1979 June 29

[TRIANTAFYLLIDES, P., STAVRINIDES, L. LOIZOU, HADJIANASTASSIOU AND MALACHTOS, JJ.]

CYTECHNO LTD.,

Appellant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE COUNCIL OF MINISTERS,

Respondents.

(*Revisional Jurisdiction Appeal No.* 183).

Administrative Law—Discretionary powers—Judicial control—Principles applicable—Mines and Quarries (Regulation) Law, Cap. 270*—Discretion of respondents to renew prospecting permit under section* 13(4) *of the Law—To be exercised properly so as not to frustrate the policy and objects of the Law, particularly with regard to the class of persons for whose benefit the power may be intended to have been conferred—Refusal to renew prospecting permit—By giving a lot of importance to the fear that water supply in the area would be polluted, whilst according to the experts there was no such fear—Respondents' discretion exercised in a defective manner.*

Mines and Quarries (Regulation) Law, Cap. 270*—Prospecting permit—Renewal—Within discretion of Council of Ministers—Manner in which such discretion is to be exercised—Section* 13(4) *of the Law.*

The appellants were the holders of 5 prospecting permits which were assigned to them by their previous owner and were transferred and registered in their name in July 1967 with the consent of the respondents in accordance with the provisions of section 13(3) of the Mines and Quarries (Regulation) Law, Cap. 270. Thereafter they carried out, at a considerable cost, systematic prospecting and engaged for the purpose experts from the Geological Department and from abroad; they strictly complied with the requirements of the Mines and Quarries (Regulation) Law, Cap. 270 and the relevant Regulations and had the said prospecting permits renewed; but when they applied

for their renewal for the last time the respondents refused to accede to their application.

Before taking the decision to refuse the application for renewal the respondents had decided to recall experts from abroad to advise them especially with reference to the pollution of the water of certain villages in the area of the proposed mine. Though the experts, who were secured through the media of the United Nations Development Program, reported that there was no fear of pollution of the surface and underground water, provided certain measures were taken, in taking the *sub judice* decision the respondents gave a lot of importance to the fear that the water supply in the area would be infected or interfered with.

Upon appeal against the dismissal of the recourse challenging the aforesaid refusal:

Held, (*after stating the principles governing judicial control of discretionary powers of the administration*—vide pp. 528–35 *post*) that though the Council of Ministers is entrusted with a discretion under the Mines and Quarries Regulation Law, Cap. 270, particularly under section 13(4), to renew or not to renew the prospecting permits such discretion has to be exercised properly so as not to frustrate the policy and objects of the Law, Cap. 270, particularly with regard to the class of persons for whose benefit the power may be intended to have been conferred (principle enunciated by Lord Reid in *Padfield and Others* v. *Minister of Agriculture, Fisheries and Food and Others* [1968] 1 All E.R. 694 (H.L.) adopted and applied).

(2) That having in mind the facts and circumstances of this case and the case-law relating to the judicial control of the discretionary powers of the administration (vide pp. 528–35 *post*) the renewal of the prospecting permits was refused in a defective manner by the administration because in exercising its discretion it erroneously took into consideration that there was fear of pollution of the water of the surrounding area from the mine, whilst according to the experts there was no fear of pollution of the water; and that, therefore, the appeal must be allowed and the *sub judice* decision be annulled. (See, also, *Vassos Eliades Ltd.*, v. *The Republic* (1979) 3 C.L.R. 259).

Appeal allowed.

Cases referred to:

Droushiotis v. *Republic* (1966) 3 C.L.R. 722; (1967) 3 C.L.R. 232;

Padfield and Others v. *The Minister of Agriculture, Fisheries and Food and Others* [1968] 1 All E.R. (H.L.) 694 at pp. 701–702;

British Oxygen Co. v. *Board of Trade* [1968] 2 All E.R. 177;

Laker Airways Ltd., v. *Department of Trade* [1977] 2 All E.R. 182;

Vassos Eliades Ltd., v. *Republic* (1979) 3 C.L.R. 259.

Appeal.

Appeal from the judgment of a Judge of the Supreme Court of Cyprus (A. Loizou, J.) given on the 31st December, 1976 (Case No. 89/73) whereby appellant's recourse against the refusal of the respondent to renew five prospecting permits was dismissed.

G. Pelayias with *A. Markides*, for the appellants.

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

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Mr. Justice Hadjianastassiou.

HADJIANASTASSIOU J.: The main question raised in this appeal from the decision* of a Judge, sitting at first instance under the provisions of s. 11(2) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (33/64) is whether the Council of Ministers had properly approached the question of the renewal of the five prospecting permits granted to the appellant company.

In order to understand the point involved in this case, it is necessary to refer to the legislation. The Mines and Quarries (Regulation) Law Cap. 270 deals in s. 13 with prospecting permits. It reads as follows:

"13. (1) The Governor may grant to any person applying therefor in the prescribed manner and on payment of the prescribed fees a prospecting permit.

(2) A prospecting permit shall be in the prescribed form and shall be subject to such terms and conditions as the Governor may determine.

* Reported in (1976) 3 C.L.R. 407.

