1984 April 27

[TRIANTAFYLLIDES, P., LORIS AND STYLIANIDES, JJ.]

THE REPUBLIC OF CYPRUS,
Appellant (Acquiring Authority).

v.

IOANNIS CLEANTHOUS CHRISTOFIDES AND OTHERS.
Respondents (Claimants).

(Civil Appeal No. 6510).

Compulsory acquisition—Compensation—Assessment—Residual or development method of valuation—Property in question undivided land at time of acquisition—But it could be divided into building sites—Compensation has to be assessed by having regard to the state of the property at the time of the notice of acquisition—In assessing compensation trial Judge omitted to deduct any amount for profit and risk or for transfer and registration fees of the building sites—By omitting to do so he misdirected himself in law—Retrial ordered as there was no ascertainment by the trial Court of the amounts of the omitted deductions.

In assessing the compensation payable by the Acquiring **Authority in respect** of the property of the respondents which **was compulsorily** acquired the trial Judge relied on the residual **or development method** of valuation. Though the property **in question at the** time of acquisition was undivided land, at **the time of the trial** the respondents had a definite written **indication from the** Nicosia Municipality that a division as per a provisional plan submitted by the respondents after the acquisition would be approved. The trial Judge ascertained the gross value of the building sites into which the land could be converted at the time of the acquisition; he deducted an agreed amount of costs for the division of the land into 6 building sites and an amount for the deferment of payment for one year but he did not deduct any amount for profit and risk or for transfer and registration fees.

Upon appeal by the Acquiring Authority:

Held, that the owner of land acquired is entitled to the value of his property at the time of the publication of the notice of acquisition; that the compensation is to be assessed having regard to the state of the property at that time; that where the residual method is employed, the market value of the property, when developed to the best advantage, is ascertained and allowance made for the period of deferment; that the costs of carrying out the works required to put the land to the proposed use and other expenses necessary to put the property into the state to command such yield and an allowance for profit and risk are then deducted; that the allowance for "risks" is made because the prospect of deriving an increased yield from the development of land is a speculative one and the prospective developer is unlikely to purchase except at a price which allows some margin for this element of risk; that the trial Judge by omitting to deduct the D.L.O. transfer fees and to make allowance for risks misdirected himself in law; that as there is no ascertainment by the trial Court of the amount of the transfer fees and the profit and risk, there is no alternative but to order a retrial of the case.

Appeal allowed.
Retrial ordered.

Cases referred to:

Horn v. *Sunderland Corporation* [1941] 1 All E R 480 at pp. 483–489;

Monogahella Navigation v. *United States* (1983) 148 U.S. 312, 326;

Inland Revenue Commissioners v. *Clay and Buchanan* [1914] 3 K.B. 466;

Maori Trustee v. *Ministry of Works* [1958] 3 W.L.R. 536;

Commissioner of Inland Revenue v. *Kirzi*, 24 C.L.R. 197;

Moti and Another v. *Republic* (1968) 1 C.L.R. 102 at p. 113;

Republic v. *Mantovani* (1975) 1 C.L.R. 232 at pp. 236, 237.

Appeal.

Appeal by the Acquiring Authority against the judgment of the District Court of Nicosia (Artemides, Ag. P.D.C.) dated the 30th November, 1982 (Ref. No. 174/81) whereby the amount of

£10,720.- was awarded to the Claimants as compensation in respect of their property which had been compulsorily acquired.

N. Zomenis, for the appellant.

L. Demetriades, for the respondents.

Cur. adv. vult.

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

STYLIANIDES J.: This appeal was taken by the appellant Acquiring Authority against the assessment of compensation made by the District Court of Nicosia in respect of the property of the respondents compulsorily acquired.

The subject property is a field, 3 donums, 2 evleks and 3,125 sq.ft. in extent, and was owned in undivided shares as follows: 3/6 shares by respondent No. 1 and 1/6 share by each of the other three respondents. No agreement was reached on the compensation to be paid but the appellant at the request of the respondents paid to them the amount assessed by appellant's expert.

Article 23.4 of our Constitution provides that any immovable property may be compulsorily acquired upon payment "of a just and equitable compensation to be determined in case of disagreement by a civil court."

Section 10(1)(a) of Law 15/62 enacted pursuant to the provisions of Article 23 provides that the compensation is the sum that the subject property could fetch if sold by a willing seller in the open market at the time of the publication of the notice of acquisition.

The respondents' immovable was building land ripe for immediate development.

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 acquisiton, and it will transgress the principle of equivalence which is at the root of "statutory compensation" - (*Horn v. Sunderland Corporation* [1941] 1 All E.R. 480, at 483-489).

"Just compensation" means the full and perfect equivalent in

money of the property taken - (*The Monogahella Navigation v. United States* (1983) 148 U.S. 312, 326).

