

CASES

DECIDED BY

THE SUPREME COURT OF CYPRUS

IN ITS REVISIONAL JURISDICTION AND IN ITS
REVISIONAL APPELLATE JURISDICTION

[STAVRINIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

TIMOTHEOS DEMETRIOU,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH

(1) THE DISTRICT OFFICER NICOSIA-KYRENIA,

(2) THE MINISTRY OF AGRICULTURE,

Respondents.

(Case No. 98/66).

Wells—Wells Law, Cap. 351, sections 4 and 7—Covering permit for deepening existing well—Recourse for annulment of, on the ground that the yield of applicant's neighbouring well is injuriously affected by said deepening of the other well—Such injurious affection of applicant's well by work done on interested party's land, established—But it was established also that such injurious affection was not due to the work done under, and covered by, the sub judice permit—Therefore, the recourse fails in the absence of legitimate interest affected by the decision complained of as required by Article 146.2 of the Constitution.

Recourse under Article 146 of the Constitution—Legitimate interest within paragraph 2 thereof—See supra.

Words and Phrases—“ Deepening ” a well cannot include the making of horizontal tunnels.

Legitimate interest—Article 146.2 of the Constitution—See supra.

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The applicant owns a piece of land at Lapithos, on which there is a well, also belonging to him. Adjoining that land is a piece of land belonging to the Interested Party Mr. Theocleous. On the latter land there is a well fitted with a pump worked by means of an engine. In February, 1966, the appropriate Authority (the District Officer, Kyrenia) issued to the said Mr. Theocleous a permit for the “deepening” of his well under the Wells Law, Cap. 351, sections 4 and 7. By his present recourse under Article 146 of the Constitution, the applicant seeks the annulment of the aforesaid permit.

Article 146.2 of the Constitution reads as follows :

“ 146.2. Such a recourse may be made by a person whose any existing legitimate interest, which he has either as a person or by virtue of being a member of a Community, is adversely and directly affected by such decision or act or omission ”.

It would seem that the pumping of water from Mr. Theocleous' well reduced the yield of applicant's said well. But it was established that this injurious affection was not due to the work (*i.e.* the deepening) done under, and covered by, the permit sought to be annulled by this recourse. Consequently, the Court held that the recourse fails on the ground that the applicant failed to establish that some “subsisting legitimate interest” of his “is injuriously affected in a direct manner by the decision or act” complained of, as required under Article 146.2 of the Constitution (*supra*).

The facts sufficiently appear in the judgment of the Court.

Cases referred to :

Demetriou v. The Republic (1965) 3 C.L.R. 308.

Recourse.

Recourse against the decision of the respondents to issue a covering permit in respect of a well belonging to the interested party Costas Theocleous.

G. Tornaritis, for the applicant.

L. Loucaides, Senior Counsel of the Republic, for the respondents.

K. Michaelides, for the Interested Party.

Cur. adv. vult.

The following judgment* was delivered by :

STAVRINIDES, J. : The applicant owns a piece of land situated at the locality Phlouthia, within the area of Lapithos, on which there is a well, also belonging to him. Adjoining that land is a piece of land belonging to Mr. C. Theocleous, of Lapithos, who has been served with notice of, and taken part in, these proceedings as an interested party. On the latter land there is a well fitted with a pump worked by means of an engine. In 1962 the applicant applied to this Court (*Demetriou v. Republic* (1965) 3 C.L.R. 308) complaining of the issue to Mr. Theocleous of "a permit to deepen" the latter well. The wells are 143 feet apart, and water from each is raised to the surface by mechanical means. Hence each of them is, in relation to the other, outside the protection afforded to wells by s. 3 of the Wells Law, Cap. 351. But since they are within an area in respect of which an order made in 1959 under s. 4 of that Law was, at all material times, in force, the concurrence of the Director of Water Development (hereafter "the Director") in the issue of the permit was required by that provision ; and the Court annulled the permit on the ground that the Director's concurrence in its issue had been given "under a misconception" as to the effect of a District Court decision dismissing a charge against Mr. Theocleous' father-in-law of unlawfully sinking the well which is on Mr. Theocleous' land (p. 315). Section 4, so far as material, reads :

"(1) Notwithstanding anything in this or any other Law contained, where the Governor is satisfied that special measures for the conservation of water in any area are necessary in the public interest whether for the protection of public water supplies or for the protection of water supplies used for industrial, domestic or other purposes, he may make an Order defining such area and, thereupon, no permit for the sinking or construction of a well in any such area shall be issued by a Commissioner and no variation or modification of any condition or restriction imposed in such permit shall be effected, save with the concurrence of (the Director).