(3) A prospecting permit shall not be transferable and any right or interest conferred thereby shall not be assignable except with the previous consent of the Governor.

(4) A prospecting permit shall remain in force for one year from the date thereof, unless previously cancelled under the provisions of this Law, but it may be renewed by the Governor in the prescribed manner.

(5) Any person prospecting without a prospecting permit or any holder of a prospecting permit who fails to comply with or contravenes any of the terms or conditions of his prospecting permit shall be guilty of an offence."

Regarding the duties of a holder of a prospecting permit, s. 15 says that:

"15(1) The holder of a prospecting permit shall—

(a) carry on all prospecting on the lands comprised in his permit in a safe and workmanlike manner in accordance with any Regulations made under this Law;

(b) keep such registers and books and make such returns as may be prescribed;

(c) permit at all reasonable times the Inspector of Mines or any other person authorised in that behalf by the Governor to inspect any prospecting and to inspect and take copies of any register and book of account in the possession or under the control of the holder and kept in connection with the prospecting;

(d) not divert water from any public river, stream, spring, well or water course without the previous consent in writing of the Inspector of Mines or any water privately owned without the previous consent in writing of the owner thereof;

(e) at all times have a responsible agent supervising the prospecting if not personally residing on the lands comprised in his permit or sufficiently nearto as to give continuous supervision to the prospecting on such lands."

The Governor-in-Council is given power to make regulations, and section 47 is in these terms:-

"47 (1) The Governor in Council may make Regulations

for fully and effectively carrying out, and giving effect to, all or any of the purposes, provisions and powers in this Law contained.

(2) In particular, and without prejudice to the generality of the foregoing power, such Regulations may provide for all or any of the following subjects–

(a) all matters which by this Law are required or permitted to be prescribed;

(b) the manner in which application for prospecting permits, mining leases and quarry licences shall be made, and the form to be used;

(c) the information to be supplied by the applicant;

(d) the fees, dues and rentals to be paid for prospecting permits, mining leases, quarry permits and quarry licences;

(e) the size and shape of the areas over which prospecting permits, mining leases and quarry licences may be granted;

(f) the manner in which areas and boundaries shall be surveyed and marked, and the fees payable therefor;

(g) the working conditions to be applied to mining leases and quarry licenses;

(h) the construction and use of roads....."

With regard to the renewal of prospecting permits, the Mines and Quarries Regulations 1958 published in supplement No. 3 to the Official Gazette No. 478, regulation 6 at p. 531 says that:

" Upon application being made to the Governor through the Inspector, at least one month before a prospecting permit is due to expire, the Governor may renew such prospecting permit for one or more periods of 6 months up to a maximum period of 3 years in the case of Class A permit and one year in the case of Class B permit."

Having referred to some relevant sections of the legislation, we now turn to the facts of this case. The CYTECHNO

Company Limited has been registered under the Companies Law and has been carrying on for some time prospecting and mining operations in Cyprus and elsewhere and has been granted five prospecting permits, Nos. 2154, 2219, 2082, 2074 and 2083, which expired on January 8, 1970, November 9, 1969, September 19, 1969, July 23, 1969 and September 19, 1969 respectively.

It appears further that these prospecting permits were originally issued—as far back as 1955—to Mr. Nicos Kalimeras of Nicosia, who in 1967 assigned the said permits to the company in question for valuable consideration, including, *inter alia*, an amount of £20,000 and they were transferred and registered on July 25, 1967 with the consent of the respondents in accordance with the provisions of s. 13(3) of Cap. 270.

The company carried out at a considerable cost, systematic prospecting, and also engaged for that purpose experts from the Geological Department as well as from abroad, including a team of experts from Bulgaria, an Italian mining geologist, a team of Russians and a team of Canadian experts. In order to avoid referring to the actual reports, we would add that a detailed reference to their work is to be found in those reports and documents produced as *exhibits* and which are duly summed up in the letter of the Senior Mines Officer of November 10, 1969.

There is no doubt that anyone reading those reports is left with the feeling that the work is more than encouraging and the safe conclusion that could be drawn is that Cyprus could acquire and have functioning, and in full production, a second asbestos mine of great significance. (See the submission to the Council of Ministers, *exhibit C*, and the note of the Attorney-General of the Republic attached to the minutes of the proceedings of the Council of Ministers, paragraph 3, dated 5th and 6th April, 1971).

It is true that the question of the renewal of those prospecting permits was examined by the Council of Ministers at two meetings of the 5th and 6th April, 1971. It is significant to state that the Ministers of Finance and Commerce and Industry, in paragraphs 8 and 9, expressed the opinion that in view of the seriousness of the subject, it would be expedient, before a final decision was taken, to engage an expert firm to study the whole subject from all angles and advise the Government

accordingly. Finally, the Council of Ministers decided (see Decision No. 10377) that "the Government should recall the soonest possible experts, to consider same especially *with reference to the pollution of the water* (the underlining is ours) and advise accordingly the Government". It is equally true to add that before this submission was taken an examination of the same matter was made at a meeting held under the Chairmanship of His Beatitude the President of the Republic who, having heard the views of the departments concerned, postponed the taking of a decision, because he wanted to have the views of the company concerned.

