IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

APHRODITE MICHAEL,

Applicant,

and

1. THE IMPROVEMENT BOARD OF DHALI THROUGH ITS CHAIRMAN, THE DISTRICT OFFICER, NICOSIA,
2. THE REPUBLIC, THROUGH THE DIRECTOR OF THE DEPARTMENT OF ANTIQUITIES,

Respondents.

(*Case No.* 212/67).

Antiquities Law, Cap. 31—*Ancient monuments—Building operations thereon—Complete prohibition of, under section* 8(1) *of the Law—When and how to be resorted to—Part II of the Constitution, Articles* 6 *to* 35—*Not reasonably open to Respondent* 2, *in the particular circumstances of this case, to disallow completely any building operations on Applicant's property—He could have imposed terms instead*—Lordos and Others *v.* The Government of Cyprus, *Case Stated No.* 128, *decided on the* 20*th January,* 1959 (*unreported*) distinguished.

Ancient monuments—Building operations thereon—Absolute prohibition—Section 8(1) *of the Antiquities Law, Cap.* 31—*See, also, under Antiquities Law, Cap.* 31, above.

In this case the Applicant attacked the validity of the refusal of Respondent 1 to grant her a building permit, with a view to building a house on her property at Dhali village, which consisted of an approved building site.

The said permit was refused because Respondent 2, acting under section 8(1) of the Antiquities Law, Cap. 31, (the full text of which appears in the judgment *post*) objected to any building operations on Applicant's property on the ground that the said property was included in the Second Schedule to the Antiquities Law (*supra*), as an ancient monument, and there were clear and reliable indications that in such property there existed remains of the fortifications of the ancient town of Idhalium.

It was quite clear, at the time of hearing of the recourse, that there did not exist on the surface of Applicant's property, nor have there ever been unearthed (as when such property was being ploughed) any actual archaelogical remains; so one could not say, with real certainty, whether or not there was anything archaelogically worthwhile to be found in that particular property. Moreover there was no concrete evidence to the effect that it was practically certain that that particular property contained such archaelogical remains that irreparable harm will be done if any digging at all was permitted anywhere therein.

In annulling the *sub-judice* refusal the Court:-

Held, 1. In the light of the letter and spirit of the relevant provisions in Part II of our Constitution (regarding Fundamental Rights and Liberties) the absolute prohibition of any building operations should be resorted to, nowadays, under section 8(1), only when absolutely necessary in view of the circumstances of a particular case, and not by way of general policy; and before deciding to prohibit building completely, on a specific site, Respondent 2 should satisfy himself that nothing short of that, such as the imposition of appropriate terms, will meet the needs of the particular situation.

2. The complete prohibition of building on Applicant's property, an approved building site, in an already developing built-up area, is by far more oppressive than it would have been had it affected purely agricultural land only; thus, Respondent 2 should have been very slow in deciding on an absolute prohibition of building, and in doing so he must have had very cogent grounds forcing him to adopt such a course.

3. Respondent 2, by prohibiting completely any building operations on Applicant's property, exceeded the proper limits of his relevant powers. It was, not reasonably open to him, in the particular circumstances of the case, as established before the Court, to disallow completely any building operations in the said property. (*Lordos and Others* v. *The Government of Cyprus,* Case Stated No. 128, decided on the 26th January, 1959 (unreported) *distinguished*).

Sub judice decision annulled; no order as to costs.

Cases referred to:

Lordos and Others v. *The Government of Cyprus*, Case Stated No. 128, decided on the 26th January, 1959 (unreported).

Recourse.

Recourse against the refusal of Respondent 1 to grant Applicant a building permit for the erection of a dwelling house on her property at Dhali village.

L. Papaphilippou, for the Applicant.

K. Michaelides, for Respondent 1.

L. Loucaides, Counsel of the Republic, for Respondent 2.

Cur. adv. vult.

The following judgment was delivered by:-

TRIANTAFYLLIDES, J.: In this case the Applicant complains against the refusal by Respondent 1—as a result of action taken by Respondent 2—of a building permit in respect of her property at Dhali village under registration F532 (plot 633, block F, sheet/plan XXXIX/8.E.1; see her title deed *exhibit* 1 and the survey map *exhibit* 2). Such property is an approved building site as a result of a division which took place in 1962. It is common ground that prior to such division the property of the Applicant was part of a field known for land survey purposes as plot 685.

The Applicant applied on the 5th May, 1967, for the building permit in question, with a view to building a house on her said property.

She received a letter dated the 28th August, 1967 (see *exhibit* 3), by means of which she was informed by Respondent 1 that the permit applied for by her could not be granted, because Respondent 2 was objecting to any building operations on her property, in view of the fact that the said property was included in the Second Schedule to the Antiquities Law, Cap. 31, as an ancient monument, and there were clear and reliable indications that in such property there existed remains of the fortifications of the ancient town of Idhalium; in the said letter the property of the Applicant is erroneously described as plot "639" instead of "633".

The decision of Respondent 2, which led to the refusal of the building permit, is to be found in a minute dated the 27th July, 1967 (see *exhibit* 4); it is stated therein that it is envisaged that, in future, the property concerned might be compulsorily acquired.

The Antiquities Law, Cap. 31,—which was amended by the Antiquities (Amendment) Law, 1964 (Law 48/64)—provides, in section 2, that "ancient monument" means, *inter alia*, any object, building or site specified in the First or Second Schedule to Cap. 31; and under Item 1 (Nicosia District) in the Second Schedule, we find plot 685—from which plot 633 was derived—included in an ancient monument described thus: "Such parts of the site and remains at Idhalium as are situate on private property".

