1983 March 18

[SAVVIDES J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

FOURNIA LTD.,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE DISTRICT OFFICER, NICOSIA,

Respondent.

Case No. 271/80).

Administrative Law—Administrative acts or decisions—Executory act—Confirmatory act—A decision confirmatory of a previous one of the same administrative organ is not executory unless there is a new inquiry into the matter—Sub judice decision taken after consideration of facts which were put before the administration for the first time—Is not confirmatory of any previous decision but an executory one.

Administrative Law—Administrative acts or decisions—Reasoning—Need for due reasoning—Sub judice decision by its contents not reasoned—And lack of reasoning not supplemented by the material in the file—Sub judice decision annulled—Moreover even if possible for contents of file to form a reasoning then such reasoning is defective because it comes in direct conflict with the reasons given by counsel for respondent in his opposition and his address and which are not recorded any where in the file as being the reasons for issuing the sub judice decision.

Administrative Law—Administrative acts or decisions—Misconception of fact—Even mere probability of such misconception enough to vitiate the administrative decision involved—Taking into consideration matters which were not in existence renders sub judice decision bad on the ground of misconception of facts.

The applicants, a limited company, who were the owners

of a piece of land under plot 532 at Dhali village, were on the 26th November, 1975 granted a permit to sink a borehole in the aforesaid plot subject to the condition that they were not allowed to pump water from the borehole unless a permit to that effect was granted to them (condition No. 7) and to the condition that they were not entitled to sell any surplus water to any owner of adjacent properties unless a permit for such purpose was obtained (condition No. 8).

On the 8th June, 1979 applicants applied for a permit to instal machinery in the said borehole and the respondent in response to such application by his letter* dated 17.9.1979 cancelled the previous condition No. 7 and substituted it by other conditions authorising, inter alia, the applicant to instal machinery in the borehole and to pump water to be used only for the irrigation of the above plot 523.

On the 29th April, 1980 the applicants applied** for a permit to instal a 50 h.p. and a turbine of 4 inches in diameter in their borehole and for a permit to irrigate the nearby plots 529 and 186 of an area of 27 donums. Respondent replied by his letter of the 26th May, 1980 informing applicants that a permit to instal machinery was granted to them on 17.9.1979 and that "with regard to your application for an alteration of the conditions of the said permit so that the irrigated area is increased, you are informed that this cannot be done".

Hence this recourse:

Counsel for the respondent raised the preliminary objection that the decision of 26.5.1980, which is challenged by this recourse, is a confirmatory act of the decision of 26.11.1975 whereby the permit for the sinking of the borehole was granted.

Held, (I) *on the preliminary objection*:

That when a decision is confirmatory of a previous one of the same administrative organ, then it is not executory, unless there is a new inquiry into the matter; that the application of the 29.4.1980, which gave rise to the sub judice decision, was a new application putting forward all the facts, whether

* The letter is quoted in full at p. 266 post.

** The application is quoted at pp. 266 - 267 post.

new or old, for the first time and therefore the decision referring to it must be considered as the first decision on the point and not confirmatory of any previous decision and that, therefore, the sub judice decision is not executory.

Held, (II) *on the merits of the recourse:*

(1) That the reasoning of an administrative decision must be recorded so as to enable the Court to exercise control over it and absence of any record renders the sub judice decision defective; that the sub judice decision by its contents gives no reasons for the dismissal of applicants' application; that the lack of reasoning in the contents of the sub judice decision is not supplemented by the material in the file of the administration; and that, therefore, the sub judice decision has to be annulled for lack of due reasoning.

Held, further, that even if it was possible for the contents of the file to form a reasoning, then, again, such reasoning would have been defective as coming in direct conflict with the reasons given by counsel both in his opposition and his address and which are not recorded anywhere in the file as being the real reasons for issuing the sub judice decision (see *Hadjidemetriou* v. *Republic* (1980) 3 C.L.R. 20 at p. 26).

