[MALACHTOS, J.]

1972
July 14

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

GEORGHIOS MILTIADOUS

v.

REPUBLIC (SENIOR MINES OFFICER AND ANOTHER)

GEORGHIOS MILTIADOUS AND OTHERS

Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH
1. THE SENIOR MINES OFFICER,
2. THE MINISTER OF COMMERCE AND INDUSTRY,

Respondents.

(Case No. 173/72).

Provisional Order—Quarry licence—Grant to other party—Recourse against such licence—Application for provisional order suspending effect and operation of said quarry licence pending determination of recourse—Application granted—Recourse likely to succeed on the merits—Public interest—Not involved in this case—Dispute being in substance one between private parties public interest will not be harmed in granting the order applied for—Irreparable damage in case the order is refused—Applicants incurred expenses of thousands of pounds as a result of the quarry licence on the determination of which the sub judice *one was granted to the interested party—Interested party (the new licensee) obtained said quarry licence on payment of a small annual rent only—Damage to be caused to the applicants if the order applied for is not granted held to be irreparable and much greater than the damage, if any, which the interested party will sustain if the order is issued—Application for a provisional order granted.*

Provisional order—Provisional order suspending effect and operation of an administrative executory decision pending

determination of the recourse already filed under Article 146 of the Constitution—Principles applicable—Factors to be taken into account—Rule 13 of the Supreme Constitutional Court Rules, 1962.

Provisional order—The notion of irreparable harm (if the order is refused)—What constitutes irreparable harm—Pecuniary loss—When considered as irreparable.

Irreparable harm—See supra, passim.

This is an application in a recourse already filed for a provisional order under Rule 13 of the Supreme Constitutional Court Rules, 1962.

The facts sufficiently appear in the judgment of the learned Judge granting a provisional order suspending the effect of the quarry licence granted to the interested party pending determination of the recourse, on the main ground that irreparable harm would be caused to the applicants if the order applied for is refused.

Cases referred to :

Cleanthis Georghiades (No. 1) v. *The Republic* (1965) 3 C.L.R. 392, at p. 395;

Iordanou (No. 2) v. *The Republic* (1966) 3 C.L.R. 696, at p. 699.

Application.

Application for a Provisional Order restraining the effect and operation of a quarry licence granted to the interested party pending the determination of a recourse against the decision of the respondents to determine all quarry licences which had been granted to the Kythrea Lime Company and to grant the said quarry licence to the interested party.

A. Dikigoropoullos, for the applicant.

N. Charalambous, Counsel of the Republic, for the respondent.

M. Paschali (Miss) with *A. Markides*, for the interested party.

Cur. adv. vult.

The following judgment was delivered by :-

MALACHTOS, J. : The applicants in this recourse, which is made under Article 146 of the Constitution, apply to the Court for the following relief :

1. A declaration that the act or decision of the respondent, which was communicated to applicants under cover of a letter dated 15/6/1972 and was received by them on the 17/6/1972, whereby respondent purports (a) to determine with effect from the 31/5/1972, all the quarry licences, (including class A quarry licence No. 9) which had been granted to the Kythrea Lime Company under the provisions of the Mines & Quarries (Regulation) Law Cap. 270 and the Mines & Quarries Regulations 1958, (b) To grant a quarry licence (No. 2505) to Christophis Makris, respecting an area which formed part of quarry licences No. 9 and 1903, is null and void and of no effect whatsoever as having been made and/or taken contrary to the provisions of the law and/or of the Constitution and/or in excess and/or abuse of their powers if any.

2. A declaration that the act or decision of the respondent which was communicated to applicant No. 5 under cover of a letter dated 15/6/1972, and was received by the addressee on the 19/6/1972, whereby respondent purports to cancel with effect from the 31/5/1972 all the quarry licences Nos. 9, 1123, 1531 and 1903 granted to the Kythrea Lime Company under the provisions of the Mines & Quarries (Regulation) Law, Cap. 270 and the Mines & Quarries Regulations, 1958, is null and void and of no effect whatsoever, as having been made or taken contrary to the provisions of the Law and/or of the Constitution and/or in excess or abuse of their powers if any.