So, it is not only the "remains" of Idhalium, as such, but, also, the "site" thereof that has been declared an ancient monument, by virtue of the said Second Schedule; and I am moreover, quite satisfied, from the evidence adduced, that apart from the fact that Item 1 (Nicosia District) in the Second Schedule includes the property of the Applicant, such property is *actually* at the site of Idhalium, especially as next to it, beneath a road on which it has its frontage, there exist the remains of the ancient fortifications of Idhalium (see also in this respect *exhibit* 7).

Respondent 2, in refusing to allow the issue, to the Applicant, of the building permit, has acted under section 8(1) of Cap. 31, which reads as follows:

" No person beneficially interested in any ancient monumen specified in the Second Schedule to this Law, or in any other ancient monument as may from time to time be added thereto shall make any alterations, additions or repairs affecting its architectural character to such ancient monument or fell any tree growing within the boundaries of the same save in accordance with the terms of a permit in writing from the Director previously obtained"; the "Director" being Respondent 2.

In the light of the definition of "ancient monument" in section 2 of the Law, and of the description of Item 1 (Nicosia District) in the Second Schedule to the Law, as well as on the basis of all the evidence before the Court, I am quite satisfied that the property of the Applicant, plot 633, is properly subject

to the powers of Respondent 2 under section 8(1) of the Law. On this point I take the same view of the property concerned as was taken regarding the property involved in *Lordos and Others and The Government of Cyprus* (Case Stated No. 128, decided on the 26th January, 1959, *unreported*).

It is quite correct that Respondent 2 has, under section 8(1) of the Law, the right to disallow completely, in a proper case, any building operations at all on property within the ambit of such section.

But in the light of the letter and spirit of the relevant provisions in Part II of our Constitution (regarding Fundamental Rights and Liberties) the absolute prohibition of any building operations should be resorted to, nowadays, under section 8(1), only when absolutely necessary in view of the circumstances of a particular case, and not by way of general policy; and before deciding to prohibit building completely, on a specific site, Respondent 2 should satisfy himself that nothing short of that, such as the imposition of appropriate terms, will meet the needs of the particular situation.

In the light of all the material before the Court, I am quite satisfied that, in the present instance, Respondent 2, by prohibiting completely any building operations on plot 633, the property of the Applicant, exceeded the proper limits of his relevant powers. I take this view because of, *inter alia*, the following reasons:-

It is quite clear that there do not, at present, exist on the surface of the property of the Applicant, nor have there ever been unearthed (as when such property was being ploughed) any actual archaeological remains; so one cannot say yet, with real certainty, whether or not there is anything archaeologically worthwhile to be found in this particular property.

That it is possible that, in spite of the inclusion of this property under Item 1 (Nicosia District) in the Second Schedule to Cap. 31, no significant archaeological remains may, actually, exist there, seems to be indicated by the fact that Applicant's husband was allowed to build a house on plot 596, which is also included in the said Item 1, and, according to his evidence—which I do accept and which has not been challenged on this point—no archaeological remains were found in plot 596 either when digging the foundations of the house or when digging wells in an effort to find water.

On the other hand, as this property is an approved building site, in an already developing built-up area, the complete prohibition of building thereon is by far more oppressive than it would have been, had it affected purely agricultural land only; and, thus, Respondent 2 should have been very slow in deciding on an absolute prohibition of building, and in doing so he must have had very cogent grounds forcing him to adopt such a course.

One who reads the minute of Respondent 2 in relation to this matter (*exhibit* 4) is led to expect that evidence called by counsel for Respondent 2 would establish what is stated therein, namely, that there are clear indications that in the property of the Applicant exist the remains of the ancient wall of Idhalium; yet the evidence called by counsel for Respondent 2 fell far short of establishing the said ground, on the basis of which Respondent 2 seems to have decided to prohibit any building at all on Applicant's property.

In the light of all the foregoing, and in the absence, particularly, of any concrete evidence to the effect that it is practically certain that this particular property—of the Applicant—contains such archaeological remains that irreparable harm will be done if any digging at all is permitted anywhere therein, I have reached the conclusion that it was not reasonably open to Respondent 2, in the particular circumstances of this case, as established before me, to disallow completely any building operations on Applicant's property; this was not a situation like that in the *Lordos* case (*supra*) where it was sought to preserve the specific character and appearance of the site concerned.

In my opinion all that Respondent 2 could have lawfully done, in this case, was to impose such terms, under section 8(1), as would ensure that any digging to be done in Applicant's property would be done only under the supervision of his Department, and would be suspended or discontinued, as it might prove to be necessary in furtherance of the objects of the relevant legislation; otherwise, Respondent 2 might decide to acquire the property in question compulsorily, as it appears to be envisaged in the aforementioned minute of Respondent 2 (*exhibit* 4).

It is, consequently, my conclusion that Respondent 2 has acted in excess and abuse of powers in refusing absolutely to

allow, at the present stage of things, any building operations at all on the property of the Applicant; and this factor necessarily vitiates the refusal by Respondent 1 of the building permit applied for by the Applicant. The *sub judice* administrative action is, therefore, declared to be *null* and *void* and of no effect whatsoever.

In the circumstances, it is not necessary for me to decide any other issue that has been raised in these proceedings.

It is now up to Respondents to re-examine the application for a building permit, made by the Applicant, and deal with it in accordance with the relevant legislation and all pertinent factual considerations.

Regarding costs, I have decided to make no order as to costs as the Respondents have acted in all good faith and the Applicant has failed in her contention that section 8(1) was inapplicable in this case.

Sub judice decision annulled;
no order as to costs.