(2) *On the contention of Counsel for the respondent that applicants were interested in a licence to pump a greater quantity of water in order to use it for the division of land into building sites and not for agricultural purposes:*

That once any opinion in this respect had been formed by the respondent, the least he had to do was to carry out an inquiry into the matter and ascertain the true factual situation, leaving apart the fact that in case of an application for a division permit, such application would have come to him for consideration; that the fact that the respondent took into consideration matters which were not in existence, renders the sub judice decision bad, on the ground of misconception of facts; that even mere probability of such misconception is enough to vitiate the administrative decision involved (see *Mallouros* v. *E.A.C.* (1974) 3 C.L.R. 220).

Sub judice decision annulled.

Cases referred to:

Georghiades v. *Republic* (1980) 3 C.L.R. 486 at pp. 490–491,

Eleftheriou v. *Central Bank* (1980) 3 C.L.R. 85 at pp. 98–100,

Vorkas v. *Republic* (1982) 3 C.L.R. 309 at pp. 314–315;

Hadjidemetriou v. *Republic* (1980) 3 C.L.R. 20 at p. 26:

Maltouros v. *E.A.C.* (1974) 3 C.L.R. 220.

Recourse.

Recourse against the refusal of the respondent to alter the conditions of the permit of a borehole under No. 39384.

L. Papaphilippou, for the applicant.

M. Kyprianou, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. The applicant, a limited company, is the owner of a piece of land under Plot 532, Sheet Plan 30/40 W.2, situated at Dhali village. On 9.10.75 the applicant applied to the respondent for a permit to sink a borehole in the aforesaid plot. Such permit was granted to the applicant on 26.11.75, under No. 039384, copy of which appears under Blue 11 in the file of the administration No. W 32/74, which is before me, subject to certain conditions in which the following were included:

(a) That the water would be used for irrigation purposes only, for the irrigation of Plot 532 (Condition (1) of the permit).

(B) That the applicant was not allowed to pump water from the said borehole, unless a permit to that effect was granted to him (Condition No. (7) of the permit).

(c) In case of surplus water, the applicant was not entitled to sell it to any owner of adjacent properties, unless a permit for such purpose was obtained (Condition (8) of the permit).

(d) That an improved system of irrigation should be applied (Condition (9) of the permit).

On 8th June, 1979 applicant applied by letter (Blue 12 in the file) for a permit to instal machinery in the said borehole adding that he intended to use the water for the irrigation of 30 donums of adjacent land. Respondent in response to such application,

by letter dated 17.9.1979 (Blue 13) cancelled the previous condition (7) of the permit, and substituted it by the following conditions:

"Condition (7) of the permit No. 039384 (File No. W 32/74), issued by me to Fournia Co. Ltd., of Nicosia, is hereby cancelled and substituted by the following condition:

7(a) You are authorised to instal a pump not larger than 4 inches in diameter.

(b) To instal a turbine motor engine, of a maximum output of 25 h.p.

(c) You are authorised to pump water to be used only for the irrigation of Plot 532 of Sheet Plan XXX/40.W.4 at Dhali.

(d) An improved system of irrigation should be applied."

At the bottom of the above letter, the following was inserted:

"The above condition will be subject to reconsideration and /or cancellation by me without any notice".

On 30.10.1979 the applicant addressed to the respondent the following letter (Blue 19):

"I refer to the permit granted for the sinking of a borehole, under No. W.32/74 dated 26.11.1975 as well as to the permit which was granted for the installation of machinery and use of the water - permit No. 039384, dated 17.9.1979 - and I apply for the granting of a permit to irrigate the near-by plots 217 and 582 of Sheet/Plan XXX/40 E.2.

I enclose copies of titles of ownership of the plots in respect of which the present application is made."

It appears that no reply was sent to the above letter as no record of any reply appears in the file of the administration, before me. On 29.4.1980, applicant submitted the following letter:

"I apply for the grant of a permit to instal machinery, that is, an engine of 50 h.p. output and a turbine of 4 inches in diameter, on my borehole under File W.32/74 Sheet Plan XXX/40)W.2, Plot 532 at Dhali village.

The above borehole has been tested and its water is about 30 c.m. per hour and it can irrigate a much larger area than the plot in which it lies and for this reason I apply for a permit to irrigate the nearby plots 529 and 186, of an area of 27 donums on the same Sheet Plan and near the borehole in question, without any problem for the conveyance of the water as it appears on the attached survey plans.