This recourse was filed on the 26th June, 1972, together with an application for a provisional order

suspending the effect and operation of quarry licence No. 2505, which was granted by the respondents to Christofis Makris (interested party) regarding an area which forms part of quarry licences No. 9 and 1903 of the firm Kythrea Lime Company. The application is supported by two affidavits sworn by applicants 1 and 5.

The salient facts as far as the present application is concerned are the following :

Applicants 1 to 4 are limited partners in the firm Kythrea Lime Company, which was on the 25th day of August, 1948 registered under the Partnership and Business Names Law, Cap. 116, as a limited partnership. The main business of the said company is manufacture and trade in lime. Besides applicants 1 to 4 there are five more partners including Yiannis G. Makris, who is registered as the only general partner, and Christofis G. Makris, the interested party. In order to carry on its business the firm applied and secured the following quarry licences :

1. Quarry licence No. 9 Class A, granted by the Governor of the former Colony of Cyprus on the 13/3/1960 for a period of 15 years.

2. Quarry licence No. 1123, class B, granted to the firm on 17/12/65 for a period of 10 years.

3. Quarry licence No. 1531, class B. granted on 9/11/67 for a period of 10 years; and

4. Quarry licence No. 1903, class B, granted on 24/4/72 for a period of 4 years.

The partnership was dissolved on 16/1/1972 by a notice sent by the General Partner Yiannis G. Makris to the Registrar of Partnerships. As a result of application No. 3/72 filed in the District Court of Nicosia on 4/2/72, applicant No. 5, who is an accountant, was appointed as liquidator together with Yiannis G. Makris to wind up the affairs of the said firm under the provisions of the Partnership Law, Cap. 116. It appears that after the dissolution of the firm the applicants came to know

that the general partner, Yiannis G. Makris, together with three of the remaining partners, formed a new company under the name of Asbestopiia ke Skyropiia Makris Ltd. with a view to operating a quarry licence in respect of the same area covered by the firm's quarry licence No. 9 and an application was made to that effect by Christofis G. Makris, the interested party.

By a letter dated 22/2/1972, *exhibit* J, the applicants informed the Senior Mines Officer (respondent 1) that they considered the licences granted to the firm, as aforesaid, valid and in full force and effect and that the rights and the interests under them were partnership property which belonged to all nine partners in common inspite of the dissolution of the partnership as from the 16/1/1972 by the notice given by the said general partner Yiannis Makris. In this very same letter the said applicants objected strongly to the grant of any quarry licence or permit to Christofis G. Makris in respect of any of the plots covered by quarry licence No. 9 or any other licence granted to the firm and submitted that —

(a) until the affairs of the partnership are wound up, under the provisions of sections 49(3) and 40 of the Partnership Law, Cap. 116, the rights, liberties, powers and privileges granted under the said quarry licence No. 9 or any other licence should be exercised on behalf of all nine partners, by the liquidators appointed by the Court to wind up the affairs of the partnership and complete the unfinished transactions; and

(b) that subsequent to the completion of the unfinished transactions the aforesaid two persons appointed by the Court to apply on behalf of all the partners to the Government of the Republic for its consent to transfer or assign the rights and privileges conferred under the said licence to a person or persons or corporate body to be agreed upon or approved by the Court.

By letter dated 11/5/72, *exhibit* D, respondent 1 wrote to the liquidators and requested them to inform

him within 15 days whether the obligations of the firm for the supply of quarry materials and/or lime to third persons, were fulfilled and informed them at the same time that if he had no reply to his above request within fifteen days as from 11.5.72 he would take it that the obligations of the firm had been fulfilled and that he was at liberty to act accordingly.

To the above letter Ioannis G. Makris, the general partner and liquidator of the firm, replied by letter dated 12/5/1972, *exhibit* F, informing respondent 1 that the working operations of the firm would definitely stop on 31/5/1972. In fact publications to that effect had appeared in the local press, *Exhibit* C. The other liquidator, however, did not reply, and on the 19th May, 1972, addressed to respondent 1 a letter, *exhibit* K, where he was complaining that although 86 days had elapsed since the letter of the 22nd February, 1972, *exhibit* J, was addressed to him, yet he had received no reply.

By letter dated 25th May, 1972, *Exhibit* L, the Senior Mines Officer, informed applicant No. 5 that the delay was due to the fact that he had not yet received a final legal advice from the Legal Department and that he should not fail to communicate with him when he would be able to do so.

