

1979 December 5

[MALACHTOS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

GEDEON PROCOPIOU AND OTHERS,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE ATTORNEY-GENERAL OF THE REPUBLIC,

Respondent.

(Cases Nos. 237/79, 238/79 and 248/79).

Provisional order—Rule 13 of the Supreme Constitutional Court Rules, 1962—Discretion of the Court—Principles applicable—Whether recourse likely to succeed on the merits—Flagrant illegality and irreparable damage—Application for provisional order suspending building works on land subject-matter of compulsory acquisition—Merits of recourse having no decisive effect—No irreparable damage because alleged damage is pecuniary and is generally recoverable—Project in question, which is supposed to provide residence for displaced persons, has to proceed with all speed in the public interest—Non-payment of compensation for compulsory acquisition not a reason for granting a provisional order—Applications refused.

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By means of an order of acquisition the respondents acquired an area of land of an extent of about 105 donums, belonging to the applicants, for the purpose of erecting 350 houses, the necessary roads, and a number of shops for the needs of displaced persons due to the Turkish invasion. After the publication of the order of acquisition the respondents entered into possession of the said properties, by means of an order of requisition, and started preparatory works. The applicants challenged the validity of the order of acquisition by means of recourses, under Article 146 of the Constitution, which were followed by applications for a provisional order restraining the respondents from cutting off any trees and/or from starting or continuing any

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building works on their properties till the final determination of the recourses.

On the applications for a provisional order:

5 *Held*, (1) that in order to succeed in an application for a provisional order under rule 13 of the Supreme Constitutional Court Rules, 1962 an applicant must show to the Court that his application is likely to prevail on the merits and that the non making of the order will cause him irreparable damage; that flagrant illegality of an administrative act militates strongly to the making of a
10 provisional order even though irreparable damage has not been proved.

15 (2) That it can neither be said that there exists flagrant illegality of the administrative act complained of nor that the claim of the applicants 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 that, therefore, the merits of the case, cannot have a decisive effect on the outcome of these applications.

20 (3) That it is clear from the affidavits in support of these applications and the evidence before the Court that the injury alleged by the applicants is only pecuniary loss which is generally recoverable and is not irreparable; and that, accordingly, the applications for a provisional order must fail.

25 *Held*, further, (1) that the project in question which is supposed to provide a residence for displaced persons has to proceed with all speed in the public interest; and that the submission of counsel for the applicants that the question of public interest cannot be examined at this stage of the proceedings but only after the hearing of the recourses on the merits must fail.

30 (2) *On the submission of Counsel for the applicants that since no compensation has been paid for the property acquired the provisional order should be granted:*

35 That there is no merit in the above submission because this Court is not concerned in the present proceedings with the proprietary rights in the said immovable property or with the vesting thereof in the name of the respondent authority; and because the respondents did not enter into possession of the property by virtue of the order of acquisition but they entered

lawfully by virtue of an order of requisition, made under sections 4(1) and 6(1) of the Requisition of Property Law, 1962 (Law 21/62) and the reason why no compensation has been paid either under Law 21/62 or under the Compulsory Acquisition of Property Law, 1962 (Law 15/62) is that such compensation has neither been agreed nor has it been determined by the Court as provided in the said Laws. 5

Applications refused.

Cases referred to:

- C.T.C. Consultants Ltd. v. The Cyprus Tourism Organization* 10
(1976) 3 C.L.R. 390;
- Aspri v. The Republic*, 4 R.S.C.C. 57;
- Georghiades (No. 1) v. The Republic* (1965) 3 C.L.R. 392;
- Leonida v. The Republic* (1965) 3 C.L.R. 553;
- Iordanou (No. 1) v. The Republic* (1966) 3 C.L.R. 308; 15
- Cyprus Industrial and Mining Co. Ltd. (No. 2) v. The Republic*
(1966) 3 C.L.R. 474;
- Artemiou (No. 2) v. The Republic* (1966) 3 C.L.R. 562;
- Iordanou (No. 2) v. The Republic* (1966) 3 C.L.R. 696;
- Iordanou (No. 3) v. The Republic* (1966) 3 C.L.R. 705; 20
- Vassiliades v. The Republic* (1966) 3 C.L.R. 708;
- Markantonis v. The Republic* (1966) 3 C.L.R. 714;
- Kouppas v. The Republic* (1966) 3 C.L.R. 765;
- Galazi v. The Minister of Education* (1967) 3 C.L.R. 577;
- HadjiKyriakou and Others (No. 1) v. The Council of Ministers* 25
and Another (1968) 3 C.L.R. 1;
- Sepos v. The Presidential Election Returning Officer* (1968)
3 C.L.R. 82;
- Georghiou (No. 1) v. The Republic* (1968) 3 C.L.R. 401;
- Constantinidou v. The Republic* (1968) 3 C.L.R. 651; 30
- Gouelias v. The Republic* (1969) 3 C.L.R. 583;
- Pavlou and Another v. The Republic* (1971) 3 C.L.R. 120;
- Georghiades v. The Republic* (1971) 3 C.L.R. 309;
- Papadopoullou and Others v. The Republic* (1971) 3 C.L.R. 317;
- Sofocleous v. The Republic* (1971) 3 C.L.R. 345; 35
- Miltiadous and Others v. The Republic* (1972) 3 C.L.R. 341;
- Cleanthous (No. 2) v. The Republic* (1972) 3 C.L.R. 376;

Lanitis Bros. Limited v. The Central Bank of Cyprus (1974)
3 C.L.R. 160;

Papadopoulos v. The Republic (1975) 3 C.L.R. 89;

5 *The Bar Association of Nicosia and Others v. The Republic*
(1975) 3 C.L.R. 24;

Miltiadous and Others v. The Republic (1972) 3 C.L.R. 341.

Applications for provisional orders.

10 Applications for provisional orders restraining the respondent
from cutting off any trees and/or from starting or continuing
any building works on the properties of applicants, before the
determination of their recourse, whereby they challenged the
decision of the respondent to acquire compulsorily their prop-
erties.

B. Vassiliades with E. Evripidou for the applicants.

15 *M. Kyprianou*, Senior Counsel of the Republic with *C.*
Mavrandonis, for the respondent.

Cur. adv. vult.

20 MALACHTOS J. read the following judgment. The applicants
in the present recourses claim a declaration of the Court that
the Notice of Acquisition under No. 495, which was published
in the Official Gazette of the Republic dated 15/9/78, as well
as the Order of Acquisition under No. 401, which was
published in the Official Gazette of the Republic dated 27/4/79,
as regards their respective immovable property situated at Kato
25 Polemidhia in the Limassol District comprising plots 420,
417/1 and 416, respectively; of S/P LIV/49 are, as regards the
aforesaid properties of the applicants, null and void.

The grounds of law on which the recourses are based as stated
therein, are—

30 (a) that the said Notice and/or Order of Acquisition are
contrary to the letter and spirit of Article 23 of the
Constitution since the said acquisition is not absolutely
necessary and is not for the public benefit, it does not
serve any purpose and/or logical purpose, it is illegal
35 and not properly studied, it is injurious to public
interest and was made in excess of power and/or it does
not provide for the payment of compensation, and

(b) the said Notice and/or Order of Acquisition and/or

project are contrary to Article 28 of the Constitution as they amount to discrimination against the applicants.

By the said Order of Acquisition the respondents acquired land of an extent of about 105 donums for the purpose of erecting 350 houses, the necessary roads, a number of shops, etc. for the needs of displaced persons due to the Turkish invasion.

The plots of the applicants affected by this Order are comprising agricultural land of about 19 donums in extent. On the first two plots there exist some carob and olive trees, whereas in the field in Application No. 248/79 there are no trees growing.

