1985 April 5

[A. LOIZOU, MALACHTOS AND STYLIANIDES, JJ.]

VIAS DEMETRIOU AND OTHERS,

Appellants-Claimants,

v.

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

Respondent-Acquiring Authority.

(Civil Appeals Nos. 6593 and 6601).

Compulsory acquisition—Compensation—Assessment—Betterment—Material date for assessment is the date of the notice of acquisition—Section 6(c) of the Compulsory Acquisition Law 1983 (Law 25/83) amending section 10 of Law 15/62—Two separate acquisitions—Impermissible to consider the two properties as one for the purpose of calculation of the betterment—No account must be taken of any fall in the value of money in assessing the compensation.

Civil Procedure—Trial in civil cases—Court has to confine itself to the issues as appearing at the close of the pleadings.

In assessing the compensation payable to the appellants for the acquisition of appellants' property the trial Judge found that there was enhancement of 10% in the value of the remaining property held by them, which occurred by reason of the acquisition. Upon appeal by the owners the main issue for consideration was whether the material date for assessment of the betterment was the date of the notice of acquisition or the date of trial.

Held, that only data existing at the time of the notification of the acquisition should be taken into consideration in the assessment of the betterment or injurious affection

of the other property of the owners (see section 6(c) of the Compulsory Acquisition Law, 1983 (Law 25/83) which amended section 10 of Law 15/62); and that, therefore, the case must go back for retrial on the issue of betterment in the light of the Law as above expounded.

Held, further, (1) that no account must be taken in assessing compensation of any fall in the value of money between the date by reference to which the compensation is to be assessed and the date of payment; and that the provision of payment of interest remedies this difference to some extent.

(2) That when there are two separate acquisitions it is impermissible to consider the two properties—subject matter of both acquisitions—as one for the purpose of calculation of the betterment.

(3) That these appeals should be sent back for retrial on the further ground that the trial Judge was carried away by the evidence and the issues raised by the witnesses, without objection by counsel, and did not confine himself to the prayer of the appellants and the issues as they crystallised in the pleadings of the parties, as it is well settled that a Court of Law has to confine itself to the issues as appearing at the close of the pleadings or properly added to at the date of the hearing and not take up at the trial other issues which the evidence of a particular witness might suggest (see *Eleni Panayiotou Iordanou* v. *Polycarpos Neophytou Anyftos,* 24 C.L.R. 97 at p. 106; *Christakis Loucaides* v. *C.D. Hay & Sons Ltd.* (1971) 1 C.L.R. 134).

Appeals allowed.
Retrial Order.

Cases referred to:

Horn v. *Sunderland Corporation* [1941] 1 All E.R. 480 at p. 496;

Moti and Another v. *Republic* (1968) 1 C.L.R. 102;

Misirlizade v. *Municipality of Nicosia* (1976) 1 C.L.R. 413;

Republic v. *Christofides and Others* (1984) 1 C.L.R. 305;

D. J. Demades & Sons Ltd. v. *Republic of Cyprus* (1977) 1 C.L.R. 189;

Commonwealth of Australia v. *Milledge* [1953] 4 P. & C.R. 135;

Iordanou v. *Anyftos*, 24 C.L.R. 97 at p. 106;

Loucaides v. *C.D. Hay & Sons Ltd.* (1971) 1 C.L.R. 134.

Appeals.

Appeals by claimants against the judgment of the District Court of Larnaca (Artemides, Ag. P. D.C.) dated the 29th June, 1983 (Ref. No. 23/81) whereby the compensation payable to them for their immovable property compulsorily acquired was determined at £128,755.=.

A. S. Angelides, for the appellants.

Gl. HjiPetrou, for the respondent.

Cur. adv. vult.

A. LOIZOU J.: The judgment of the Court will be delivered by Mr. Justice Stylianides.

STYLIANIDES J.: These appeals were taken against the judgment of the District Court of Larnaca determining the compensation payable to the appellants for their immovable property compulsorily acquired.

The appellants are the owners in undivided shares by virtue of Reg. No. L.106 of Plot 98, Sheet/Plan 40/63. W. 1, Complex L, of Larnaca town—63 donums, 2 evleks and 700 sq. ft. in extent.

On 11.4.80 notice of acquisition of part thereof—33 donums, 1 evlek and 1,200 sq. ft.—was published in the Official Gazette No. 1596 under Notification No. 274. The object of the acquisition, as published in the aforesaid notification, is the creation of a housing estate (οικισμός) for refugees, i.e. for the erection of houses, shops, other buildings, schools, health centres and other establishments.