By letter dated 26th May, 1972, *exhibit* M, addressed to respondent 1, applicant No. 5 referred to the letter of the 25th May, 1972, *exhibit* L, and added the following :

> "7. It is with regret that I have to state that, in the absence of any explanation, the undue haste shown by your Department to deal summarily with this case involving very substantial rights of my clients, without waiting to receive full legal advice on the points raised by them and without replying to them for three months, appears to me to be contrary to the well recognized principles of good administration. You will appreciate that your decision in this matter is indispensable in winding-up the affairs of the partnership by selling the business as a going concern and not as plant and machinery etc.

8. In conclusion may I reiterate that I am still awaiting your reply to my clients' petition dated 22.2.1972. Meantime I shall be obliged to receive your assurance that you will take no action regarding my clients' quarry licence before you communicate to me your fully reasoned decision as required under Article 29 of the Constitution. Needless to say that, if you act unilaterally to the detriment of my clients' rights, both you as well as any other competent authority under the law may be held responsible for any damage that my clients may suffer as a consequence of your action."

In answer to his above letter applicant No. 5 received a letter from respondent 2 dated 15th June, 1972, attached to the application as *exhibit* 1, which reads as follows :

"I would refer to the above subject ending with your letter dated 26th May, 1972 and I would advise you as follows :-

Having received legal advice from the Attorney-General of the Republic I have decided to determine all the quarry licences which were held by the above named Company with effect from 31st May, 1972, (as far as Q.L. No. 9 is concerned, being Class A, I received my Director-General's authority).

A quarry licence has been issued to Mr. Christofi Makri Q.L. No. 2505 respecting an area which formed part of Q.L. No. 9 and No. 1903."

On the same day respondent 1 addressed a letter to applicant No. 5 and the other liquidator, attached to the application and marked *Exhibit* 2. which reads as follows :

"With reference to your advice published in the local papers on the 11.5.1972, and with further reference to my letter to you both Ref: M.Q. 259 dated 11.5.1972, which so far has been answered only by Mr. Y. Makris to the effect that the Company terminates all its activities (in this respect

please see order of the District Court of Nicosia drawn up the 7th day of Febr. 1972 and signed by the Honourable Mr. Justice Stavrinakis, Ag. President District Court copy of which order was submitted to me by you), I now advise you that since no quarrying operations can be continued (as a matter of fact the partnership as a firm is not and will never be in a position to pursue such quarrying operations, as it has been dissolved) all the licences Nos. 9, 1123, 1531 and 1903 in the name of the above referred dissolved Company are hereby cancelled with effect as from 31st May, 1972."

It is significant to note here that the interested party addressed a letter dated 16/6/1972 to the two liquidators of the firm informing them that as from the 30th May, 1972, he had been in possession of quarry licence No. 2505 (covering quarry licence No. 9 and 1903) and asking them to remove by the end of June, 1972, all the plant and machinery of the firm which were installed on the plots covered by the above licences. The liquidators were further informed that if they failed to do so then the interested party would debit them with the sum of £100.- daily by way of damages. A photo copy of the said licence has been produced and is *Exhibit* 1 before me.

Against these decisions the applicants filed the present recourse, as well as the application for a provisional order.

Learned counsel for the applicants in addressing the Court in his attempt to show that the acts of the respondents are illegal and that if the order applied for is not granted the applicants will suffer irreparable damage, reiterated the facts contained in the affidavits in support of the application and argued on the grounds of law on which the application is based, which grounds are the following :

1. The decision/s complained of are based upon a misconception of both the law and the facts of the case in that, respondent wrongly assumed that :-

(a) The firm Kythrea Lime Company is a corporate body or person distinct from its members and that the property of the said firm was vested in the said firm as such corporate body or person.

(b) The rights and/or privileges and/or interests arising out of and/or inherent in the quarry licences Nos. 9, 1123, 1531 and 1903 granted to the said firm did not form part of the assets of the said firm distributable among its partners on the winding up of the said firm.

(c) The quarry licences granted to the said Kythrea Lime Company were mere or bare licences whereas in truth and/or in fact and on a true construction of the relevant provisions of the law the said quarry licences are coupled with an interest and/or are a statutory profit a prendre and/or a right or an interest in land.

(d) The said Kythrea Lime Company has been wound up whereas in truth and/or in fact its partnership affairs have not yet been would up.

