[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

LANITIS BROS. LIMITED (No. 1),

Applicants,

and

THE CENTRAL BANK OF CYPRUS,

Respondent.

(*Case No.* 74/74).

Provisional Order—Rule 13 *of the Supreme Constitutional Court Rules,* 1962*—Recourse against decision of the respondent Central Bank of Cyprus considering the applicant Company a resident Company controlled by non-residents and against decision refusing unlimited banking facilities to the applicant Company—Application under rule* 13 (supra) *staying or suspending said decisions pending final determination of the recourse—Principles governing the grant or refusal of a provisional order—Well settled—Triable issue—Irreparable harm—Frustration of important aims of administrative functioning in case the provisional order is granted—Pecuniary damage—Irreparable harm—There are cases where a pecuniary damage may be considered as irreparable e.g. when such damage endangers a commercial enterprise exposing it to risks such as bankruptcy and the like—But in the present case it cannot be said that such irreparable damage would be caused to the applicants if the provisional order is refused—Moreover, even in cases where irreparable harm will inevitably be caused on account of the duration of the* sub judice *administrative decision, a speedy trial of the recourse may lead to the dismissal of the application for a provisional order—Application for a provisional order refused—But speedy trial ordered—Cf. The Exchange Control Law, Cap.* 199, *section* 32 (3)*—The Exchange Control (Amendment) Law,* 1972, *enacted on July* 6, 1972*—See further immediately hereunder.*

Provisional Order suspending the effect of administrative decisions challenged by a recourse under Article 146 *of the Constitution—Principles governing the grant or refusal of such provisional order—The stay of an executory administrative decision has the*

character of an exception to the rule of executability of administrative acts or decisions—Consequently, applications for such provisional orders should be sparingly granted—See further supra.

Recourse under Article 146 *of the Constitution—Provisional order suspending effect of the* sub judice *administrative decision—Rule* 13 *of the Supreme Constitutional Court Rules,* 1962*—Principles applicable etc.—See* supra.

By this recourse under Article 146 of the Constitution the applicant company challenges the validity of the decisions of the respondent Central Bank of Cyprus (a) to consider the applicants as a company resident in Cyprus, but controlled by non-residents for the purposes of section 32 (3) of the Exchange Control Law, Cap. 199, and (b) not to allow Barclays Bank International Ltd. of Nicosia, to grant to the applicants unlimited banking facilities by way of loans, overdrafts etc. Upon the filing of this recourse, the applicants filed an application under Rule 13, of the Supreme Constitutional Court Rules, 1962, for a provisional order staying or suspending the aforesaid decisions pending final determination of the recourse.

After reviewing the facts and the authorities, the learned Judge refused the application for a provisional order, but in fairness to all concerned he ordered a speedy trial.

Note: The principles governing the granting or not of a provisional order for the stay of administrative decisions pending the determination of the recourse are to be found in a number of decisions of this Court, *inter alia*, *Cleanthis Georghiades* (*No.* 1) v. *The Republic* (1965) 3 C.L.R. 392, at p. 395; *Iordanou* (*No.* 1) v. *The Republic* (1966) 3 C.L.R. 308; *Sofocleous* v. *The Republic* (1971) 3 C.L.R. 345 and *Goulelis* v. *The Republic* (1970) 3 C.L.R. 81.

Refusing the provisional order applied for, but directing a speedy trial, the learned Judge:

Held, (1) It is a well settled principle that the law dealing with provisional stay has the character of an exception to the rule of executability of the administrative acts; consequently, applications for such stay are sparingly granted (see *Sofocleous'* case (*supra*) at p. 345; and Kyriacopoulos, Diikitikon Dikaion, 3rd ed. vol. 3, at p. 138).

(2) For the purpose of this application I shall treat the present recourse as raising a triable issue. Having done so, I will now proceed to approach the case from the point of view of the alleged irreparable damage to the applicants if the stay is refused; and from the point of view, as well, of the risk of frustration of important aims of the uninterrupted administrative functioning, if the stay applied for is granted.

(3) Having considered the facts and circumstances of this case I have not been persuaded that the applicant Company will suffer irreparable damage in the sense that they will not be in a position to meet their financial obligations and as a result be forced to dismiss their employees, close down the factory, stop carrying on their business and face immediate danger of bankruptcy, if the *sub judice* decision is not stayed, as applied for, pending the determination of the recourse.

