1978 August 8

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

KYRIAKI PETROU HADJIPETROU AND OTHERS,
Applicants,

v.

THE MUNICIPALITY OF NICOSIA,
AND/ OR THE MUNICIPAL COMMISSION OF NICOSIA,
Respondent.

(*Case No.* 87/77).

Time—Within which to file a recourse—Article 146.3 *of the Constitution—Decision imposing fees for issue of a building permit—Brought to the knowledge of applicants in* 1971*—Who filed no recourse against it—Their counsel reverting to the matter in* 1977 *and asking for re-examination—Request for re-examination rejected—Recourse against it—No new factual elements brought to the notice of the administration—And no new appreciation of already existing factual elements—Latter decision a mere confirmatory of the previous executory decision—And as such it cannot be made the subject of a recourse—Said recourse out of time as it has not been filed within* 75 *days from the* 1971 *decision.*

Administrative Law—Executory acts and decisions—Confirmatory act—New inquiry.

Administrative Law—Administrative act—Validity—Determined on the basis of the legal status existing at the time of its issue.

On November 21, 1969, the applicants submitted an application to the respondent Municipality for the issue of a building permit. On being asked by the respondents to submit, also, an application for a demolition permit they did so by August 26, 1970.

On March 19, 1971, applicant Savvidou was informed that her application for a building permit had been checked and was

asked to pay the relevant fees for the building permit which amounted to £276. These fees were double than the fees that would have been paid had the permit been issued before the 13th October, 1970, the date when the Streets and Buildings (Amendment) Regulations, 1970, were published.

Applicants protested in writing to the respondent on May 29, 1971, and pointed out that since the technical Department of the respondent had checked the application as from the 29th May, 1970 and the fees at the time were assessed at £136.– and recorded on the relevant document, they could not understand why they were not immediately asked to pay these fees. The respondents turned down this protest by means of their letter dated November 2, 1971; and they, also, turned down similar protests, which were addressed to them on May 8, 1974 and on February 4, 1975.

On March 16, 1976 the applicants paid the increased fees under protest.

On January, 1977 their advocate wrote* to the Municipality pointing out certain facts and asking them to re-examine the whole matter.

Respondents replied by letter dated the 3rd of February, 1977, stating that it was impossible to refund any part of the duly paid fees.

This last reply of the respondents (dated 3.2.77) was challenged by means of this recourse which was filed on the 14th March, 1977.

On the question whether the present recourse has been filed within the 75 days prescribed by Article 146.3 of the Constitution:

Held, (after dealing with the concept of confirmatory and executory act and new inquiry—vide pp. 244-45 post) that as it is clear that as far back as 1971 the decision of the respondent Municipality with regard to the fees was clearly brought to the knowledge of the applicants and yet no recourse was filed against that decision; that as by means of the letter of applicants' advocate dated 12th January, 1977 no new factual elements have been brought to the notice of the administration and no new

* See the text of the letter at pp. 243-44 *post*.

appreciation of already existing factual elements has taken place, the decision complained of was a mere confirmatory act of a previous executory decision based on the same factual and legal elements and as such it cannot be the subject of a recourse; and that, accordingly, this recourse which is directed against the demand of increased fees, is out of itme.

(*Note:* In spite of the above conclusion the Court dealt with the merits of the application and after considering applicant's contention that the fees in question should have been those provided for by the regulations in force at the time the application was submitted and not at the time the *sub judice* administrative decision was taken, dismissed same by adopting the principle formulated in *Lordou and Others* v. *The Republic* (1968) 3 C.L.R. 427 to the effect that the "validity of an administrative act is determined on the basis of the legal status existing at the time of its issue".

Application dismissed.

Cases referred to:

Loiziana Hotels Ltd., v. *Municipality of Famagusta* (1971) 3 C.L.R. 466;

Lordou & Others v. *The Republic* (1968) 3 C.L.R. 427.

Recourse.

Recourse against the decision of the respondent by means of which there were asked increased fees for the issuing of a building permit.

A. Pandelides, for the applicants.

K. Michaelides, for the respondent.

Cur. adv. vult.