On 27.3.81 order of acquisition was published under the provisions of s.6 of Law 15/62 in the Official Gazette

No. 1672. The extent of the property acquired under the order, however, was less than the area covered by the notice, that is to say, the property acquired was 28 donums, 2 evleks and 3,400 sq. ft.

On 27.3.81 under Notification No. 245 another notice of acquisition was published, stating the intention of the Acquiring Authority to acquire a portion of the aforesaid plot of the appellants—1 donum and 2,350 sq. ft. in extent— for a purpose of public benefit, to wit, the construction or roads, sewage and installation of electric and water for the housing and convenience, use and facilities of displaced persons.

After the expiration of the period set out in the aforesaid notice of acquisition, on 15.5.81 an order of acquisition of this last portion of land of the appellants was published in the Gazette under Notification No. 405. In this judgment we shall refer to the aforesaid acquisitions as first and second acquisition, respectively.

As no agreement was reached on the compensation to be paid by the Acquiring Authority, the appellants resorted to the District Court of Larnaca by Reference No. 23/81 for the determination of the amount to be paid to them in respect of the property acquired under the 1st acquisition.

In a modern society the State and others are empowered to acquire compulsorily immovable property required for public purposes.

Article 23 of our Constitution which guarantees and enshrines the right of ownership, provides in paragraph 4 thereof:-

> "4. Any movable or immovable property or any right over or interest in any such property may be compulsorily acquired by the Republic or by a municipal corporation or by a Communal Chamber for the educational, religious, charitable or sporting institutions, bodies or establishments within its competence and only from the persons belonging to its respective Community or by a public corporation or

a public uitility body on which such right has been conferred by law, and only-

(a) for a purpose which is to the public benefit and shall be specially provided by a general law for compulsory acquisition which shall be enacted within a year from the date of the coming into operation of this Constitution; and

(b) when such purpose is established by a decision of the acquiring authority and made under the provisions of such law stating clearly the reasons for such acquisition; and

(c) upon the payment in cash and in advance of a just and equitable compensation to be determined in case of disagreement by a civil Court".

Pursuant to this constitutional provision the Compulsory Acquisition Law, No. 15/62, was enacted. Section 10 thereof provides for the Rules governing the assessment of the compensation of property compulsorily acquired. The principle underlying the assessment is set out in r. (a):-

"The value of the property shall be the amount which the property if sold in the open market on the date of the publication of the relative notice of acquisition by a willing seller, might be expected to realize".

The statute gives to the owner compelled to sell compensation—the right to be put, so far as money can do it, in the same position as if his land has not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater. As it was said by Scott, L. J., in *Horn* v. *Sunderland Corporation,* [1941] 1 All E.R. 480, at p. 496:-

"The statutory compensation cannot and must not exceed the owner's total loss, for, if it does, it will put an unfair burden upon the public authority or other promoters, who on public grounds have been given the power of compulsory acquisition, and it

will transgress the principle of ecquivalence which is at the root of statutory compensation, which lays it down that the owner shall be paid neither less nor more than his loss".

This principle of equivalence of the compensation to the loss sustained by the compulsory acquisition at the time of the notice permeates our Case Law—*(Moti and Another* v. *The Republic* (1968) 1 C.L.R. 102; *Osman Misirlizade* v. *Municipality of Nicosia* (1976) 1 C.L.R. 413; *The Republic* v. *Christofides & Others* (1984) 1 C.L.R. 305).

The trial Judge, after hearing the experts of both sides, who employed the direct comparison method, assessed the value of the property, subject of the notification of 11.4.80 —28 donums, 2 evleks and 3,400 sq. ft.—at £4,887.- per donum, total £140,500.-, and the value of the subject property of the second acquisition of 1 donum and 2,350 sq. ft. at £5,375.- per donum, having accepted the version of the respondent's expert that there was an increase of 10% —total £6,275.- There is no quarrel on this assessment.

Then he proceeded to apply rule (f) of s.10 that reads:-

"In the case of property of which a part only is acquired under this Law, account shall be taken of the increase or decrease, if any, in the value of other property held by the owner together with the part so acquired, which will occur by reason of the acquisition".

There were rival contentions by the experts and by counsel on the matter before the trial Judge.