The Government, having in mind the great significance regarding the economy of the State, showed keen interest and secured the services through the media of the United Nations Development Program, of one hydrologist, and one mining engineer with wide experience in asbestos mining. Their reports were lodged with the secretariat of the Council of Ministers and summaries of their reports were attached to the submission made by the Ministry of Commerce and Industry on the 7th November, 1972. Attached to the said submission were also the summaries of the reports of the various departments which had also expressed their views on the proposed exploitation of the asbestos resources of the area in question. Everyone showed great interest, and the reports were prepared as a result of a decision taken at a meeting of representatives of the said departments which took place at the Ministry of Commerce and Industry on the 3rd September, 1960, to be followed by a subsequent meeting of the 6th February, 1970.

It is perhaps significant to state that the advisers of the Ministry concerned on tourism were also present, and the question of tourism was also raised during their meetings. Attached also to the submission were the minutes of the meeting which was held at the Presidential Palace on the 6th October, 1970, with regard to the same subject. It is equally right to say that paragraph (3) of *exhibit C* shows clearly that the Senior Mines Officer raised in time the question of the renewal of the five prospecting permits granted to the company in question.

As we said earlier, the question of the touristic development of Troodos area was raised by the experts on tourism and arguments were heard whether the exploitation of the new

asbestos mine would affect that touristic area. In addition, the water supply of certain villages of the area, of Pitsilia, Marathasa and Solea, could also be affected.

Having gone through the various views of the departments, it is clear that the various departments were trying to find ways and means at first, to see whether the touristic and mining industry could effectively co-exist, but finally, a lot of importance was given about the fear that the water supply in the area would be infected or interfered with.

That this project was very much in the mind of the Government, appears also from the questions which had been placed before the Attorney-General for an advice on these matters. The questions placed before the Attorney-General were:- (a) whether the Council of Ministers could refuse the renewal of the prospecting permits; (b) whether it could refuse the granting of mining leases, given that the prospecting permits have already been issued; and (c) which would be the financial consequences of the Republic as a result of such refusal. There were a lot of other arguments in the submissions and with respect some were self-conflicting, and in paragraph 9 of the submissions in question, one sees the arguments given in favour of the renewal of the permits (a) that from the operation of the asbestos mine the economy of the Island would benefit yearly with a substantial amount of foreign exchange; and (b) even under circumstances of full employment, the engagement of a labour force by the new asbestos mine would be welcome in view of the anticipated restriction of the work in other mining companies.

On the other hand, particularly the Ministry of Commerce and Industry is reported to have given the following views, that, since the time of the granting of the prospecting permits, there has arisen especially during the last few years, a new situation which demands their non-renewal in the public interest. The Ministry went on to add that such new situation arose because (a) of the recent agricultural development of the Solea area, at a great scale, which would be endangered if in any way, by the operation of the asbestos mine, the surface and underground waters, as it is feared, are affected, as well as from the dust which will be caused by the operation of the asbestos mine and will be carried by the winds and for the

prevention of which there cannot be a complete certainty; and (b) the recently noticed great touristic development of the village of Kakopetria and Galata.

From this report, one can definitely take the view that the Ministry of Commerce and Industry has made up its mind and particular importance was given to the question of the touristic development and of the fear of the water. Furthermore, the said Ministry in a language with a stern warning said that the operation of the asbestos mine in Troodos would mean a complete abandonment of the touristic development of Troodos, as well as for the development of the mountain tourism in general and of the realization of the plans under preparation; and for the construction of dams in Solea for further agricultural development of the area. Finally, the Ministry added that the prevention of the destruction, on account of exhaustion of the underground waters of lower areas, will face difficulties and problems, by the operation of the asbestos mine, on account of the possible pollution of rain water.

It seems to us that the question of the pollution of rain water was in the forefront of the minds of the various departments and by going through the reports one cannot but take the view that the minds of some experts were influenced a lot in turning down the idea which appeared earlier that with the functioning of the mine, the implementation of the economic policy of the Government would gain.

As we said earlier, there was a false alarm because after reading the reports of the experts, the fears about the water regarding the injurious affection of the underground water, and the pollution of the water in general were no longer there, because both, the experts who were called from abroad and at home showed that there was no question of pollution; and no justification that there was fear for the pollution of water in general. In fact, Mr. Dixey, a hydrological consultant, stated that the fears expressed so far of possible harmful effects on the surface and underground water resources of the area from the technical point of view are largely or wholly groundless, since they are based in part on a misinterpretation of the hydrogeological factors involved and largely on the out of date practices of the early phase of asbestos mining at Troodos, practices which are in fact now avoided. He concluded his report by

stating that "Provided the mining activities of the company are well-planned and executed under proper control, no adverse effect of the asbestos mining on watter supplies need be anticipated. The existing legislation gives the Council of Ministers complete freedom in issuing a mining lease as well as powers to determine same after continued breach on the part of the leases of the terms and conditions of the mining lease. In view of what is stated above, and provided that before actual mining begins the water development department is consulted, he does not see any reason for objecting to the renewal of the prospecting permits."