A. Loizou J.: By the present recourse the applicants seek the annulment of the decision of the Municipality of Nicosia (hereinafter referred to as the respondent Municipality) contained in their letter of the 3rd February, 1977, and by which they asked increased fees for the issuing of a building permit and/or by which they refused to remit the difference of the increased fees which the applicants paid for the said building, on the ground that the said decision was without any legal effect and/or was taken in excess and/or abuse of power.

The relevant facts are the following:-

The applicants' predecessor in title—mother of applicants 1,

2 and 3, and wife of applicant 4—submitted on the 21st November, 1969, an application to the respondent Municipality, the appropriate Authority for Nicosia town, under the Streets and Buildings Regulation Law, Cap. 96, for the issue of a building permit in respect of a building to be erected. The respondent Municipality by letter dated 3rd December, 1969 (*Exhibit* 2) asked the said Magdalini to submit also an application for the issue of a demolition permit in respect of the old building standing on her property together with two site-plans. As there was no response to it the respondent Municipality wrote on the 12th June, 1970 (*Exhibit* 3) to her architect asking him to submit the application for demolition permit together with two site-plans, a plan for the sewage system of the proposed building and a plan for a watertight septic tank. On the 26th August 1970, an application (*Exhibit* 6) for a demolition permit was made together with a request to have the absorption capacity of the soil tested so that if the results were satisfactory the construction of a watertight septic tank would not be insisted upon. The applicants in fact dug a hole 5'6" deep, a check was carried out on the 29th August 1960 which proved that the subsoil was of slow absorption capacity and consequently the construction of a watertight septic tank was still found necessary. On the 23rd September 1970, a letter (*Exhibit* 16) was sent to the applicants' architect asking him to submit a plan for the functioning of the sewage system as well as a plan for a watertight septic tank.

As claimed by the respondent Municipality, on the 10th October 1970, at the oral request of the applicants a check of the absorption capacity of a new hole, this time ten feet deep, was carried out and same proved that the subsoil at such deeper depth was of a good absorption capacity. The applicants through their counsel denied that there were two tests carried out regarding the absorption capacity of the subsoil, but I have no difficulty, going through the relevant file, *Exhibit* 17, to accept the version of the respondent Municipality on the matter.

On the 19th March 1971, applicant Magdalini Savvidou was informed by letter (*Exhibit* 7) that her application for a building permit had been checked and was asked to pay the relevant fees which for the building permit amounted to £276.- which were double than the fees that would have been paid had the

permit been issued before the 13th October 1970, the date when the Streets and Buildings (Amendment) Regulations of 1970 were published under Notification number 831 in supplement number 3 to the Official Gazette of the Republic, number 829. By letter dated the 30th April 1971, (*Exhibit* 8) Magdalini Savvidou was informed that the technical services of the respondent Municipality had noticed that she had proceeded with building works although she had not complied with their letter of the 19th March, 1971, and was warned that if within fifteen days therefrom she did not pay the relevant fees for the issue of the permit applied for legal measures would have been taken against her.

On the 29th May, 1971, the applicants protested in writing (*Exhibit* 9) to the respondent Municipality. It was pointed out therein that on the 8th March 1971, when applicant No. 4, visited the Municipality in connection with matters relating to the building, he was informed that in view of the amendment of the regulations the fees would be double, although he had noticed on the relevant document of the Municipality the fees recorded being £136.– and that in his presence that amount was struck out and doubled; thereupon he protested and observed to the appropriate officer that since the technical department had checked the application as from the 29th May, 1970, as it appears on the rubber stamp affixed on *Exhibit* 4, and the fees at the time were assessed at £136.–, he could not understand why he was not immediately asked to pay those fees, and instead the file of the case was put away.

By letter dated the 31st May 1971, (*Exhibit* 10) the applicant, No. 4, sent a cheque (*Exhibit* 10(*a*)) for the sum of £137.500 mils being the fees for the said building permit. On the 2nd November 1971 the respondent Municipality by letter (*Exhibit* 11) asked the applicants to pay the sum of £297.500 mils otherwise they would take Court proceedings against them.