(4) On the other hand, I am of the opinion that if stay is granted, the important aims of administrative functioning, namely, the enforcement of the Exchange Control Law, a measure to protect the national economy, would be frustrated.

(5) In fairness to all concerned though I have not accepted that irreparable damage will be caused to the applicants on account of the duration of the *sub judice* decision, yet, in the circumstances of this case I think it proper to deal with this recourse the soonest possible and I direct a speedy trial to be held.

Application for provisional order dismissed. No order as to costs.

Cases referred to:

Sofocleous v. *The Republic* (1971) 3 C.L.R. 345;

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

Iordanou (No. 1) v. *The Republic* (1966) 3 C.L.R. 308;

Goulelis v. *The Republic* (1970) 3 C.L.R. 81.

Application for Provisional Order.

Application for a provisional order staying (a) the decision of the respondent to consider applicants as a body corporate resident in Cyprus, but controlled by non-residents for the purposes of section 32 (3) of the Exchange Control Law, Cap. 199 and (b) the decision of respondent not to allow Barclays

Bank International Limited of Nicosia, to grant applicants unlimited banking facilities by way of loans, overdrafts, etc. until final determination of a recourse whereby, the applicants, *inter alia*, challenged the above decisions of the respondent as being *null* and *void*.

K. Michaelides, for the applicants.

L. Loucaides, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following decision was delivered by:-

A. LOIZOU, J.: This is an application made under Rule 13 of the Supreme Constitutional Court Rules, 1962, for a provisional Order of this Court:-

"A. Staying the decision of the respondent to consider applicants as a body corporate resident in Cyprus but controlled by non-residents for the purposes of section 32 (3) of the Exchange Control Law, Cap. 199 (hereinafter referred to as 'The Law') until the final determination of the recourse.

B. Staying the decision of respondent not to allow Barclays Bank International Limited, of Nicosia, to grant applicants unlimited banking facilities by way of loans, overdrafts, etc., until the final determination of the recourse".

These two prayers coincide with the first two reliefs prayed for in the recourse itself, the third one being to the effect that the decision of the respondent to allow the applicants banking facilities up to £200,000.- till the 28th February, 1974 on conditions and not to allow them banking facilities up to £400,000 is *null* and *void* and of no effect whatsoever.

The applicants are a public company, limited by shares, incorporated in Cyprus in 1944 under the provisions of the Companies Laws, for the purpose of carrying on the business of distillation, production, preparation or purification of essential oils, manufacture of juices, etc. and they carry on the business, *inter alia*, of bottlers in Cyprus of Coca Cola and other beverages.

In or about 1963 the Food Products Corporation Limited was incorporated in the Bahamas Islands and the 93.595 per

cent of the shareholders of Lanitis Bros. Ltd. exchanged their shares with shares of the Food Products Corporation Ltd. It is not in dispute that the overwhelming majority of the shares of the Food Products Corporation Ltd. are in the hands of residents of Cyprus, and as stated in paragraph 5 of the affidavit filed in support of the present application, the latter appoint and remove its Directors and control the voting rights in the said Company.

At the time of the incorporation of this Company the Bahamas Islands were within the scheduled territories (Sterling Area) and no permission was required under the Cyprus Exchange Control Law, although exchange control approval was required pursuant to the provisions of section 32 (2) of the Law in passing the control of the applicant Company to the foreign non-resident Company.

By the enactment of the Exchange Control (Amendment) Law, 1972, which came into force on the 6th July, 1972, the scheduled territories (Sterling Area) were abolished and the transfer of funds from Cyprus to any country of the world, including former scheduled territories (Sterling Area) countries required permission from the Central Bank of Cyprus. All Companies which were controlled by residents of the scheduled territories were affected as regards their borrowing from local sources in view of the provisions of section 32 (3) of the Law. This section reads as follows:-

> "(3) Except with the permission of the Financial Secretary, no person resident in the Colony shall lend any money or securities to any body corporate resident in the scheduled territories which is by any means controlled (whether directly or indirectly) by persons resident outside the scheduled territories:
>
> Provided that this subsection shall not apply where the lender after making such inquiries as are reasonable in the circumstances of the case does not know and has no reason to suspect that the body corporate is controlled as aforesaid.
>
> No person resident in the scheduled territories shall in the Colony do any act which involves, is in association with or is preparatory to any such transaction outside the Colony as is referred to in this subsection".