The next expert, Mr. Hebron, a mining consultant, in his report, expressed the opinion that there are methods of avoiding pollution of the atmosphere and the pollution of streams, and his view was that the answer to what can be done to minimize damage to the aesthetic value of the area, is that new designs make an effort to present a pleasing appearance to all the buildings and the plan site. An effort should also be made to preserve the trees between the buildings on the site. Then it was pointed out that the proposed mining area will be definitely smaller than the area now covered by prospecting permits.

He concluded his report by suggesting that at the time of renewing the prospecting permits, the company should be made aware of the Government's concern as regards the environmental factors and advised of the design requirements which can be summarized as follows: (a) The plant design will be satisfactory in respect of atmospheric dust inside the plant, taking note of international regulations and future standards to be adopted by the industry; (b) dust abatement measures will be taken to avoid damage or loss of use of neighbouring regions; and (c) the waste disposal areas will be designed so as not to pollute streams and to minimize the aesthetic damage by using a valley site when possible.

The *sub-judice* decision No. 11840 was communicated to the company on the 22nd January, 1973, and is in these terms:– "The Council of Ministers examined the application for the renewal of prospecting permits of the company CYTECHNO Ltd. in the area of Troodos (Pasa Livadhi) for the purpose of finding asbestos, and after detailed examination of all the documents placed before it, and facts and information given at this

meeting, and after exhaustive discussion of the subject and careful weighing of all the present existing circumstances, it considered that the said renewal will not have been in the public interest and decided on the basis of the provision of the Mines and Quarries (Regulation) Law Cap. 270, and Law 5/65 that the said application be refused."

The said company feeling aggrieved because their expenses and all their labours would have been wasted, filed a recourse No. 89/73 seeking a declaration that the decision of the respondents dated 9.11.72 which was communicated to them by letter dated January 22, 1973, whereby the former refused to renew the five prospecting permits referred to therein, was null and void and of no effect whatsoever. The said recourse was based on a number of legal grounds.

On the contrary, counsel for the respondents opposed the application and alleged (1) that the decision attacked was not within the sphere of public law in accordance with the provisions of Article 146 of the Constitution; (2) that the said decision was taken lawfully having regard to all the facts and circumstances of that case and in exercise of the discretionary powers of the administration; and (3) that the said decision was duly reasoned and was taken in accordance with the provisions of the Mines and Quarries (Regulation) Law, Cap. 270.

The case went before a Judge of first instance who having gone into the mass of documents and the long and exhaustive arguments of both counsel, and having quoted authorities on the issues raised before him, had this to say:- "In the light of the above and having looked at the law as a whole and the purpose which it is meant to serve, I have come to the conclusion that the administration in issuing or renewing a prospecting permit has, by law, an unfettered discretion. In such a case, however, the considerations that may legitimately be taken into account by the administration in exercising such a discretionary power are again a matter for the discretion of the administration, provided, however, that it does not act in abuse of power or on facts that are not accurate or on material which is not supported by the facts."

Then the learned Justice, dealing with the argument of counsel for the applicant company that in the absence of any change of

the factual position the respondents had no choice but to renew the prospecting permit, said:-

> " In support of this proposition, reference was made to the advice of the Attorney-General of the Republic (*exhibit* L p. 6) where it is stated that 'in the exercise of its administrative discretion, the Council of Ministers should take into consideration the existing situation at the time of the renewal. If it has not changed from the one existing at the time of the issuing of the permit, then I am inclined to the view that the permits must be renewed. If, however, it changed and in the meantime there arose matters of public interest not existing at the time the permit was granted, the Council of Ministers must take into consideration the new created situation, and if, in its judgment after weighing carefully all facts existing at the time of the renewal, such renewal would not be in the public interest to be granted, then it may refuse same, (see Greek Council of State, decision No. 294/1933) or to grant same under such conditions or other restrictions which the new situation would demand. (In particular, see Conclusions of M. Letourneur in Receuil des arrets du Conseil d' Etat, 1954 p. 308, and compare Greek Council of State 1631/551.)"

Finally, the learned Justice having taken into consideration the question of touristic development of the area of Troodos, and the possibility of its being affected by the creation of a new asbestos mine, as well as the agricultural and touristic development of the Solea area and of the villages of Kakopetria and Galata, took the view that in those circumstances, the adoption of a new definite policy and the reversal of an existing situation with the obvious financial consequences to others was justified from the material in the file and those were sufficient and cogent reasons as to why the renewal was not called for in the public interest. In the light of those findings, the learned Justice dismissed the recourse.

Regarding the finding of the learned Judge that there were sufficient and cogent reasons as to why the renewal was not called for in the public interest, it is interesting to state that on November 10, 1969, Mr. Petropoulos, the Senior Mines Officer, addressed a long letter to the Director-General of the Ministry of Commerce and Industry regarding the prospecting permits

held by Cytechno Limited, and having given the historical background and the work done both by Mr. N. Kalimeras and the present holders of the prospecting permits, reached this conclusion: "The preliminary technical and economic calculations show that (1) the construction of an industrial asbestos enterprise on the areas investigated, is a sensible and profitable thing from the economic point of view; (2) the main technical and economic indices of the future enterprises can improve; and (3) it is advisable to study more thoroughly the problem and consequently make a more detailed and technical and economic substantiation of construction of an asbestos enterprise."