It is clear from the aforesaid that as far back as 1971 the decision of the respondent Municipality with regard to the fees in question, was clearly brought to the knowledge of the applicants, a protest was submitted (*Exhibits* 9 and 10) which was turned down (letter of the 2nd November 1971, *Exhibit* 11) and yet no recourse was filed against that decision. On the 8th May, 1974, the applicants through their then advocate

wrote (*Exhibit* 18) to the respondent Municipality giving their version of the facts to which reference has already been made and informing them that upon having their views after their re-examination of the whole case he intended "to advise his clients to take the necessary steps for the protection of their constitutional right". On the 18th July 1974 the respondent Municipality replying thereto (*Exhibit* 19) stated that the delay in deciding whether a building permit would be granted or not was not due to their fault but to that of the applicants who did not comply with their request in time and therefore the fees to be paid were those in force after the 13th October 1970. As for the amended regulations no exception was made for the building permits issued in respect of applications already submitted. The same advocate wrote again on the 4th February 1975 (*Exhibit* 20) asking that the whole case be re-examined afresh and the fees for the building permit applied for be fixed on the basis of the regulations in force at the time of the submission of the application.

On the 23rd April 1975, the respondent Municipality answered by letter (*Exhibit* 21) dismissing the claim of the applicants for the payment of the lesser fees and asking them to pay the fees due within one month, otherwise legal steps would be taken against them. On the 16th March 1976, applicant No. 4, wrote (*Exhibit* 12) to the respondent Municipality enclosing therein two cheques one for the sum of £137.500 mils for the correct, as he claimed, fees and another one for the sum of £140.- the difference between the old and the new fees which he stated he was paying without them being properly due and Court proceedings would be taken for their recovery if within two months therefrom, were not returned to him, reserving thereby the rights also of his co-owners. A note was made on the said *Exhibit* to the effect that the money should be collected as properly due for the relevant permits which should be issued if they otherwise satisfied the regulations and that the criminal proceedings pending against the applicants for building without a permit should be discontinued. On the 9th April 1976 by letter (*Exhibit* 22) the applicants were informed accordingly, the sum of £277.500 mils was collected as representing the fees payable under the Streets and Buildings Regulations as amended and the relevant receipts were sent to the applicants.

Inspite of this payment under protest, as above explained,

no recourse was filed within 75 days from either the 16th March, or the 9th April 1976. The matter was left dormant until the 12th January 1977 when their present advocate addressed a letter (*Exhibit* 14) to the respondent Municipality on behalf of the applicants.

As it is of significance to the issue whether the present recourse is out of time or not, I intend to quote it verbatim:

"I have instructions from my clients Petros HadjiPetrou, Magdalini Savvidou, Kyriaki HadjiPetrou and Stella HadjiPetrou to refer to their letter to you dated 16th March, 1976 and the payment by my clients of the sum of £137.500 mils and another sum of £140.– as fees for a building permit as well as to the correspondence exchanged before that and place before you the following:–

As it is known their original application for a building permit was submitted on the 21st November 1969 and they were asked to submit also an application for a demolition permit of the old building which was done on the 26th August 1970.

As it appears from the rubber stamp on the submitted plans, same were checked on the 29th May, 1970 by the appropriate officer when the costing was also made and the amount of the fees was fixed at £137.500 mils.

In spite of the fact that on the 26th August 1970 an application for demolition was submitted the relevant building permit was approved on the 19th March 1971, after the plans were reviewed by the appropriate official on the 8th March, 1971, as it appears again from the relevant rubber stamp on the submitted plans. These facts appear not to have been raised nor to have been examined during the previous correspondence on the subject of the amount of the fees payable.

I observe that the plans were checked on the 29th May 1970 and the application for demolition was submitted on the 26th August 1970, nothing was done until the 13th October 1970 when the fees were increased and only on the 13th September 1971 the permit was approved.

Please re–examine the whole subject in the light of these

new facts and bearing in mind also the case of *Loiziana Hotels Ltd.* v. *Municipality of Famagusta* (1971) 3 C.L.R. p. 466, and communicate to me your decision."

The respondent Municipality answered on the 3rd February 1977 by letter (*Exhibit* 15) in which it is stated that with regard to the fees payable for the building permit in question the final plans for the building were submitted after the increase of the fees and in view of the fact that there was also the relevant advice of their legal adviser on the subject, the Municipality found it impossible to refund any part of the duly paid fees.

According to the said legal advice dated the 1st July, 1971 (Red 37 in *Exhibit* 17), the fees for building permits become payable as from the date of their publication in the official gazette and there was nothing in the order of the 13th October, 1970, to permit the collection of fees as in force at the time of the submission of the application.