The expert of the appellants testified that only betterment and/or enhancement of value of the remaining part of the plot of the appellants was the construction of the road—35 ft. wide and 530 ft. long—envisaged in the second acquisition. Such road would be necessary for the conversion of the remainder into building sites and would cost £3,000.- to the appellants.

The valuer of the Acquiring Authority, on the other

hand, testified that the acquisition and the execution of the project of the housing estate as well as the construction of the aforesaid road contributed to the enhancement of the remainder.

The trial Judge, relying on the testimony of the valuer of the Acquiring Authority, accepted that the remaining property of the appellants has gained value by 10%. The relevant part of his judgment reads:-

«Συμφωνώ επομένως πως το υπόλοιπο κτήμα των απαιτητών απέκτησε κατά την επίδικη ημερομηνία αξία 10% πάνω από την κανονική του σαν αποτέλεσμα του έργου για το οποίο έγινε η απαλλοτρίωση. Η έκταση της υπόλοιπης γης που έχει παραμείνει στην ιδιοκτησία των απαιτητών μετά την απαλλοτρίωση είναι 33-2-2150 τ.π. Η έκταση αυτή θα πολλαπλασιαστεί με το ποσό των £537 για να ευρεθεί η υπεραξία που απόκτησε. Από τον πολλαπλασιασμό αυτό μας δίδεται το ποσό £18,020. Το ποσό αυτό θα αφαιρεθεί από την αποζημίωση που δικαιούνται οι απαιτητές για την απαλλοτριωθείσα έκταση. δηλαδή £146 775 μείον £18,020 = £128,755».

("Therefore I agree that the rest of claimants' property had acquired on the disputed date a value 10% above its regular value as a result of the project for which the acquisition was made. The extent of the rest of the land which remains in the possession of the claimants is 33-2-2150 sq. ft. The land will be multiplied by the sum £537.- as to find the increased value it acquired. From this multiplication we have the sum of £18,020. This sum will be subtracted from the compensation which the claimants are entitled for the compulsorily acquired land i.e. £146,775 less £18,020=£128,755").

The appellants complain against this part of the judgment on the following grounds:-

(a) The trial Court disregarded the provisions of s. 6 (c) of the Compulsory Acquisition Law, No. 25/83;

(b) Even if there was an increase by 10%, as found

by the trial Court, it only affected the compensation payable for the second acquisition—1 donum and 2,350 sq. ft.; and,

(c) That if there was a 10% increase in the value of the property acquired from 1980 to 1981—the difference in the assessment between the two acquisitions—then there was no margin for the finding of the Court that the enhancement due to the the acquisition was of the order of 10%.

The Supreme Court in *D. J. Demades & Sons Ltd.* v. *The Republic of Cyprus* (1977) 1 C.L.R. 189, held that s. 10(f) of Law 15/62 encompasses all gains resulting to the owner because of the enhancement of his remaining lands on account of the acquisition crystallising by the date compensation has to be assessed, i.e. the date of trial.

The Compulsory Acquisition Law, No. 25/83, s. 6(c), amending s. 10 of Law No. 15/62, provides:-

«Δια τους σκοπούς υπολογισμού της αποζημιώσεως δυνάμει των παραγράφων (στ) και (ζ) του παρόντος άρθρου λαμβάνονται υπ' όψιν τα κατά τον χρόνον της δημοσιεύσεως της γνωστοποιήσεως απαλλοτριώσεως υφιστάμενα δεδομένα».

("For the purposes of assessment of compensation under paragraphs (f) and (g) of this section, account shall be taken of the existing facts at the time of publication of the notice of acquisition").

By virtue of the provisions of s. 10(f) of Law 15/62 the compensation should be scaled down directly proportionate to the enrichment of the owner concerned because of the acquisition.

Law No. 25/83 came into operation on 27.5.83. The legislature knew the state of the Law as propounded and interpreted by this Court, that the date of the calculation of the betterment was the date of trial. The amending law clearly provides that only the data existing at the time of the notification of the acquisition should be taken into

consideration in the assessment of the betterment or injurious affection of the other property of the owner. Thus, as from the date of the coming into operation of this amendment, the material time is the time of the notification. The actual construction of the road could not be taken into account. Neither the execution of the works for which the bigger part was acquired under the first acquisition. The Court is legislating only by interpreting the laws but where there is a clear and definite legislative provision, their function is to apply the law as enacted by the legislature.