On 14th November, 1969, Mr. Anastassiou, the Director-General of the Ministry of Interior, addressed also a letter to the Director-General of the Ministry of Commerce and in expressing the views of his Ministry, said that the whole matter must be examined from the points of contribution of both, the asbestos mines and tourism to the national economy. Furthermore, he added that they were of the view that it must be possible for those two aspects to co-exist regarding the economy by the possible, if necessary, amendment of the prospecting permit and of the business of the asbestos mine in such a way as not to endanger the vital interests of the touristic development of that area, but at the same time not to leave the mining wealth without utilizing it for the sake of the winter tourism in that area which is uncertain. "At the same time," the writer goes on, "we will be in a position to impose the appropriate conditions for the avoidance of such results, viz., the placing of useless or other objects by the mining company or the interference of the underground water of the area..... As we understand the preliminary studies of the mining company have discovered rich mining products worth more than £100,000,000 with a yearly production worth over C£1,500,000..... and according to our view, it will be a big mistake to keep it buried without a serious study of all the facts and circumstances."

There was a further report by the Planning Bureau and once again the whole position was reviewed with regard to the renewing of the prospecting permits and the Planning Bureau recommended action on the following lines:-

"(a) As a first priority, the Ministry should try to achieve co-existence between the tourism and mining develop-

ment aspects of the Troodos region. If necessary, it should investigate the possibility of limiting the operations of the proposed new mine to 1/3 or 1/4 of the area now under prospecting permits held by Cytechno Ltd. The locality to be chosen should be, as distant as possible from the centre of the Troodos resort and the skiing valley.

(b) If the above compromise is not feasible, the Ministry should consider seriously authorising the renewal of the prospecting permit applied for. Such a course of action appears to be justified on the basis of the data made available to the Planning Bureau. But as already explained, these data are stated to be provisional. If it is decided to go ahead with the mine, the company should be asked to supply the Government, with detailed plans on the rock waste disposal systems and other relevant information connected with the future mining operations; this is necessary, in order to enable it to build in the eventual lease agreement to be signed all the necessary safegrounds, with a view to minimising future losses to agricultural income and to the scenic environment of the area.

(c) In future, on the basis of data from the research work completed by the Geology Department, the Ministry should try to earmark all those potential mining regions, whose development may come into conflict with alternative forms of development, such as tourism. These regions where a conflict in land use is likely to arise, should be studied at this stage, with a view to forming a concrete view on the land-use pattern to be adopted in future."

On appeal, counsel based his argument on these grounds of law:-

"(1) The trial Court erred in holding that the *sub-judice* decision was not contrary to law, that is to say, to the general and well-settled principles of administrative law, and in excess and abuse of powers and that the *sub-judice* decision was taken (a) under a misconception of fact and/or law; (b) without sufficient deliberations and in a manner inconsistent with all notion of proper

administration; (c) without proper and due enquiry into and evaluation of the relevant factors and considerations; and (d) without the respondents taking properly and duly into account or giving proper weight to relevant and material factors or considerations;

(2) The trial Court wrongly construed the provisions of s. 13(4) of the Mines and Quarries (Regulation) Law Cap. 270 regarding the renewal of prospecting permits; and that s. 13(4) casts a mandatory duty on the administration which has only a fettered competence or discretion in the matter, and they are bound to renew such a prospecting permit so long as its holder complies with the law and the terms of the permit if any;

(3) In the absence of any change of the factual position the respondents were bound to renew the prospecting permits, and as the alleged changes were immaterial and insignificant, the trial Court wrongly came to the conclusion that the alleged changes of the factual position justified the refusal of the renewal of the prospecting permits."

There is no doubt that by virtue of Article 23 of the Constitution, the right of the Republic to minerals is expressly reserved. With that in mind, the main question, having regard to the facts and circumstances of this appeal, is whether the Council of Ministers had properly exercised their discretionary power in not renewing the five prospecting permits.

In *Yiangos Droushiotis and the Republic of Cyprus, through* 1. *The Minister of Commerce and Industry*, 2. *The Senior Mines Officer*, (1966) 3 C.L.R. 722, Triantafyllides, J., (as he then was) dealing with the discretionary powers of the administration under that law had this to say at pp. 729–730:–

"... the fact remains that once, under the relevant legislation (Cap. 270), a discretion has to be exercised, as to whether or not to grant a prospecting permit, such discretion has to be exercised properly; and it is well settled that in matters of discretionary powers this Court will not interfere so long as on a proper exercise thereof a decision has been taken which was reasonably open to the appropriate organ on the basis of the material before it; but this Court is bound to interfere if the said powers have been exercised in a

defective manner, as for example, when the decision reached cannot be validly supported by the reasons given therefor, or when material considerations have not been duly taken into account.....