(5) (The Director), in giving or withholding his concurrence under this section, shall have regard to the extent to which the general water situation in the

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* For final judgment on appeal see p. 231 in this Part *post*

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area (including its further development) or the requirements of prior users of water may be affected by the proposed well."

On August 31, 1965, Messrs. Demetriades and Christophides, the Kyrenia advocates, wrote to the District Officer, Kyrenia, on behalf of Mr. Theocleous, a letter (reds 11 and 10 in a Kyrenia District Office file, *exhibit 7*) stating, *inter alia*, that there was nothing to prevent the Director from "re-examining the matter and concurring in the issue of such permit, after being satisfied that the rights of the person who had applied to the Supreme Court are not substantially affected in consequence of the issue of that permit". On February 17, 1966, the District Officer replied to that letter by one (*exhibit 3*) which reads :

"With reference to your letter of August 31, 1965, regarding the decision of the Supreme Court in application 146/62 (meaning 149/62) of Timotheos Demetriou, of Nicosia, I wish to inform you that your application for the issue of a covering permit to your client Costas Theocleous, of Lapithos, has been re-examined in the light of the decision of the Supreme Court and s. 4 of the Wells Law and, after taking into account the concurrence of (the Director) I decided to issue a new permit to your client for the deepening of the well, which (sic.), as is known, the permit previously issued was annulled by the Supreme Court ;"

and on the same day he sent to Mr. L. Clerides, the Nicosia advocate, who had written to him on behalf of the applicant complaining that Mr. Theocleous "is keeping his well in the condition in which it was before the decision of the Supreme Court" (*exhibit 1*), a letter (*exhibit 2*), paras. 2-4 of which read :

"2. In reply to my letter Messrs. Demetriades and Christophides of Kyrenia, the advocates, submitted an application for the re-examination of the case of their client, in the light of the decision of the Supreme Court and, if possible, the issue to him of a new permit.

3. The application of the interested person was transmitted to (the Director) for him to say whether he, having regard to the decision of the Supreme Court and the provisions of s. 4 of the Wells Law, was prepared to give his concurrence in the issue of a covering permit for the said deepening or not. On September 23, 1965, I was informed by (the Director) that the case was re-examined in detail and that he gives his con-

currence because the careful re-examination of the case which has been made proved that the yield of the nearby wells, including the well of your client, and generally the situation in the area as regards water is not and will not in any way be affected by the deepening of the well of the interested person.

4. The facts of the case were placed before the Attorney-General of the Republic, and having received legal advice from him I decided to issue to him (Mr. Theocleous) a new permit in that behalf."

It is common ground that *exhibit 3* is an actual permit, no particular form having been prescribed under Cap. 351 ; and what is sought by these proceedings, is in substance, the annulment of that permit (hereafter " the subject permit ").

Following a consent order :

" for an experiment to be carried out with a view to determining whether the working of (Mr. Theocleous') well affects the yield of applicant's well and if so whether this is due to the deepening complained of "

two experts, *viz.* Mr. T. Pandazis, a geologist attached to the Geological Survey Department of the Republic; and Mr. C. Lytras, a geologist in the Water Development Department of the Government, went down Mr. Theocleous's well and later filed a joint report in English (*exhibit 4*). It is necessary to quote only the following paragraphs of that document :

" 6. During the pumping test of the said well a complete drawdown was obtained after pumping for 1½ hours with an output of 6,000 gallons per hour and the pump suction being at 52.97 feet.

7. Two horizontal tunnels were observed. One on the south-eastern side of the well and the other one on the western side. The bottom of the first tunnel was at about 46 feet and its top at about 40 feet ; its width was about two feet and was directed towards about 118 degrees (*i.e.* towards the ESE) for about ten feet and then its direction was deflected slightly to the south.