The water of my borehole is brackish and it is my intention to plant seasonal plantations."

The respondents by letter dated 26th May, 1980, rejected the application. The contents of such letter (Blue 22 of the file) read as follows:-

"I wish to refer to your letter dated 29th April, 1980 whereby you apply for a permit to instal pumping machinery on the borehole sunk by virtue of Permit No. 39384 in Plot 532 Sheet Plan 30/40/E4 at Dhali village and to inform you that such permit has been granted to you on 17th September, 1979. A photocopy is attached.

2. With regard to your application for an alteration of the conditions of the said permit so that the irrigated area is increased, you are informed that this cannot be done."

As a result of such refusal, the applicant filed the present recourse whereby he prays for a declaration of the Court that the decision and/or act of the respondents dated 26.5.1980 by which they refused to alter the conditions of the permit of the borehole under No. 39384, is null and void and of no legal effect whatsoever and that anything omitted to be done should be done.

The legal grounds on which the recourse is based, as set out in the application, are as follows:

1. The respondents acted under a misconception of facts in that:-

(a) They did not take into consideration and/or they did not assess properly the fact that the borehole of the applicants can yield water for irrigation of a much larger area than that of the plot on which it was sunk.

(b) They did not take into consideration the fact that the applied alteration of the permit concerned only the horse power of the pumping engine and not the width of the pipes.

(c) They did not take into consideration the fact that the applicants are the owners of the land intended to be irrigated which is an extension and/or continuation of the plot on which the borehole lies.

(d) They did not take into consideration the opinion or suggestion of the Water Development Department.

2. The respondents acted discriminatorily and with a sense outside the scope of impersonal good administration.

3. In any circumstances the sub judice decision is arbitrary and/or lacks any lawful or legal result.

The respondents opposed the application and by their opposition, they raised the following grounds of law:

1. The decision which is challenged which was communicated to the applicant on the 26th May, 1980, is a confirmatory act of the decision dated 26th November, 1975, whereby the permit under No. 039384 for the sinking of a well, was granted.

2. The recourse of the applicant is out of time. In alternative,

3. The challenged decision and/or act of the respondents was taken lawfully and in compliance with the provisions of the relevant legislation and in particular of the Wells Law, Cap. 351.

4. The challenged decision and/or act was taken after a careful examination of all the relevant facts and circumstances of the case and in accordance with the expressed policy of the Government.

Before dealing with the other legal grounds posing for consideration in this recourse, I shall deal first with the preliminary objection raised by the opposition whereby it is contended that the sub judice act and/or decision is not an executory act but merely a confirmatory one of a previous decision. If such contention is upheld, then there is an end to these proceedings.

Counsel for respondent contended that the sub judice decision merely confirms the decisions of the respondent dated

26.11.1975 (when the original permit was issued) and 17th September, 1979 (when the permit for the installation of the machinery was granted). He argued, that the administration, at the time of taking the two previous decisions mentioned above, had before it all relevant material and no new facts were submitted for reconsideration of the case by the application of the 29th April, 1980.

Counsel for applicant, on the other hand, submitted that the application of the 29th April, 1980, was different from the other two applications mentioned above, and new facts were introduced by such application for consideration by the appropriate authority. Furthermore, he added, conditions (7) and (8) of the original permit did not impose a prohibition on the applicant to apply for a permit to pump water and sell it to owners of nearby plots of land. Conditions (7) and (8) were subject to a provision that the applicant was not allowed to pump water for irrigation of other properties, or sell it to owners of adjacent properties unless a permit for such purpose was obtained.

The position as to the principles governing executory and confirmatory acts is well settled by our Case Law and there is no need to repeat it. It suffices to say that when a decision is confirmatory of a previous one of the same administrative organ, then it is not executory, unless there is a new inquiry into the matter.

In order to decide whether the sub judice decision is a confirmatory one or not, I have to consider, in addition to the contents of the sub judice decision, the contents of the application of the applicant dated 29.4.1980 which led to the sub judice decision, as well as the contents of the previous decisions of 26.11.1975 when the permit to drill the borehole was granted and 18.9.1979 when the permit to instal a pump was granted, as well as the applications dated 9.10.1975 and 8.6.1979 which led to those decisions, respectively.