As the ground on which the applications of Applicant were refused did not render it reasonably open for Respondent to refuse them finally, at that stage, and as their final refusal, as then made, was clearly not otherwise based on a due consideration of all relevant factors pertaining to their individual merits, it follows that such applications were turned down finally, at the material time, in a defective exercise of the relevant discretionary powers and that the three relevant *sub judice* decisions of Respondent in the matter are contrary to law (in the sense that they are contrary to basic principles of Administrative Law relating to the proper exercise of discretionary powers) and they have also been taken in excess and abuse of powers, and have to be annulled; it is, therefore, hereby ordered accordingly."

See also on appeal the judgment of the Full Bench in the *Republic of Cyprus* v. *Yiangos Droushiotis* (1967) 3 C.L.R., 232 where the judgment of the first instance Judge was affirmed and the appeal was dismissed.

In England, the extent of judicial control over the exercise of discretionary powers by public authorities, have occupied the time of the Courts in a number of cases. In *Padfield and Others* v. *The Minister of Agriculture, Fisheries and Food and Others*, [1968] 1 All E.R. H.L. 694, Lord Reid dealing with the discretionary power of the administration, said at pp. 701–702:-

" It was argued that the Minister is not bound to give any reasons for refusing to refer a complaint to the committee, that if he gives no reasons his decision cannot be questioned, and that it would be very unfortunate if giving reasons were to put him in a worse position. I do not agree, however, that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act of 1958, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the Court must be entitled to act.

A number of authorities was cited in the course of the argument, but none appears to me to be at all close to the present case. I must however notice *Julius* v. *Lord Bishop* of Oxford ([1874–80] All E.R. Rep. 43), because it was largely relied on. There the statute enacted that with regard to certain charges against any clerk in Holy Orders it 'shall be lawful' for the bishop of the diocese 'on the application of any party complaining thereof' to issue a commission for enquiry. It was held that the words 'it shall be lawful' merely conferred a power. Earl Cairns, L.C., said ([1874–80] All E.R. Rep. at p. 47):

> 'But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of a person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person on whom the power is reposed to exercise that power when called upon to do so.'

Lord Penzance said that the true question was ([1874–80] All E.R. Rep. at p. 51)

> 'whether regard being had to the person enabled, to the subject matter, to the general objects of the statute, and to the person, or class of persons, for whose benefit the power may be intended to have been conferred, (the words) do or do not create a duty...'

and Lord Selborne said ([1874–80] All E.R. Rep. at p. 54) that the question was whether it could be shown from any particular words in the Act or from the general scope and objects of the statute that there was a duty. So there is ample authority for going behind the words which confer the power to the general scope and objects of the Act in order to find what was intended. In *Julius*' case ([1874–80] All E.R. Rep. 43), no question was raised whether there could be a discretion but a discretion so limited that it must not be used to frustrate the object of the Act which conferred it; and I have found no authority to support the unreasonable proposition that it must be all or nothing—either no discretion at all or an unfettered discretion. Here

the words 'if the Minister in any case so directs' are sufficient to show that he has some discretion, but they give no guide as to its nature or extent. That must be inferred from a construction of the Act of 1958 read as a whole, and for the reasons which I have given I would infer that the discretion is not unlimited, and that it has been used by the Minister in a manner which is not in accord with the intention of the statute which conferred it. As the Minister's discretion has never been properly exercised according to law, I would allow this appeal."

Lord Hodson, delivering a separate speech said at p. 710:–

" If the Minister has a complete discretion under the Act of 1958, as in my opinion he has, the only question remaining is whether he has exercised it lawfully. It is on this issue that much diffffference of Judicial opinion has emerged, although there is no divergence of opinion on the relevant Law. As Lord Denning M.R. said, citing Lord Greene, M.R., in Associated Provincial Picture Houses, Ltd. *v.* Wednesbury Corpn. ([1947] 2 All E.R. at p. 682):

> ' a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider.'

In another part of this judgment Lord Greene drew attention ([1947] 2 All E.R. at p. 682) to that which I have mentioned above, namely, the necessity to have regard to matters to which the statute conferring the discretion shows that the authority exercising the discretion ought to have regard. The authority must not, as it has been said, allow itself to be influenced by something extraneous and extra-judicial which ought not to have affected its decision."

It appears further that in *British Oxygen Co.* v. *Board of Trade*, [1968] 2 All E.R. 177, the dictum of Lord Reid at p. 699 in the case just quoted, applied in the latter case.

In *Laker Airways Ltd.* v. *Department of Trade*, [1977] 2 All E.R. 182, the Court of Appeal dealing with the powers of the

Secretary of State, under the Civil Aviation Act, 1971, s. 3(1)(2), held:

"The plaintiffs were entitled to the relief sought for the following reasons—

(i) Although s. 3(2) of the 1971 Act empowered the Secretary of State to give guidance to the CAA with respect to the functions conferred on it by s. 3(1) that could not be construed as conferring on the Secretary of State power to give the CAA directions which, by granting a monopoly to British Airways, overrode the objectives set out in s. 3(1)(b), to secure that at least one major British airline not controlled by the British Airways Board had an opportunity to provide air transport services. Since the policy guidance issued in 1976 to the CAA amounted to a reversal of at least one of the objectives set out in s. 3(1), it was, so far as it affected the plaintiffs, ultra vires.