It was then that the Cyprus Exchange Control Law came into the picture with regard to the borrowing by the applicant Company. Lanitis Bros. Ltd. being a resident company controlled by Food Products Corporation Ltd. became, according to the respondent, a resident company controlled by non-residents. Therefore, their financiers in Cyprus, namely, Barclays Bank International Ltd. required permission to finance them and to continue their overdraft facility which previously could be granted without permission.

Although from the statement of facts set out in the Opposition it appears that the question of the status of the applicant Company being considered by the respondent Bank as a resident company controlled by non-residents, arose as far back as July-August, 1972, I shall not deal with that aspect of the case and the possible legal consequences now. In setting out the relevant facts for the purposes of this application, I shall confine myself to *exhibit* 1 by which Barclays Bank International Ltd. submitted an application headed " Application to grant a loan to a resident company controlled from outside the Republic" by which it applied for permission under section 32 (2) of the Law, to establish an overdraft loan facility for the applicant Company to a maximum amount of £150,000 in substitution of a previous authority dated the 30th November, 1973, and for the purpose of the applicant Company's seasonal requirements, peak demand for credit facility taking place during the second quarter of the calendar year. The respondent Bank approved the aforesaid loan facility until the 31st January, 1974, on the condition that out of the above amount, the sum of £19,048,071 mils was paid into a blocked account in accordance with their directions of the 8th June, 1973. By the same document Barclays Bank International Ltd. was requested to inform the applicant Company that on submission of an application for renewal or revision of that facility, they would be required, *inter alia*, to provide them with a statement showing their exact receipts and payments compared with their forecast for the period involved.

By *exhibit* 2, a letter of the 4th February, 1974, written by the respondent Bank to the secretary of the applicant Company, the former confirmed that they had already approved an overdraft facility with Barclays Bank International Ltd. to the extent of £200,000 till the 28th February, 1974, adding therein that any further request for further approval will be considered

in the light of the particular circumstances, and in particular the receipt by them of the information required in respect of applicant's group of companies. They further reiterated, "as we already mentioned to you arrangements must be made for the immediate repatriation of the amount of about £50,000 due to you by Food Products Corporation Ltd. and of any other amounts due to you by non-residents and/or foreign institutions. In this respect please arrange to furnish us with a detailed list showing the amounts due to your company by non-residents. The list should not include the value of goods exported from Cyprus.....". This amount of £200,000 was intended to cover the financial needs of the applicant Company, as it appears from *exhibits* 12A and 12B, the statement entitled "Cash Flow—February and March, 1974", by which their need on the 31st March, 1974 would be £260,000. The repatriation of the £50,000 would leave a very small amount needed by applicant Company and it is upon this that counsel for the respondent has urged this Court that the danger to the existence of the applicant Company is not a reality.

Counsel for the applicant Company has stated in the course of his reply that this amount of £50,000 Sterling would be repatriated by the 15th of April.

Argument has been advanced on the question whether the stand of the applicant Company regarding their legal status is as claimed by them or not and in particular whether in view of the fact that the shareholders having the control of the Food Products Corporation Ltd. are residents of Cyprus, the approach should not be different in the sense that the shareholders having the control of this Corporation are Cypriot residents the applicant Company should be considered as a resident company controlled directly or indirectly by residents of Cyprus.

I do not propose to deal with the merits of the recourse, in order not to prejudice the pending determination of the recourse proper. This is consistent with the approach of this Court in *Sofocleous* v. *The Republic* (1971) 3 C.L.R. 345 wherein reference to a passage from "The Compliance of the Administration to the Decisions of the Council of State" by Ph. Vegleri is made and also as stated in *Cleanthis Georghiades* (*No.* 1) v. *The Republic* (1965) 3 C.L.R. 392 at 395—"This is not a case where the claim of the 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 and neither a case where the applicant is clearly bound to succeed".