By comparing the sub judice decision and the application of 29.4.1980 on which such decision was based, with the original application of 9.10.1975 and the decision taken on same, it is apparent that they are entirely different both in nature and in substance. The application of 9.10.1975 was an application for a permit to sink a borehole which was granted on 26.11.1975,

subject to the conditions that the applicant was not entitled to pump water from the said borehole without a permit (Condition (7)) and was restricted to sell surplus water to any other owner of nearby land without a permit obtained for such purpose (Condition (8)). On the other hand, the application of 29.4.1980 was for a permit to instal pumping machinery on the said borehole and irrigate the nearby plots 529 and 186. Such application could be made at any time either under Condition (8) of the permit granted on 26.11.1975 or under the proviso to sub-section (3) of section 3 of the Wells Law, Cap. 351, whereby the holder of a permit may, at any time, apply for the modification of any conditions or restrictions imposed on such permit.

It is clear from the contents of the two applications which refer to different matters, and the conditions of the permit granted on 26.11.1975 that the sub judice decision cannot in any way be confirmatory of that of the 26th November, 1975.

I am coming now to consider whether the sub judice decision is confirmatory of the decision of the 17th September, 1979, whereby a permit to instal pumping machinery was granted to the applicant. Comparing the sub judice decision to the one of the 17th September, 1979, I find the following facts:

(a) The application of 8.6.1979 was an application for the installation of pumping machinery in general with an addition that applicant intended to use the water for the irrigation of 30 donums of adjacent land.

(b) The permit issued to the applicant on the 17th September, 1979 in consequence thereof, substituted the original Condition (7) which read as follows:

> "You are not entitled to pump water from the said borehole unless you apply and obtain a permit to this effect"

with a new condition, Condition 7 enabling him to instal a water pump not greater than 4 inches in diameter and an electric motor engine of an output of not more than 25 h.p. for the irrigation of Plot 532 only, subject to reconsideration and/or cancellation by the District Officer.

(c) The application of the 29th April, 1980 was for the granting of a permit to instal pumping machinery of 50 h.p. and for the use of the water for the irrigation of the nearby plots 529 and 186.

With regard to the first leg of the application of 29.4.1980, concerning the installation of machinery, after considering and comparing the two applications and decisions, I have reached the conclusion that (though not mentioned in so many words) the application of 29.4.1980 differs from the one of 8.6.1979, and must be treated as an application to alter the conditions (Condition (7)) of the permit. The applicant was entitled to make such application, not only under paragraph 2 of the decision of 17.9.1979 but also under the provisions of the Law. In this respect, section 3(3) of the Wells Law, Cap. 351, reads as follows:

"S.3.(1) _____

(2) _____

(3) In granting a permit under the provisions of subsection (1) of this section, the District Officer may impose such conditions and restrictions as to him may seem necessary or desirable regarding the sinking or construction of the well, the manner in which the water shall be taken therefrom and generally regarding the use of the water of such well:

Provided that upon the application of the holder of a permit the District Officer may vary or modify any conditions or restrictions imposed in such permit.

(4) _____"

Therefore, in this respect, the sub judice decision was not a confirmatory decision but a decision on a new application and in consequence an executory act.

Examining now the second leg of the sub judice decision which concerns the use of the water for the irrigation of the nearby plots 529 and 186 as well, it is very clear that this has nothing to do with the application of 9.10.1975 and the decision of 26.11.1975 (the original permit). It was one of the conditions of the original permit that the water was to be used only for the irrigation of plot 532 (Condition (1)). But this was before the borehole was sunk and Condition (8) which has not been altered

since, provided that in case of surplus water this could not be sold to owners of nearby property, unless a permit was obtained for that purpose. This did not exclude the extension of the use of the water for other properties, subject to a permit for such purpose. At that time no application was made for the irrigation of any plot other than the one in which the borehole was sunk.

In the application of 8.6.1979 the second paragraph reads:

> "I request that the licence applied for be granted to me the soonest possible because I urgently require the use of the water of my borehole for the irrigation of the nearby plots of an area of 30 donums."