2. The decision/s complained of are contrary to the provisions of the Mines and Quarries (Regulation) Law, Cap. 270 and the Mines and Quarries Regulations 1958 in that respondent:

(a) did not comply with the provisions of the said law in purporting to determine the said quarry licence.

(b) The said Law and/or Regulations do not empower and/or authorise respondent to cancel the said quarry licences as he purports to do in his letter to applicant No. 5.

3. Respondent's decision to grant a quarry licence to Christophis Makris "respecting an area which formed part of quarry licences Nos. 9 and 1903" of the said Kythrea Lime Company with effect from 30/5/1972 prior to the lawful determination of the said quarry licences Nos. 9 and 1903 is contrary to the provisions of the relevant Law and/or Regulations.

4. Respondent's decisions complained of are contrary to the provisions of Articles 23 and 28 of the Constitution in that applicant's rights over and/or interest in the assets of the said Kythrea Lime Company are thereby nullified in favour of Christofis G. Makris, another of the limited partners of the said firm.

5. On the facts as set out in Schedule B hereof respondent's acts and/or decisions complained of are contrary to the principles of administrative law and in excess and/or abuse of respondent's powers and duties under the Law and the Constitution.

6. The decisions complained of are not duly reasoned.

7. The decisions of the respondent with retrospective effect are contrary to the basic principles of Administrative Law.

Able arguments were also advanced by counsel for the respondents, as well as for the interested party, in opposing the application.

Counsel for the interested party lay stress on the contents of the affidavit filed in opposition and, in particular, paragraph 3 thereof where it is stated that as a result of the grant of the quarry licence No. 2505 the interested party ordered plant and machinery of the value of £150,000.- and had already undertaken contractual obligations to third parties so that if the order applied for is issued he will suffer irreparable damage.

I now turn to the legal aspect of this application. It is well settled that in making a provisional order in an administrative recourse under rule 13 of the Supreme Constitutional Court Rules 1962, our Courts have to be guided by the jurisprudence existing in other countries where competence analogous to our own, under Article 146, exists. Such jurisprudence in particular exists in Greece where the competency of the Greek Council of State for annulment is closely similar to our own under Article 146, and is set out, *inter alia*, by Tsatsos second edition, page 281 et seq. (now third edition, pages 423-431).

(See *Cleanthis Georghiades* (No. 1) v. *The Republic* (1965) 3 C.L.R. 392. In *Georghiades'* case at page 395, it is stated that :

> "There is no doubt that serious questions, mainly questions of law, arise for determination in the present Case. So, this is not a Case where the claim of applicant is so obviously unfounded as to lead the Court to the conclusion that it is not proper in any case to grant the provisional order applied for. But it is not either a case where the claim of applicant is clearly bound to succeed; had it been so this could have been a factor militating strongly in favour of the making of the provisional order. The merits of the Case, therefore, cannot have a decisive effect on the outcome of the application for a provisional order.
>
> It is a cardinal principle of administrative law that where a provisional order is sought in an administrative recourse and where on the one hand the non-making of the order will cause damage, even irreparable, to the applicant but on the other hand the making of such an order will cause serious obstacles to the proper functioning of the administration then the personal interest of the applicant has to be subjected to the general interest of the public and the provisional order should not be granted. It goes without saying that where the non-making of the provisional order will not cause to an applicant irreparable damage such an order will not be made, in any case, on the strength of the application made by applicant for the purpose."

In the case of *Iordanis Iordanou* (No. 2) v. *The Republic* (1966) 3 C.L.R. 696, at page 699, it is stated that :

> "It is correct that on the face of the recourse there do appear serious allegations, by which applicant is challenging his transfer, but they do not amount, on the material before me at present, to such a case of flagrant illegality of the transfer in question, as would make it necessary for this

Court to intervene and prevent it from taking effect, at this stage; they are matters to be gone into properly at the trial of this recourse."