For the purposes of this decision I shall treat this case as raising a triable issue and I leave it at that.

The principles governing the granting or not of a provisional Order for the stay of an administrative action pending the determination of the recourse, are to be found in the judgments of this Court, *inter alia*, *Cleanthis Georghiades* (*No.* 1) v. *The Republic* (*supra*) *Iordanou* (*No.* 1) v. *The Republic* (1966) 3 C.L.R. p. 308, *Sofocleous* v. *The Republic* (*supra*) and *Goulelis* v. *The Republic* (1970) 3 C.L.R. 81.

Having considered that there is a triable issue, I will approach the case from the point of view of the existence or not of irreparable damage and whether the important aims of administrative functioning are frustrated if the provisional Order is granted.

In this respect, the factual background relied upon by the applicant, is to be found in the affidavit filed in support of the present application and in particular paragraphs 9, 10, 11 and 12, which read as follows:-

"9. Applicants are a going concern; they require substantial sums of money for replacement of their machinery and equipment, to pay for materials required for the production of their products and they need an overdraft up to C£400,000 without time limits in order to be able to plan their operations on a long term basis. They cannot operate on day to day basis.

10. The loans and overdraft facilities are absolutely necessary for the operation of the company. Without them the company cannot operate and face the immediate prospect of bankruptcy.

11. Applicants from the overdraft approved can to-day utilise only about C£20,000 (as the other amount has already been used before). Their present commitments and obligations exceed by far the amount of C£20,000.

12. If the Provisional Order requested is not granted applicants will not be in a position to meet their financial obligations as a result of which they may be forced to

dismiss their employees, close down their factory and stop carrying on their business and face immediate danger of bankruptcy. Thus non-making of the provisional order requested will cause to the applicants irreparable damage".

It is a well settled principle that the law dealing with stay has the character of exception to the rule of executability of administrative acts and it is from this character that the strict framework of the criterion on the basis of which the application to stay is decided is drawn. (See *Sofocleous* case (*supra*) at p. 352 and Kyriacopoullos Diikitikon Dikaion, vol. 3, third ed. page 138, to the effect that the stay is an exceptional measure and for that purpose relevant applications are sparingly granted, given that the basis of such application is the personal interest to which on principle, the general interest should not be sacrificed).

Whilst at this point, I may also quote from Tsatsos: "The Recourse for Annulment before the Council of State" 3rd ed. page 528, where it is stated that the pecuniary damage on principle is capable of re-establishment. In certain cases, however, and especially when it is about damage capable to put in danger a commercial enterprise or the ability of maintenance of the person applying for stay, the pecuniary damage rightly is considered as irreparable.

Another factor as to whether the damage will be irreparable or not, is if the person likely to compensate is solvent or not.

Having considered the facts and circumstances of this case I have not been persuaded that the applicant Company will suffer irreparable damage in the sense that they will not be in a position to meet their financial obligations and as a result be forced to dismiss their employees, close down their factory, stop carrying on their business and face immediate danger of bankruptcy if the respondent's decision is not stayed, as applied for, pending the determination of these proceedings.

If I were to decide otherwise and grant this application for stay, in effect I would be performing the duties of the respondent Bank in whose competence the matter lies, as evidently, the Relief 'B' sought by this application is the annulment of a negative act and Relief 'A' is so interwoven with it and merged into it that it cannot be treated on a separate basis, and if granted, the important aims of administrative functioning, namely, the

enforcement of the Exchange Control Law, a measure to protect the national economy, would be frustrated.

In conclusion, I would like to reiterate what I said in *Sofocleous* case (*supra*) adopting a passage from Tsatsos which is to the effect that even in cases where irreparable damage will inevitably be caused on account of the duration of the *sub judice* act, the speedy trial of the recourse may lead to the dismissal of the application for stay and in fairness to all concerned, though I have not accepted that irreparable damage will be caused to the applicant, yet, in the circumstances of this case I think it proper to deal with this recourse the soonest possible. Therefore, I fix same for directions on the 16th March, at 9 a.m. and for trial on the 23rd March at 10 a.m.

For all the above reasons the application for a provisional Order is dismissed, but I make no order as to costs.

Application dismissed; no order as to costs.