In assessing the compensation payable the experts of both sides resorted to the residual or development method of valuation. This method, though it has a margin of error due to the various factors that are taken into consideration, it is usually adopted whenever there are no current sales of comparable properties to allow for the employment of the best method - the direct comparison of the sale price of such properties with that of the land acquired.

The trial Judge ascertained the gross value of the building sites into which the land could be converted at the time of the acquisition; he deducted an agreed amount of costs for the division of the land into 6 building sites and an amount for the deferment of payment for one year but he did not deduct any amount for profit and risk or for transfer and registration fees. He said in his judgment:-

> "There is ample evidence that the claimants could proceed to the division of their land themselves. No difficulty at all would arise. Why then should 'the developer' enter into the picture with his profit and risk deductions and the registration fees? The claimants would sell in the open market at the prices ruling at the relevant date, which I have accepted to be those referred to in the report of Mr. Karavalis. A purchaser who buys a building site knows that he will have to pay the registration fees, why then should these be deducted from the value of the land?
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> In my judgment the Acquiring Authority labours under a misunderstanding in regard to the legal requirement that the compensation price for the land acquired should be equal to the price the land would fetch if sold in the open market. They proceed to say that although this requirement does not preclude the claimants from developing their property, yet they step, so to speak, into the shoes of the 'developer' and the concept, therefore, which I have described earlier on applies.
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> It is correct that the value of the land at the relevant date is not the value it has to the owner but the price it would

fetch to the willing seller if sold in the open market. This, however, does not mean that an intermediary called a 'developer' should be the purchaser. The evidence that the claimants could themselves divide and sell their land to their best interest is undisputed and cannot be ignored".

The property in question at the time of acquisition was undivided land. At the time of the trial the respondents had a definite written indication from the Nicosia Municipality that a division as per a provisional plan submitted by the respondents after the acquisition would be approved. This inquiry was made by the respondents for the purpose of the case pending before the Court.

It is well established that the willing purchaser in the development method is a notional person who makes all the calculations of a reasonable developer. Sale in an open market assumes the existence of a willing seller and a willing purchaser.

An open market sale of property presupposes knowledge of each situation with all surrounding circumstances - (*Inland Revenue Commissioners v. Clay and Buchanan* [1914] 3 K.B. 466).

In *Maori Trustee v. Ministry of Works* [1958] 3 W.L.R. 535, a Privy Council case, the land compulsorily acquired was ripe for development and a paper plan for a proposed subdivision had been prepared. The Privy Council held that the land must be valued for what it in fact was on the specified date - a tract of land capable of subdivision into building allotments and being sold subsequently in that form, but there must be excluded from the Court's contemplation retention by the claimant, and an assessment of what in his hands it would yield if subdivided. To give a claimant compensation on the basis that there were subdivisions of the land, when, in fact, there were not, would be to give him compensation for unrealized possibilities as if they were realized possibilities. Lord Keith of Avonholm in delivering the opinion of the Board approved the following extract from the judgment of Gresson, J.:-

"In my opinion in this case the land must be valued for what it in fact was on the specified date - a tract of land capable as to some, perhaps all of it, of subdivision into building allotments, and of being sold at some time and over some period in that form. That circumstance would influence a

purchaser in his determination of price. In estimating what price a purchaser would be willing to pay recourse may be had to an examination of the estimated gross yield from a subdivision as yet notional only, and the estimated deductions that a purchaser would have to take into account; but that is the extent to which a notional subdivision can be regarded. There must be excluded from the court's contemplation retention by the claimant and an assessment of what in his hands it would yield if subdivided, because that course is not open to him. At the time value has to be determined the land was in fact not - legally speaking - subdivided so as to permit of sale piecemeal. A good deal requires to be done before there can be disposal in that manner, and as well as expenses there will be risk and delay."

And further down he had this to say:-

"It is clear that there was in fact no subdivision of the land and that the land had the potentiality of subdivision. This potentiality was estimated by witnesses as being fully realizable in a relatively short period of time. The contest between the parties was whether the value of the land should be assessed on the assumption that the owner would have made his own subdivision, and would have sought to sell the resultant building sections direct to purchasers, or upon the assumption of a sale by the owner to a purchaser who, having purchased, subdivided the land into building allotments and marketed them. For present purposes the material part of the court's judgment is in the passage which runs: 'If then the claimant is able to show that there was a market for the subdivisions as on December 15, 1942 (the relevant date), and that the subdivisions could then have been sold, it is open to the compensation court to award compensation upon the assumption that, on that date, the claimant sold the land to several purchasers in lots accordingly'. In their Lordships' view this was an erroneous direction in law for the reason that there were in fact no subdivisions, and that to give the claimant compensation on the basis that there were, would be to give him compensation for unrealized possibilities as if they were realized possibilities."

