payable as water fees in respect of tourist establishments was fixed "up to £100 per bed" (μέχρι £100 κατά κλίνη). On the 3rd May, 1985, the respondent Board required from the applicants the payment of £100 per bed i.e. a total of £10,000; and the applicants paid the said amount under

protest as per their letter of 8th May 1985 (Exhibit 1), and challenged the relevant decision by means of Recourse No. 653/85 which is still pending.a

The sub judge decision was taken at the meeting of the respondents of the 16th September 1985, and it is deemed expedient to quote in full the relevant extract from the minutes of the said meeting. They read as follows: 5

" .....

There was discussed in extenso the question of payment of water supply fees for the connection of tourist establishments with the Village Water Supply. In accordance with the provisions of Regulation 113(a) and after a reference to the relevant decision of the Board which was taken on the 11th January, 1985, the following were ascertained or decided. 10

(a) Notwithstanding the decision of the Board that in respect of the instances referred to there would be collected fees of £50 per bed, in accordance with the instructions of ex Minister of Interior Mr. Chr. Veniamin, there are collected fees of £100 per bed. 15

(b) As from the 16th September 1985, there should be collected fees of £100 per bed in the instances of connection of tourist establishments with the village water supply. Messrs G. Constantinou and A. Andreou disagreed with the above decision. 20

(c) The above fees to be paid to the Board together with the fees for the issue of the building permit that is to say upon the completion of the examination of the relevant application. 25

(d) Mr. Michalakis Stergides and Emmanouella Enterprises (the applicants) who sought recourse to the Supreme Court 30

5 because they paid connection fees of £100 per bed instead of £50 and Alasia Land Development Co. , which sent a cheque through their advocate for the payment of connection fees of £50 per bed, should be refunded the amounts paid by them and to be informed about the relevant decision of the board, that is to say that the connection fees should be paid to the Board after the completion of the examination of the relevant applications for the issue of the building permit together with the building permit fees."

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Indeed, by letter of the advocate of the respondent Board dated the 18th November 1985, (Exhibit D), the amount of £10,000 was refunded to the applicants and the applicants were, also, informed that the relevant fees "are to be paid on the date of the issue by the Board of the building permit when the exact number of beds will be known". The applicants' advocates in reply informed the advocate of the respondent Board, by letter dated the 4th January, 1986 (Exhibit E), That the contents of his above letter were unacceptable and that they would challenge the decision is question by a recourse. In fact they filed Recourse No. 38/86 which is also pending awaiting together with Recourse No. 653/85 the result of this recourse.

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It would appear that some time at the beginning of July 1986, the applicants came to know that the building permit could be issued provided that they paid the water supply fees as claimed by the respondent Board. So the applicants paid the amount of £10,000 under protest and with full reservation of their rights (see the letters of their advocates dated the 3rd July 1986, and 7th July, 1986, Exhibits "F" and "G" respectively; and on 1st September 1986 they filed this recourse.

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The said Bye-Law 113(a) which governs the fees in question, leaves the amount of fees to the discretion of the respondent Board. This is clear from its wording which provides "up to £100 per bed". And it is settled law that there is discretionary power when the rules establishing the competence do not determine ex-

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actly the act of the administrative organ but leave freedom of action to it. The amount of the fees, being a matter within the discretionary powers of the respondent Board, had to be fixed by the respondent Board by exercising such powers as it had been done in the present case and were until the sub judice decision was taken £50 per bed. 5

Before proceeding any further reference may be made to the minutes of the respondent Board of the 11th January 1985, which reads:

"1. There was discussed at length the question of the amendment of Bye-Law 113 which governs the collection of fees for connection from the village water supply. In spite of this prompting by the Chairman to adopt the suggestions of the Ministry of Interior as its general letter under No. 259/83, and dated 14th June 1984, it was decided by the local members not to have these suggestions of the Ministry of Interior adopted for the following reasons: 10 15

(a) There are no divided building-sites in the area of Ayia Napa.

(b) There is no first quality water supply for consumption. 20

(c) The imposition of increased fees of connection for properties which are outside the area of the water supply is not considered as a fair treatment of the consumers.