(ii) Since the prerogative was a discretionary power to be exercised for the public good, it followed that its exercise could be examined by the Courts just as any other discretionary power that was vested in the executive. In particular the Court could intervene to prevent the exercise of a prerogative power in such a way as to deprive a subject of a right conferred on him by statute. It followed therefore that, once the plaintiffs had been granted a licence under the 1971 Act, they could only be deprived of that licence in accordance with the provisions of the Act and it was an improper exercise of the prerogative power in effect to nullify that licence by withdrawing the plaintiffs' designation as a scheduled air carrier under the Bermuda Agreement (see p. 193 a to d, p. 194 a to c, p. 206 a to j and p. 210 g to p. 211 b *post*); *Walker* v. *Baird* [1892] A.C. 491, *Attorney-General* v. *De Keyser's Royal Hotel* [1920] All E.R. 80, *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] 1 All E.R. 694 and *Secretary of State for Education and Science* v. *Metropolitan Borough of Tameside* [1976] 3 All E.R. 665 applied."

Lord Denning M.R., delivering the first judgment, and having dealt with the exercise of the powers of the Secretary of State,

had this to say regarding the extent of the Minister's discretionary powers at p. 194:-

> " We have considered this case at some length because of its constitutional importance. It is a serious matter for the Courts to declare that a Minister of the Crown has exceeded his powers. So serious that we think hard before doing it. But there comes a point when it has to be done. These Courts have the authority, and I would add the duty, in a proper case, when called on to inquire into the exercise of a discretionary power by a Minister of his department. If it found that the power has been exercised improperly or mistakenly so as to impinge unjustly on the legitimate rights or interests of the subject, then these Courts must so declare. They stand, as ever, between the executive and the subject, alert, as Lord Atkin said in a famous passage, 'alert to see that any coercive action is justified in law': see *Liversidge* v. *Anderson* [1941] 3 All E.R. 338 at 361. To which I would add 'alert to see that a discretionary power is not exceeded or misused'. In this case the Judge has upheld this principle. He has declared that the Minister did exceed his powers. I agree with him. I would dismiss the appeal."

As to the extent of judicial control over the exercise of discretionary statutory powers by public authorities, see also Halsbury's Laws, 3rd edn., 687, 688, para. 1326; and for cases on the subject, see 28 Digest (Repl.) 11–13, 3848, and for the scope and exercise of statutory powers conferred on a public body or authority, see 1 Halsbury's Laws (4th edn.) paras. 18 & 27 and 30 Halsbury's Laws, 3rd edn. 685, 686, paragraphs 1323–1324, 38 Digest (Repl.) 9–11 2637.

Having considered very carefully the long and able arguments of both counsel, and having reviewed and analysed the law in a number of cases quoted, we have reached the conclusion by looking at the general scope and objects of our law, Cap. 270, that the Council of Ministers which is entrusted with a discretion under the said law—particularly under sub-section 4 of section 13—have a discretion to renew, or not to renew the prospecting permits, but such discretion has to be exercised properly as not to frustrate the policy and objects of Law,

Cap. 270, particularly with regard to the class of persons for whose benefit the power may be intended to have been conferred.

With this in mind, and having regard to the facts and circumstances of this case, we would adopt and apply in the present case the principle enunciated by the father of administrative law in England, Lord Reid, viz., that the discretion of a Minister might nevertheless be limited to the extent that it must not be so used whether by reason of misconstruction of the statute or other reason, as to frustrate the object of the statute which conferred it.

It is true that the Ministers had before them the report of the Ministry of Commerce and Industry, and particularly, paragraph 10(a) and (d) at pp. 22 and 23 of the report. These two paragraphs with respect, leave a lot to be desired: if one goes through the bundle of the reports and particularly of the foreign experts and our own experts, who made a thorough study and came to the conclusion that assuming the appropriate measures were taken, there was no fear for pollution of the surface and underground water. The reasons put forward in that report dated 7th November, 1972, are these:-

"(a) Of the recent, at a large scale, agricultural development of the Solea area which will be endangered, if, in any way, by the operation of the asbestos mine, the surface and underground waters, as it is feared, are affected as well as from the dust which will be caused by the operation of the asbestos mine and will be carried by the winds and for the prevention of which there cannot be a complete certainty.

(d) The realisation of the plans under preparation, for the construction of dams in Solea for further agricultural development of the area and the prevention of the destruction, on account of exhaustion of the underground waters at lower areas, will face difficulties and problems by the operation of the asbestos mine on account of the possible pollution of rain water."

As we have said earlier, it appears that all the experts expressed a different view and the fears for the pollution of the water are

not justified provided, of course, that appropriate measures would be taken by the appellant company.