The above passage indicated an intention to use the water for the irrigation of 30 donums of other properties, in general terms, without mentioning the particular plots for which the applicant wanted to use the water.

In the circumstances and regard having also to the fact that the above letter refers to another letter dated 25.11.77, which, as noted by the respondent, was not received by him, I find that there was no application, up to that time for a permit to irrigate any specific plot other than plot 532. The decision of 17.9.1979, was not, therefore, a decision on the point of the irrigation of any other plot but merely embodied and repeated the condition of the original permit that the water was to be used only for the irrigation of plot 532.

The first formal application for a permit to use the water for the irrigation of nearby plots (217 and 582), is to be found in a letter dated 30.10.1979. This letter, however, refers to two other plots and not to those mentioned in the application of 29.4.1980. In any case, once no reply or decision was ever taken on such application, I find it unnecessary to deal further with this, as no argument has been advanced in this respect.

The next step taken by applicant is his letter of 29.4.1980, to the contents of which reference has already been made and whereby in the light of the facts set out therein, he applied for a permit to instal a bigger engine and irrigate two nearby plots, plots 529 and 186, of a total area of 27 donums. The respon-

dent rejected such application by letter dated 26th May, 1980 which embodies the sub judice decision.

Bearing in mind all the above facts, I find that this was a new application putting forward all the facts, whether new or old, for the first time and, therefore, the decision referring to it must be considered as the first decision on the point and not confirmatory of any previous decision. Even if we treat the above application as the second one of the kind (the first being the one of 30.10.1979), no decision was ever taken on the application of 30.10.1979 on the question in issue, which the sub judice decision could be considered as confirming. I have, therefore, come to the conclusion that in respect of this leg of the application, as well, the sub judice decision is an executory one.

Having found so, I come now to consider the case on its merits.

The grounds of law advanced in support of the application, have been mentioned earlier in this judgment. In addition to the said grounds of law which were argued by counsel for applicant, another general ground was raised by him, that is, the ground of reasoning. On this last ground, counsel for applicant contended that no reasons are given by the respondent for the sub judice decision, and, as a result, the said decision has to be annulled for lack of reasoning.

Counsel for the respondent on the other hand, in his statement of facts in support of the opposition, stated the following in paragraph 2:-

> "2. The grounds on which the respondent relied for his refusal to allow the amendment of the conditions of the borehole permit are that the applicants are interested in a licence to pump a greater quantity of water in order to use it in a more suitable time for the division of land into building sites and not for agricultural purposes".

In his address he adopted the above, and contended that:

> "The reason that the applicants applied for a permit for for a greater irrigation was not, in our view, in reality, the irrigation of properties for agricultural purposes, but, obviously, to achieve increase of the market value

of their properties. This may be inferred from the fact that the water is brackish and has not been used till today not even for the irrigation of plot 532".

Counsel further maintained that the reasoning of the sub judice decision may be found in the file of the Administration, which was produced to the Court. It is clear from the contents of such file, counsel submitted, that respondent dismissed the application of the 29th April, 1980, for the same reasons that he dismissed the original application of the applicant dated 9th October, 1975 and that such reasoning may be deduced from note 15 and Blue 13 in the file.

Once the sub judice decision by its contents gives no reasons for the dismissal of applicant's application, I have to examine the file of the administration which is before me to find whether any reasoning exists, as suggested by counsel for respondent, and which may supplement the lack of reasoning in the contents of the sub judice decision. The reply of the administration to the application of 9th October, 1975, for a permit to sink a borehole, besides the fact that it does not contain any reasoning, it is a decision in the affirmative, granting the permit applied for, subject to certain conditions, and not in the negative, as suggested by counsel for respondent in his address. The only negative reply of the administration to be found in the file is the one dated 13.12.1974, which is a reply to an application of applicant dated 15.2.1974 for a borehole permit in the same plot. In that decision which is Blue 6 in the file, the reasons given for not granting the permit are that:

"(a) the said plot lies within an area which has been declared as a 'Water Conservation Area' on the basis of section 4(1) of the Wells Law, Cap. 351, by a declaration published in the official Government Gazette No 4008 dated 6.12.1956.

(b) The Director of the Water Development Department in the exercise of the powers given to him by section 4 of the Wells Law, Cap. 351 refused to concur to the granting of the permit applied for.