After the publication of the Order of Acquisition the respondents invited tenders from building contractors for the erection of blocks of flats on the properties affected by the said Order. Upon the expiration of the time fixed for the submission of the tenders on 28/7/79, the construction of the said buildings was awarded by the Committee of Ministers appointed for this purpose to building contractors on 18/9/79 and the signing of the relevant contracts took place on 29/10/79. The preparatory works had already started in the meantime as by virtue of a requisition order the respondents entered into possession of the said properties.

On the 27th October, 1979, identical applications by summons were filed in the three recourses for a provisional Order restraining the respondents through their agents, and servants, to cut off any trees and/or to start or continue any building works on the properties of the applicants till the final determination by this Court of the three recourses. In view of their nature the three applications were heard together.

Although the three applications, in my view, were wrongly based on section 32 of the Courts of Justice Law, 1960, (Law 14/60) and on section 4 of the Civil Procedure Law, Cap. 6, and not on rule 13 of the Rules of the Supreme Constitutional Court 1962, for the justice of the case I shall proceed to consider them as if they were based on the said rule 13.

In the case of *C.T.C. Consultants Ltd. v. The Cyprus Tourism Organization* (1976) 3 C.L.R. 390 at pages 393 to 394 it is stated that—

“ The making of a provisional order under rule 13, above,

involves the exercise of judicial discretion on the basis of the circumstances of the particular case and in the light of the principles which should guide an administrative Court when dealing with such an application; such principles have been expounded, and applied, in *inter alia*, the following cases:

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Aspri v. The Republic, 4 R.S.C.C. 57, *Georghiades (No. 1) v. The Republic*, (1965) 3 C.L.R. 392, *Leonida v. The Republic*, (1965) 3 C.L.R. 553, *Iordanou (No. 1) v. The Republic*, (1966) 3 C.L.R. 308, *Cyprus Industrial and Mining Co. Ltd. (No. 2) v. The Republic*, (1966) 3 C.L.R. 474, *Artemiou (No. 2) v. The Republic*, (1966) 3 C.L.R. 562, *Iordanou (No. 2) v. The Republic*, (1966) 3 C.L.R. 696, *Iordanou (No. 3) v. The Republic*, (1966) 3 C.L.R. 705, *Vassiliades v. The Republic*, (1966) 3 C.L.R. 708, *Markantonis v. The Republic*, (1966) 3 C.L.R. 714, *Kouppas v. The Republic*, (1966) 3 C.L.R. 765, *Galazi v. The Minister of Education*, (1967) 3 C.L.R. 577, *HadjiKyriakou and others (No. 1) v. The Council of Ministers and another*, (1968) 3 C.L.R. 1, *Sepos v. The Presidential Election Returning Officer*, (1968) 3 C.L.R. 82, *Georghiou (No. 1) v. The Republic*, (1968) 3 C.L.R. 401, *Constantinidou v. The Republic*, (1968) 3 C.L.R. 651, *Goulelis v. The Republic*, (1969) 3 C.L.R. 583, *Pavlou and another v. The Republic*, (1971) 3 C.L.R. 120, *Georghiades v. The Republic*, (1971) 3 C.L.R. 309, *Papadopoullou and others v. The Republic*, (1971) 3 C.L.R. 317, *Sofocleous v. The Republic*, (1971) 3 C.L.R. 345, *Miltiadous and others v. The Republic*, (1972) 3 C.L.R. 341, *Cleanthous (No. 2) v. The Republic*, (1972) 3 C.L.R. 376, *Lanitis Bros. Limited v. The Central Bank of Cyprus*, (1974) 3 C.L.R. 160, *Papadopoulos v. The Republic*, (1975) 3 C.L.R. 89, *The Bar Association of Nicosia and others v. The Republic*, (1975) 3 C.L.R. 24.”