With regard to the claim of the applicant that the fees had been fixed as far back as March 1970, when the plans were checked and a calculation of the fees at C£136.- made, the advice is to the effect that it was without any importance as "the fees recorded on forms for internal use can be changed at all stages before the completion of the administrative act, they can be amended or adapted to the requirements of the law in force. The internal forms do not constitute, according to us, a form of a declaration of the will of the organ exercising administrative duties".

The first point, therefore, that arises for determination in the present recourse is whether same has been filed within the 75 days prescribed by Article 146.3 of the Constitution. It is common ground that confirmatory acts which merely repeat the contents of a previous executory act and they reiterate the insistence of the administration to the already given solution, are not executory acts and as such cannot be the subject of a recourse. On the other hand, an act may be considered executory although containing a simple confirmation of a previously issued act, if it is issued after a new inquiry into the matter. Whether there has been a new inquiry or not, it is a matter of fact to be decided in the circumstances of each case. It is

generally, considered, however, that there has been a new inquiry if new substantial legal or factual elements were taken into consideration, but the new material used is strictly examined as he who has lost the time limit for the challenge of an executory act cannot evade same by the creation of a new act which was issued on what may appear to be a new inquiry, but in actual fact is a decision reached on the basis of the same facts (See *Stassinopoulos*, Law of Administrative Acts, p. 126). Moreover, new inquiry exists if before the issuing of the subsequent act there takes place an examination of newly arising or pre-existing but unknown factors of determination which are subsequently taken additionally into consideration.

It is the contention of learned counsel for the applicant that in this instance there has been a new inquiry and that the decision of the respondent Municipality communicated to him by the letter of the 3rd February, 1977, is not merely a confirmatory one. This is based on the contention invoked in the letter of the present counsel of the applicant, dated 12th January, 1977 (*Exhibit* 14) as revealed by the rubber stamp on the submitted plans that same were checked on the 29th May, 1970, and the fees calculated at the time at C£137.500 mils, and which facts though they existed in the file they do not appear to have been taken into consideration before his aforesaid letter.

On the material before me I cannot accept this contention. This question of the rubber stamp and the costing was material before the respondent Municipality and specifically referred to in the letter of the applicants of the 29th May, 1971 (*Exhibit* 9), in the summary of facts sent by the respondent Municipality to their legal adviser of the 7th June, 1971 (Red 36, para. 13), and in the legal advice given in reply thereto of the 1st July, 1971 (Red 37 of *Exhibit* 17).

The reference to the case of *Loiziana* (*supra*) does not add anything to the situation as that decision merely reiterated the principle followed in the case of *Andriani Lordou & Others* v. *The Republic* (1968) 3 C.L.R., 427, to the effect that "in accordance with the established principles of administrative law the validity of an administrative act is determined on the basis of the legal status existing at the time of its issue unless same is issued so that the administration may conform with an omission

to act which has already occurred prior to the alteration of the legal status or unless the law otherwise expressly provides".

There have been neither new factual elements brought to the administration nor new appreciation of already existing factual elements. The decision complained of was a mere confirmatory act of a previous executory decision based on the same factual and legal basis.

For all the above reasons I have come to the conclusion that this recourse is out of time. In spite, however, of this conclusion, I consider it necessary to deal with the ground of law upon which this recourse is based, that is to say, that the fees in question should have been those provided for by the regulations in force at the time of the submission of the application and not at the time the *sub-judice* administrative decision was taken. The answer to this contention is to be found in the principle laid down in the case of *Andriani Lordou* (*supra*) and followed in the case of *Loiziana* (*supra*). The compliance with the requirements of the respondent Municipality was only effected by the applicants on the 10th October, 1970, when the subsoil of the new hole was found to have the required absorption capacity in order to dispense with the building of a water tight septic tank. The fees were increased on the 13th October, 1970, and taking into consideration that the final examination of such a building permit, particularly in a case as the present one where the building had already commenced illegally and that such examination has to go through a process of examinations and checks before it reaches the collective organ empowered by the law to issue the permit in question, it would be impossible to hold that such a process could have been completed within the period of three days that elapsed between the 10th October and the publication of the new amended regulations providing for the increased fees. Therefore, this recourse would have failed on the merits also.

In the result, the recourse is dismissed but I make no order as to costs.

Application dismissed.
No order as to costs.