(c) There is a private borehole at a distance of 600 feet".

That one was a reasoned decision. As a result of such refusal,

the applicant moved the place of its intended borehole so that the nearest existing borehole to be 1,100 feet away (Blue 10) and the respondent, acting with the concurrence of the Director of the Water Development Department, who had no longer any reason to withhold his concurrence, granted the permit. That decision, however, had nothing to do with the present one, and its reasoning cannot afford any reasoning for the sub judice decision, because the reasons for which that permit was not granted do not exist any longer.

Note 15 to which counsel for respondent referred, is the concurrence of the Director of the Water Development Department to the granting of the original permit to the applicant. Its contents, however, cannot in any way afford any legal reasoning to the sub judice decision which concerns an application for the amendment of the conditions of the original permit. In fact, nothing in that note contains any reasoning of any sort for any matter. Lastly, Blue 13 in the file, which is the amended Condition (7), does not again contain any reasoning and does not help at all in finding any reasoning for the sub judice decision.

With regard to the reasons advanced by counsel for the respondent, both under paragraph 2 of the facts set out in the opposition and in his written address as being the real reasons for not granting the permit applied for by the respondent, they do not, in my opinion, constitute any reasoning for the sub judice decision since they do not appear anywhere either in the decision itself or in the file of the administration. Furthermore, such reasons are arbitrary inferences not recorded in the file, as reasons for refusing the application. The reasoning of an administrative decision must be recorded so as to enable the Court to exercise control over it and absence of any record renders the sub judice decision defective. (See, in this respect, the cases of *Georghiades* v. *The Republic* (1980) 3 C.L.R. 486 at pp. 490–491, *Eleftheriou* v. *Central Bank* (1980) 3 C.L.R. 85 at pp. 98–100 and *Vorkas* v. *Republic* (1982) 3 C.L.R. 309 at pp. 314, 315).

Furthermore, even if it was possible for the contents of the file to form a reasoning, then, again, such reasoning would have been defective as coming in direct conflict with the reasons given

by counsel both in his opposition and his address and which are not recorded anywhere in the file as being the real reasons for issuing the sub judice decision. In the case of *Hadjidemetriou* v. *Republic* (1980) 3 C.L.R. 20, it was said at p. 26 that:

> "The sub judice decision, therefore, has to be annulled because the reasons given by the respondent Commission in its minutes appear to be definitely contrary to the relevant administrative records and incompatible with factors which were taken into account by it. If any authority is needed for this proposition it can be found in the case of *Niki Ioannou v. The Republic* (1976) 3 C.L.R., p. 431, at p. 442, and the case of *Georghiou v. The Republic* (1976) 3 C.L.R. 74, at p. 84, where reference is made also to the conclusions from the Case Law of the Council of State in Greece 1929–1959, p. 188; to *Iacovides v. The Republic* (1966) 3 C.L.R. p. 212; and *Lardis v. The Republic* (1967) 3 C.L.R. 64, at p. 78, as well as the decisions of the Greek Council of State in Cases 254/57 & 1839/58.
>
> Furthermore, in view of these differences in the contents of these records, the respondent Commission does not appear to have carried out the due and proper inquiry which was called for in the circumstances of the case and this failure constitutes a ground for annulling the sub judice decision also".

And in a more recent case, that of *Vorkas* v. *The Republic* (1982) 3 C.L.R. 309, Demetriades, J., has stated, at pp. 314–315:

> "It is obvious that the reasons given by the respondents in rejecting the objection of the applicants against their transfer to Psevdas are in direct conflict with their communique issued on the 12th October, 1981, as in that communique they speak about surplus of teachers in the districts of Limassol and Paphos, whilst in their letter explaining their refusal to acceed to the request of the applicants they speak about surplus of teachers in the Nicosia schools. They are further, an afterthought.

Though the reasoning of an administrative organ may be ascertained and supplemented from the material in the

files of the administration, in the present case no such reasoning can be derived from the documents and files produced in the Court.