The depth of the bottom of the second well was at about 46 feet and its upper level was also at about 40 feet ; its width was about two feet and was directed towards about 330 degrees (*i.e.* towards NNW) for about 15 feet and then its direction was deflected slightly to the south.

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It was considered unsafe to enter the tunnels, so their total length could not be determined.

8. It was observed that when the water level was near the pump suction practically no water was coming in the well from either the impermeable marls or the overlying permeable rocks of the well itself, but water came from the tunnels. It was estimated that the flow from the south-eastern tunnel was at least four times more than the western tunnel.

9. Interference, for which both experts agreed on principle and in advance, was also proved during the experiment at which a lowering of about six inches was observed in Mr. Demetriou's well during the pumping of Mr. Theocleous' well.

10. The question of the effect of deepening can be answered with the evidence already obtained during the site inspection when the Court decides which was the legally accepted original depth of the well, *i.e.* from where we shall regard the deepening in question. Nevertheless, it became quite evident that the main effect is due to the tunnelling, especially to the south-eastern tunnel which makes a closer approach towards Mr. Demetriou's well."

A person applying to this Court under Art. 146 of the Constitution must establish that some "subsisting legitimate interest" of his "is injuriously affected in a direct manner by the decision, act or omission" complained of. What is the applicant's "legitimate interest" here? It can only be an interest based on sub-sec. (4) of Cap. 351. Thus in order to succeed he must establish (a) that the pumping of water from Mr. Theocleous' well reduces the yield of his own well and (b) *that such affection is due to work covered by the subject permit*. Clearly if the injurious affection, though due to work carried out in Mr. Theocleous' land, is not due to work covered by the subject permit, it is of no consequence in these proceedings.

Point (a). That the pumping of water from Mr. Theocleous's well results in reduction of the yield of the applicant's well is clear from para. 9 of *exhibit 4*.

Point (b). It is common ground that the tunnels were made at a depth reached when Mr. Theocleous's well was deepened and that both tunnels are horizontal. Are they covered by the subject permit, considering that it was only

a permit "for the deepening" of that well? In my view the answer is a clear No. Not only in Cap. 351, s. 7 of which speaks of "widening, deepening or otherwise extending an existing well", but as a matter of ordinary usage, whether English or Greek, "deepening" cannot include the making of tunnels, certainly not horizontal ones. It follows that, in order to succeed, the applicant must establish injurious affection to his well caused by work on Mr. Theocleous's well other than tunnelling. But this he has entirely failed to establish. Had it not been for para. 8 of *exhibit 4* I would have understood the second sentence of para. 10 of that document to mean that, while "the main effect" to which it refers is due to "the tunnelling", still some substantial affection was also caused by the deepening. But para. 8, which is more specific, clearly shows that only a minimal quantity of water "comes" into Mr. Theocleous's well due to the deepening, as distinct from the tunnelling, work. Had there been any evidence that that minimal quantity of water was water that would have otherwise reached the applicant's well, a question would have arisen as to whether the maxim *deminimis non curat lex* was not applicable. As it is, there is not a whit of such evidence, and therefore the application must fail.

A number of other matters were raised in the course of the proceedings. They do not affect the result and therefore I need not go into them or even specify them. But there is one other matter which, though not so raised, is worth mentioning because of the interesting question it raises. The applicant having brought an action against Mr. Theocleous in the District Court of Kyrenia (No.415/63) withdrew it on May 5, 1964 (*i.e.* while his application to this Court, 149/62 was still pending), on agreed terms, one of which was to the effect that "whatever the result of the recourse in the Constitutional Court (*i.e.* application 149/62) he would not pursue any claim against the defendant . . . personally but would confine his claim against the Republic" (*exhibit B*); and one may well wonder, though it is unnecessary for me to decide, whether that term did not put paid to all claims by the applicant to possess the legitimate interest required to maintain this application.

For the above reasons the application must fail.

LOUCAIDES : Claims no costs.

COURT : Application dismissed without costs.

*Application dismissed
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