The extent of the increase by reason of the acquisition is a matter of fact in every case. It is for the trial Court to consider, on the evidence before it, if there is any betterment and the extent thereof. Any scheme or project of any public purpose for which an acquisition takes place must be in some shape or form and it develops from day to day, and the ultimate question for the Court to decide is to what extent the value of the remainder land on the day by reference to which the valuation is to be made has been increased by reason of the acquisition. The legislature by the change effected by Law 25/83 rationalised the law. Both elements—the value of the land acquired and betterment or injurious affection of the remainder—are assessed by reference to the same day, the date of the notice of acquisition.

Each acquisition is a separate act. It has to be valued separately, more so when they take place at different times, as in the present case. The trial Judge rightly assessed the value of the land as at different dates—on the dates of the publication of the respective notices. This cannot be said with regard to his calculation of the betterment. He calculated the betterment as crystallising at the time of the trial and further considered the properties, subject-matter of both acquisitions, as one, which is impermissible. He proceeded in his calculations and either by arithmetical mistake or by misdirection of law or fact, he deducted 10% of the value of the property of the second acquisition in 1981 from the value of the property, subject-matter of the first acquisition. The Court, on the evidence before it, should have determined the enhancement of the value of

the remainder as on the date of the notice of 11.4.80 and deduct same from the value of the property acquired in furtherance of that notice. Then to proceed and assess the betterment resulting from the acquisition of the property, subject-matter of the second acquisition, and deduct such enhancement of the remainder from the value of the property so acquired. If the amount of the enhancement is greater than the value of the land acquired, no compensation is paid but the balance of the enhancement cannot be deducted from the compensation payable under another act of acquisition. There is no statutory provision for what is stricto senso called "betterment levy". We have only a set off and no more.

The appellants further complain that the trial Court did not take into consideration the inflation and/or the drop in the value of money.

It has been held in the Australian case—*Commonwealth of Australia* v. *Milledge* (1953) 4 P. & C.R. 135—that no account must be taken in assessing compensation of any fall in the value of money between the date by reference to which the compensation is to be assessed and the date of payment. The provision of payment of interest remedies this defference to some extent.

In the circumstances we think that the case must go back for retrial on the issue of the betterment in the light of the Law as we have tried to expound it.

There is another ground why this appeal should be sent back for retrial on the disputed issue. In the Reference the appellants sought the determination of the value of the property covered by Notice of Acquisition No. 274/80 dated 11.4.80 and order of acquisition under Notification No. 247/81 published in the Official Gazette on 27.3.81. This acquired property is described in the statement of claim. There is no mention at all in the pleadings of the parties of the property subject of the second acquisition. Only the valuers of the parties in their respective reports and in their oral evidence referred to the second acquisition, and in their testimony about the enhancement of the remainder they referred to the immovables, subject to both orders of acquisition. The trial Judge was carried away by

the evidence and the issues raised by the witnesses without objection by counsel and did not confine himself to the prayer of the appellants and the issues as they crystallised in the pleadings of the parties.

It is well settled that a Court of Law has to confine itself to the issues as appearing at the close of the pleadings or properly added to at the date of the hearing and not take up at the trial other issues which the evidence of a particular witness might suggest—(*Eleni Panayiotou Iordanou* v. *Polycarpos Neofytou Anyftos*, 24 C.L.R. 97, at p. 106; *Christakis Loucaides* v. *C. D. Hay & Sons Ltd.* (1971) 1 C.L.R. 134).

In this case the learned trial Judge has misdirected himself as to the proper issues.

We, therefore, allow the appeal. We set aside the part of the judgment relating to the betterment and remit the case for retrial as the trial Court had misdirected itself as to the law and applied wrong principles in determining the compensation to be paid. In the new trial the Court has to determine only the betterment to the remainder, if any, as a result of the first acquisition. It is open to the parties to take any steps they may deem fit with regard to the second acquisition. This may include agreement or reference to the Court for the determination of the value of the property acquired and the determination of the enhancement of the remainder by reason of this acquisition.

We direct that the District Court of Larnaca determines the case as expeditiously as possible.

Having given due regard to the question of costs, in the circumstances of this case we do not disturb the order for costs made by the trial Court. We make no order for costs in this appeal chiefly because the appellants by their conduct of the case before the trial Court partly contributed to the misdirections of the trial Judge.

Appeal allowed.
Retrial ordered.