The question of judicial control regarding the discretionary powers of the administration in Greece, is dealt with also by Professor Economou, in his well-known textbook "Judicial Control of Discretionary Powers", states as follows at p. 181:-

> " Ὁ δικαστικὸς ἔλεγχος τῆς διακριτικῆς ἐξουσίας ἔχει νομολογιακῶς ἐπεκταθῆ ἐπὶ πλείστων ὅσων περιπτώσεων καθ' ἃς ἡ Διοίκησις ἐνεργεῖ κατὰ τρόπον ὅστις ἀντιβαίνει εἰς τὸ περὶ Δικαίου συναίσθημα γενικῶς καὶ τὰς ἀρχὰς τὰς συγκεκριμένας πλέον, ἀγαθῆς ἢ χρηστῆς ἢ καλῆς ἢ εὐρύθμου Διοικήσεως εἰδικώτερον, κατὰ τὴν ὡσαύτως ποικίλλουσαν ὁρολογίαν τῆς Νομολογίας. Εἰς τὰς περιπτώσεις αὐτὰς ὁ διοικητικὸς δικαστὴς ἐλέγχει τὴν ὀ ρ θ ό τ η τ α τῆς μεθόδου διοικητικῆς δράσεως, ὡς χαρακτηριστικῶς συμβαίνει εἰς τὰς ἀκολούθους ὁμάδας διοικητικῶν πράξεων:.....(ἤτοι).
>
> 3. Ἐπὶ διοικητικῶν πράξεων ἐπιλογῆς πλειόνων ἐξ ἴσου νομίμων λύσεων ἐκρίθη ὅτι συντρέχει ὑπέρβασις τῶν ἄκρων ὁρίων τῆς διακριτικῆς ἐξουσίας, ὁσάκις ἡ Διοίκησις προέκρινε τὴν ἐπαχθεστέραν λύσιν ἀντὶ τῆς ἐπιεικεστέρας. Ἐν προκειμένῳ ἡ ἐπιείκια, ὑπὸ τὴν ἔννοιαν τῆς φιλαγάθου ἐπιμετρήσεως ' τῶν ἀντιτιθεμένων συμφερόντων ἐπὶ τῷ σκοπῷ ὅπως ἡ διοικητικὴ πρᾶξις παράσχῃ τὴν μεγίστην δυνατὴν προστασίαν εἰς τὸν βαρύτερον ὑπὸ τοῦ Νόμου πληττόμενον' [1] ἀποτελεῖ ἔννοιαν στενωτέραν τῆς ὀρθῆς χρήσεως τῆς διακριτικῆς εὐχερείας, διὰ τοῦτο δὲ καὶ ὑπακτέαν, ὡς εἶδος εἰς γένος, ἐν τῇ κατηγορίᾳ τῶν ἄκρων ὁρίων.....
>
> Εἰς ἁπάσας τὰς ἀνωτέρω περιπτώσεις ἡ ἐλεγχόμενη ὀρθότης κρίσεως τῶν διοικητικῶν ὀργάνων ἀναφέρεται εἰς τὸν δικαιότερον ἢ ἐπιεικέστερον τρόπον καθ' ὃν ἔδει νὰ ἐνεργήσῃ ἡ Διοίκησις, κατὰ τὰς ἐχούσας ἰσχὺν νόμου ἀρχὰς τῆς καλῆς Διοικήσεως καὶ δὴ τὰς τοιαύτας τῶν ἄκρων ὁρίων."

And in English it reads:-

> " The judicial control of the administrative discretion has been by case-law extended to most cases where the administration acts in a way contrary to the sense of justice generally and in particular the by now settled principles of

1. Ἴδε Μ. Δ. Στασινοπούλου: 'Ενθ' ἀνωτέρω, σ. 346.

good or honest or proper or regular administration according to varying terminology of the case law. In these cases the administrative Judge checks the correctness of the method of the administrative action as characteristically happens in the following groups of administrative acts:..... (viz.)

3. In the case of administrative acts when there is a choice between equal lawful solutions, it was decided that there is excess of the outer limits of the discretionary power whenever the administration had chosen the more onerous solution instead of the more equitable one. In this case equity in the sence of the benevolent assessment of the conflicting interest aiming at the granting of the greater possible protection to him who is most adversely affected by the Law[1], constitutes a concept narrower than that of the proper use of the administrative discretion and for this reason falls as a class within the genous, in the category of the outer limits.....

In all the aforementioned cases the control of the correctness of the administrative organs refers to the more just and equitable way which the administration ought to have acted, according to the principles of good administration which have the force of law and particularly those relating to the outer limits."

See also *Vasos Eliades Ltd.* v. *The Republic of Cyprus through the Minister of Commerce and Industry*, (1979) 3 C.L.R. 259 where that principle was adopted and followed, viz., that once the administration in taking a decision had a choice between more than one but equally lawful solutions, they ought to have chosen the less onerous solution and not to impose an absolute prohibition.

Having in mind the facts and circumstances of this case, and having relied on the authorities we have quoted, we have reached the view that the renewal of the permits was refused in a defective manner by the administration, but, of course, we are not propared to speculate whether had it not been for that defect, that is, the pollution of the surface and underground water, the permits would have necessarily been renewed.

1. See M D. Stassinopoulos at p. 346.

Having reached that conclusion, we think it is not necessary to deal with any other ground for annulment in this appeal, and we would set aside the decision of the trial Judge and allow the appeal.

Order accordingly. No order as to costs. 5

Appeal allowed. No order as to costs.