(d) By the adoption of the suggestions of the Ministry of Interior there will be further impetus for development of the water supply of the area which is not desirable." 25

The main issue for determination in this case is whether there has been abuse or excess of power in the conduct of the respondent Board when taking the sub judice decision of the 16th September 1985. For that purpose an administrative Court has to turn to the facts and other circumstances of the case. 30

5      It is acknowledged in paragraph (a) of the sub judice decision  
of the 16th September 1985 hereinabove set out that "notwith-  
standing the decision of the Board that in respect of the instances  
referred to there would be collected fees of fifteen pounds per  
bed, yet in accordance with the instructions of the ex-Minister of  
Interior there are collected fees of one-hundred pounds per bed."  
This establishes the fact that there had not been exercised by the  
Board its discretion to fix the fees above fifty pounds, so when  
they were demanding from the applicants in the first instance to  
10      pay £100 per bed they were acting not as a result of the exercise  
of their discretionary powers given by the relevant Bye-Law to  
the respondent Board as a collective organ taking, at a regular  
meeting with proper minutes kept, such decision, but on mere in-  
structions, from the Minister who could not have himself taken  
15      under the Law or the Bye-Laws such a decision. Hence the revo-  
cation of their previous decision and the refund of the then paid  
fees to the applicants.

20      Furthermore in paragraph (b) thereof they decide that "as from  
the 16th September 1985, there should be collected fees of one-  
hundred pounds per bed" which shows that they so decided for  
the first time to increase the fees to the maximum authorised by  
the Bye-Law so as to be entitled legally to collect that amount as  
from that date. Then under paragraph (c) of the decision it is de-  
cided that "the said fees should be paid to the Board together with  
25      the fees for the issue of the building permit, that is to say upon  
the completion of the examination of the relevant applications." It  
is obvious that by this part of their decision they changed the until  
then established practice of collecting the fees prior to the exami-  
nation of the application by the Cyprus Tourism Organisation and  
as a prerequisite to it. They changed their practice so that the case  
30      of the two applicants as set out in the following paragraph (d)  
thereof should be covered. Under this latter paragraph a decision  
is taken that the amounts paid under protest by the applicant for  
one-hundred pounds and by another firm with which we are not  
concerned in this recourse who claimed that the fees at the mo-  
35      ment of their payment were fifty pounds per bed, would be re-  
funded and that they should be informed about the relevant deci-

sion of the Board, that is to say that the connection fees should be paid to the Board after the completion of the examination of the relevant applications for the issue of the building permits together with the building permit fees.

It is obvious that though in Law they could have taken this decision in the exercise of their discretion under Bye-Law 113 same was taken in abuse of power, in so far as the applicants are concerned and the others in like position, that is to say to serve an extraneous purpose, namely the collection of the fees of one hundred pounds per bed from the applicant and from the other firm affected by their decision and not be bound to receive fifty pounds as it was their decision until then and their practice at the time the fees were collected. In that way the law and administrative practice governing the issue of the connecting fees would not be the one in force at the time of the making of the application which was the material time as far as the present applicants are concerned but the new practice and increased fees. Hence also the revocation of their previous, contrary to Law, decision to collect a hundred pound fee per bed.

This leads to the annulment of the sub judice decision as it is a general principle of administrative Law that abuse of power consists of an act or decision which starts with a lawful decision of the administration but which was given for an evidently extraneous purpose other than the one for which the law was enacted. This of course happens when the act complained of is the result of the exercise of discretion. Needless to say, however, that the inquiry into this ground presupposes an inquiry into the inside motives for the act claimed to have been taken in abuse of power, and that the burden of proof when such ground is invoked is always on the applicant alleging same. This burden has, in the present case, been successfully discharged by the applicants from the material before me, namely the whole conduct of the respondent Board which clearly establishes abuse of power. (See Conclusions of the Greek Council of State 1929-1959 p. 269 et seq.)

For all the above reasons the sub judice decision is annulled



3 C.L.R.      Stergides v. Impr. Board Ay. Napa      A. Loizou P.

and the recourse succeeds. In the circumstances, however, there will be no order as to costs.

*Sub judice decision annulled.  
No order as to costs.*