In the case of *Miltiadous and Others v. The Republic* (1972) 3 C.L.R. 341, at page 352, we read:

40 “ It is clear from the above that an applicant in order to succeed in an application for a provisional order under rule 13 of the Supreme Constitutional Court Rules, 1962, must show to the Court that his application is likely to prevail on the merits and that the non making of the order will cause

him irreparable damage. It goes without saying that flagrant illegality of an administrative act militates strongly to the making of a provisional order even though irreparable damage has not been proved. As it appears from Louis L. Jaffee on 'Judicial Control of Administrative Actions' the above principles are accepted in American Jurisprudence more clearly. In Chapter 18 under the heading of 'Temporary Judicial Stays of Administrative Action Pending Judicial Review' of this book, at page 689, it is stated that:

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

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From the material placed before me in the present case it can neither be said that there exists flagrant illegality of the administrative act complained of, a factor militating strongly to the making of the Order nor that the claim of the applicants 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. The merits of the case, therefore, cannot have a decisive effect on the outcome of the present applications.

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Coming now to the question of irreparable injury, it is clear from the affidavits in support of the applications and the other evidence before me that the injury alleged by the applicants is only pecuniary loss which is, generally, recoverable.

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In the "Recourse for Annulment before the Council of State" by Tsatsos 3rd Ed. page 428, paragraph 255 we read:

"Pecuniary loss is generally recoverable. In some cases,

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however, pecuniary loss is considered as irreparable if it is going to endanger a commercial business or the ability of providing the means of support of the applicant. Furthermore, in cases where the extent of the damage in conjunction with the conditions under which the injured party is living, does not cover the above case, the pecuniary loss may amount to irreparable injury if the person who is liable to pay is insolvent, or the damage that will result from the execution of the administrative act, cannot be ascertained.”

10 In the present case, however, this situation does not arise.

It has been submitted by Counsel for applicants that the question of the public interest cannot be examined at this stage of the proceedings but only after the hearing of the recourses on the merits. Although it is not necessary for the purpose of these proceedings to pronounce on the question as to whether the project in question and the continuation of the works already started is in the public interest, since I have already decided that the damage which the applicants may suffer is not irreparable, yet I must say, that I entirely disagree with this submission of counsel. To hold otherwise will be contrary to the Case Law of this Court developed from the case of *Aspri and Kleanthis Georghiades* (No. 1) to the case of the *C.T.C. Consultants Ltd.*, (*supra*).

25 I, therefore, hold the view that the project in question which is supposed to provide a residence for displaced persons has to proceed with all speed in the public interest.

The last point raised by counsel for applicants is that since no compensation has been paid for the property acquired, for this reason alone the provisional Order applied for should be granted.

30 I must say that I find no merit in this submission of counsel, as we are not concerned in the present proceedings with the proprietary rights in the said immovable property or with the vesting thereof in the name of the respondent authority. The respondents did not enter into possession of the property by virtue of the Order of Acquisition but they entered lawfully by 35 virtue of an Order of Requisition made under section 4(1) of the Requisition of Property Law, 1962 (Law 21/62) and the provisions of section 6(1) of the said Law, which read as follows:

“4(1) Where any property is required to be requisitioned

for a purpose of public benefit, the requisitioning authority may, subject to the provisions of the Constitution and of this Law, by an Order (in this Law referred to as an "order of requisition") published in the official Gazette of the Republic, declare that such property is so required and order its requisition, stating clearly the purpose for which it is so required and the reasons for such requisition and date as from which the requisition shall take effect. 5

6(1) Where an order of requisition of any property is made under section 4, possession of such property may be taken by the requisitioning authority on the date specified in such order as the date on which the requisition shall take effect or at any time thereafter and may be retained until the duration of such order is terminated as provided in this Law." 10 15

The compensation payable in respect of the requisition of any immovable property under the provisions of the said law, its determination and the mode of payment, are provided by sections 8 to 13 inclusive.

The reason why no compensation has been paid either under the said Law or under the Compulsory Acquisition of Property Law 1962, (Law 15/62), is because that such compensation has neither been agreed nor it has been determined by the Court as provided in the said Laws. 20

For all the above reasons I have reached the conclusion that the provisional orders applied for should be refused and, therefore, the present applications are dismissed. 25

On the question of costs I make no Order.

Applications for provisional orders refused. No order as to costs. 30