Comparing now the reasons that allegedly led the respondents to the transfer of school teachers, as they appear in their said communique, and the contents of their letter of the 9th November, 1981, one cannot reach the conclusion that the respondents arrived at their decision in a reasonable manner. Further, it is a basic principle of administrative law that the administrative organ concerned in each case, in reaching its decision, must have carried out a proper inquiry. In the present case, it does not appear either from the relevant files or from their letter of the 9th November, 1981, that the respondents have gone thoroughly into the grounds put forward by the applicants in their objection against their transfer.

Therefore, the sub judice decision has to be declared null and void for lack of due reasoning and as being the result of insufficient inquiry on the part of the respondents".

In the light of the above, I have reached the conclusion that the sub judice decision has to be annulled for lack of due reasoning. Though, having reached such conclusion, it would have been unnecessary for me to examine the other issues posing for determination, nevertheless, I am going to examine the contention of counsel for applicant that the sub judice decision should also be annulled on the ground of misconception of facts, as I consider such ground very material in the present case.

In support of his contention in this respect, counsel for the respondent maintained that before the sub judice decision was taken, certain facts were not taken into consideration, such as the fact that plot 532 is half-precipicious, that the borehole has a capacity of 30 c.m. per hour, that its water is brackish, that the amendment applied for concerned the h.p. of the engine and had nothing to do with the circumference of the pipes, that the applicant was the owner of the two other plots which were adjacent to plot 532, a fact which ought to have been taken into account, in view of the nature of plot 532 and the capacity of the borehole in question, and, lastly, that the respondents did

not ask for the views of the Director of the Water Development Department, in the matter.

In respect of the nature of plot 532 it was submitted by counsel for respondent that the fact that plot 532 is half-precipicious appears on the plans which were in the files of the administration. He added, however, that "in any case, the applicants had a duty to mention this fact, but on the contrary, in their application they mentioned the extent of plot 532 and that this plot was to be irrigated for the cultivation of clover". This statement amounts to an admission or at least, is an indication that the respondent did not direct his mind to it and, therefore, there was a misconception as to this fact. With regard to the h.p. of the engine and the capacity of the bore-hole, these facts were before the respondent and there is no indication that they were misconceived or not taken into account. Therefore, acting on the principle of good and proper administration and the presumption that the administration took them properly into account, I find that there is no misconception on these points.

Coming to the allegation that the respondent did not consider the fact that the applicant is the owner of the two other plots which are adjacent, I wish to observe the following: These plots are not adjacent with plot 532 but they are situated near it. The sketch plan of the area was however before the respondent, in the file of the administration, and the plots concerned were indicated on that sketch as well as the route for the conveyance of the water from plot 532 to them. There is, therefore, no misconception regarding this fact.

From the facts set out in paragraph 2 of the opposition and in the address of counsel for the respondent, it appears that the respondent arrived at certain arbitrary conclusions regarding the intention of the applicant as to the use of the water which seemed to have influenced his mind in taking the sub judice decision. It is stated therein that the intention of the applicant to divide the land into building sites is shown by a letter in the file by which the Department of Lands and Surveys is asking to know about the use of the borehole in plot 532 for the purpose of assessing its market value. Counsel went on to state that the applicant, even if the water is brackish, can mix it with

other good water and convey it to some other area for the purpose of dividing it into building sites. Once any opinion in this respect had been formed by the respondent, the least he had to do was to carry out an inquiry into the matter and ascertain the true factual situation, leaving apart the fact that in case of an application for a division permit, such application would have come to him for consideration. The fact that the respondent took into consideration matters which were not in existence, renders the sub judice decision bad, on the ground of misconception of facts. Even mere probability of such misconception is enough to vitiate the administrative decision involved. (*Mallouros* v. *E.A.C.* (1974) 3 C.L.R. 220).

As to the contention of applicant that the respondent did not ask the views of the Director of the Water Development I am inclined to agree with counsel for the respondent that the views of the Director of the Water Development are only required if a permit is to be granted.

In view of my above findings, I consider it unnecessary to deal with the question of discriminatory treatment or any other grounds of law which have been advanced by counsel for the applicant.

In the result, this recourse succeeds and the sub judice decision is annulled on the grounds of lack of due reasoning and misconception of facts.

In the circumstances of the case, I make no order for costs.

Sub judice decision annulled. No order as to costs.