It is clear from the above that an applicant in order to succeed in an application for a provisional order under rule 13 of the Supreme Constitutional Court Rules, 1962, must show to the Court that his application is likely to prevail on the merits and that the non making of the order will cause him irreparable damage. It goes without saying that flagrant illegality of an administrative act militates strongly to the making of a provisional order even though irreparable damage has not been proved. As it appears from Louis L. Jaffe on "Judicial Control of Administrative Actions" the above principles are accepted in American Jurisprudence more clearly. In Chapter 18 under the heading of "Temporary Judicial Stays of Administrative Action Pending Judicial Review" of this book, at page 689, it is stated that :

> "Despite the silence or variant wording of applicable statutes permitting stays 'upon good cause shown' or upon a 'finding' of irreparable 'damage', the power remains a discretionary and equitable one to be exercised according to traditional standards. The District of Columbia Circuit, with an extensive experience in motions for stays, has attempted to cast them into a formula in *Virginia Petroleum Jobbers Assn.* v. *FPC* (259 F. 2d. 921 (D.C. Cir. 1958)), which has since been widely referred to in the lower federal Courts. The applicant must show 1) that he is very likely to prevail on the merits; 2) that if he should prevail on the merits he will suffer irreparable injury if the stay is not granted: 3) that the other parties will not suffer harm: and 4) that the public interest will not be harmed."

In the present case very serious questions, particularly questions of law, arise for determination. As there is danger of prejudgment pendente lite, if I were to pronounce on the above matters at this stage, a course which, in my view, is discouraged by rule 13(1) of the Supreme Constitutional Court Rules 1962. the only

thing I can say is that on the material so far placed before me, it appears that the applicants have a good cause in applying to the Court to declare the decisions complained of as null and void and of no legal effect, and that there is a reasonable probability to their being successful in the end.

I now come to the other ground, namely, that the applicants will suffer irreparable injury if the order applied for is not granted.

What constitutes irreparable injury is not simply a question whether in fact a loss will be irrecoverable. Even if irreparable loss is not a necessary product of the administration of justice, there are, nevertheless, some losses which must be borne by the litigant who must console himself with the general profit from a complex, regulated society. Administration of the concept of irreparable injury obviously involves a balancing of conflicting interests. Loss of the mere use of money, which an applicant is prevented from receiving, or required to pay out by administrative action, is not necessarily remediable. In a case where the proceeding before the Administrative Court is essentially a dispute between private parties, the relevance of traditional equity principles is obvious. (See Jaffe "Judicial Control of Administrative Action" pages 690-691).

No doubt in this case the injury alleged by the applicants is only pecuniary loss. Pecuniary loss is generally recoverable. In some cases, however, pecuniary loss is considered as irreparable if it is going to endanger a commercial business or the ability of providing the means of support of the applicant. Furthermore, in cases where the extent of the damage in conjunction with the conditions under which the injured party is living, does not cover the above case, the pecuniary loss may amount to irreparable injury if the person who is liable to pay is insolvent, or the damage that will result from the execution of the administrative act, cannot be ascertained. (See Tsatsos "The Recourse for Annulment before the Council of State", third edition, page 428, paragraph 235).

It is clear from the facts before me that the public

interest will not be harmed if this application is decided either in favour or against the applicants, as the present proceedings are in substance a dispute between private parties. So, on the one hand we have the partnership which, as a result of the quarry licences granted to it incurred expenses of thousands of pounds in preparing the land for the required purpose and by installing plant and machinery thereon, particularly on the plot which is covered by licence No. 9, and, on the other hand, the interested party who has obtained a quarry licence for this very same land on payment of only a rent of £72.500 mils per year. This appears in *exhibit* 1, his quarry licence.

Furthermore the interested party has already started quarry operations on the land in question and has notified the two liquidators of the firm to remove the plant and machinery installed thereon.

It is clear, therefore, that the damage which will be caused to the applicants will be great and unascertainable.

Although the allegations of the interested party that he has ordered machinery valued at £150.000.- as a result of the quarry licence granted to him, may be true, yet, it is very doubtful whether he has already entered into substantial contracts with third parties before the arrival and installation of the said plant and machinery.

It is clear, therefore, that the damage which will be caused to the applicants if the order applied for is not granted, will be irreparable and much greater than the damage, if any, which the interested party will sustain if the order is made.

For all the above reasons I have decided to exercise my discretion in favour of the applicants and make the order applied for.

Therefore, an order is hereby made suspending the effect and operation of quarry licence No. 2505 which was granted by the respondents to Christofis Makris.

the interested party, pending the final determination of this case.

The costs of this application to be costs in cause and in no case against the applicants.

Order accordingly.