And at p.545:-

"At the hearing before their Lordships' Board in the present case appellant's counsel were faced with the difficulty that on their submission, the land, on the assumption of its being retained for sales in subdivision by the owner, should be assessed at a higher value than if it were sold to a hypothetical purchaser for similar development. In their Lordships' view it is impossible that the land should have two values, on the hypothesis required by the statute that it is sold in the open market by a willing seller. Both Kitto J and Taylor J. in the case just cited dealt with this point in a manner that seems to their Lordships unexceptionable. The land in the hands of the owner is just capital for whatever purpose he chooses to put it. And if he chooses to employ his capital in a subdivisional scheme the profit he will make cannot in anticipation be taken to increase the value of the land before that profit has been realized. As Kitto J. among other passages puts it: 'There simply cannot be a difference between the price which would be agreed upon between a businesslike purchaser and a businesslike vendor and the amount which a businesslike owner would treat himself as leaving invested in the land in the event of his deciding to retain it': or as Taylor J. says: 'The land at the relevant time was worth no more in the hands of the appellant than it would have been in the hands of some other owner who had acquired it with a view to subdivision'. The matter may be stated in another way. If the owner be regarded as a hypothetical purchaser of the land to be valued wishing to buy it for subdivision, he would not be expected to pay more for it than any other purchaser buying for the same purpose."

In *The Commissioner of Limassol v. Marikka N. Kirzi* (1959 1960) 24 C.L.R. 197, the scheme for division into plots of the land had already received the approval of the appropriate authority. The residual development method was commented upon by Zekia, J., who said:-

"A particular method of valuation might be the appropriate method in a case, yet it might not correctly be applied, as when, by omitting to make the necessary deductions which if not done, the rules of assessment as provided by law are

necessarily infringed. In such a case again there is room for a point of law. There might be instances where the omission or inclusion of a factor in the valuation of a property manifestly amounts to a misdirection in law".

In *Yiannis Anastassi Moti and Another v. The Republic of Cyprus* (1968) 1 C.L.R. 102, at p.113, the Court said:-

"The appellants' expert in valuing the lands acquired relied on the residual or development method. Having considered his valuation we agree with the trial Court's criticism that 'no amount is mentioned for the market value of the land, no L.R.O. transfer fees, no profit or risk and no compensation fixed separately for the acquired land and/or for severance and injury to the remaining lands due to the acquisition'. Furthermore, most of the comparable sales relied upon by him (plots 629, 680, 446 and 612) either do not show the exact area sold (pages 123-4 of the evidence), or the land sold included buildings, and in the case of one plot it was situate in another area altogether. In short, the appellants' expert failed to follow a recognised method of valuation and his assessment cannot possibly be relied upon."

In the latest case on the matter - *The Republic of Cyprus v. Eleni L. Mantovani* (1975) 1 C.L.R. 232. Triantafyllides, P., said at p.236:-

"We are in agreement with counsel for the appellant that the trial court in applying the development method of valuation had to take into account the development expenses which would have been incurred, by a notional willing purchaser in the open market of the respondent's property, for the purpose of its development by dividing it into building sites, and not only those to be incurred by the owner herself".

And at p.237:-

"Among the incidental costs of development, are expressly mentioned the costs of advertising and commission on sales payable to agents; and such commission ought to have been deducted in the present case".

The owner of land acquired is entitled to the value of his pro-

perty at the time of the publication of the notice of acquisition. The compensation is to be assessed having regard to the state of the property at that time.

Where the residual method is employed, the market value of the property, when developed to the best advantage, is ascertained and allowance made for the period of deferment; the costs of carrying out the works required to put the land to the proposed use and other expenses necessary to put the property into the state to command such yield and an allowance for profit and risk are then deducted. The allowance for "risks" is made because the prospect of deriving an increased yield from the development of land is a speculative one and the prospective developer is unlikely to purchase except at a price which allows some margin for this element of risk.

The owner cannot be held to say that he would have developed himself the land and avoid any of such deductions. The willing purchaser is a notional person and the owner, if he decides or wishes to step in his shoes, he has to make all necessary deductions. The willing businesslike purchaser has to pay the transfer fees for the registration of the property in his name and will make the necessary deduction for profit and risk before making his offer. The value of the property acquired has to be assessed objectively.

The residual development method is based on a hypothetical purchaser - developer - of the land. If the owner of undivided land wishes to be regarded as a hypothetical purchaser, he is expected to pay neither more nor less than any other purchaser buying for the same purpose.

The trial Judge by omitting to deduct the D.L.O. transfer fees and to make allowance for risks misdirected himself in law.

As there is no ascertainment by the trial Court of the amount of the transfer fees and the profit and risk, we are left with no alternative but to order a retrial of the case.

The appeal is allowed; a retrial is ordered. Having regard to the circumstances of this case, the costs in the Court below as well as the costs of this appeal to be in the cause but in any event not against the appellant.

Appeal allowed. Retrial ordered.