

1986 September 4

[MALACHTOS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

NELLI G. ROLOGI AND OTHERS,

Applicants,

v.

THE WATER BOARD OF NICOSIA.

Respondent.

(Cases Nos. 303-307/81, 317/81,
319-323/81, 326-331/81, 334-339/81,
342/81, 346/81, 347/81, 358/81,
366/81, 367/81, 371/81, 387/81,
390/81, 391/81, 417/81, 418/81,
420-422/82, 441/82, 472/82, 536/82,
14/83, 15/83, 45/83 and 59/83).

Water supply—*The Water Supply (Municipal and Other Areas)*
Law, Cap. 350—*Compulsory acquisition by the Water*
Board of Nicosia of the various water undertakings—
Rights of consumers, who had a right in the water by
5 *virtue of contracts with the old undertakers, regulated by*
s. 22 of the said law—Agreement between respondents
and such consumers that the latter would receive free of
charge a quantity of water more or less equal to that they
were receiving under such contracts—Intention of legisla-
10 *tor in enacting s. 22 was to preserve the then existing status*
quo—Rights of such consumers not for an indefinite
period—Such period regulated by the terms of the con-
tracts with old undertakers—Under such terms the latter
were not liable for diminution or complete stoppage of
15 *flow of water not due to their negligence—If, therefore,*
the water sources of the old undertakers ceased to exist,
respondents were entitled to discontinue the free supply
of water to such consumers as aforesaid.

Before the creation of the Nicosia Water Board by Cap. 350, which came into force on 22.5.51, there existed in Nicosia town five companies, which were the owners of water sources and water installations. In consideration of payment of an agreed amount these companies used to assign by virtue of written agreements a quantity of water measured by a method known as "sakkorafi". The assignment was evidenced by a certificate on which were endorsed the terms of the agreement regulating the relationship between the company, i.e. the water undertaker, and the consumer.

In or about 1951 the said water undertakings were compulsorily acquired by the Nicosia Water Board in virtue of an Order-in-Council made pursuant to s. 19(1) of Cap. 350. Thus, the Nicosia Water Board stepped into the shoes of the water undertakers (Section 20(c) and (d) of the said law). The rights of the consumers, who had a right under the agreements aforesaid were regulated by s. 22 of the same law.

Soon after the completion of the acquisition the method of measuring the quantity of water by "sakkorafi" was abolished and water metres were installed in the premises of all the consumers by the Water Board. It was agreed that the consumers should pay rent to the Board for the metres and would be entitled free of charge a quantity of water more or less equal to the quantity they were receiving with the "sakkorafi" method.

On 4.6.81 the Nicosia Water Board decided to abolish as from 1.1.82 the said rights of the consumers "due to the exhaustion of the springs of the acquisitioned companies and due to the supply by the Board of a much higher service than that contained in the relevant titles and, furthermore, even if few springs are still in existence their water has been rendered unsuitable".

As a result the applicants filed the above recourses. Counsel agreed that the following legal issue be heard and determined first: "Was the respondent Board entitled under the law to discontinue the supply of water free of charge to the applicants, assuming that the water sources of the former water undertakers were non existent?"

5 *Held*, (1) It is clear from the wording of section 22 of Cap. 350 that the intention of the legislator was to maintain the status quo that existed at the time of the acquisition. Also, subsection (b) of section 22 makes it clear that the supply of water is not for an indefinite period.

10 (2) In order to find such period one should look at the terms of the contract between the consumers and the old water undertakers. The latter were not responsible under the contracts for the diminution or for the complete stoppage of the flow of water not due to their own negligence.

15 (3) Therefore, assuming that the sources of water of the former undertakers were non-existent, the period for which the consumers were entitled came to an end and the respondents were entitled to discontinue the free supply of water to the applicants.

20 *Order for continuation of hearing on factual issues, unless an appeal is filed in the meantime.*

Recourse.

Recourse against the decision of the respondent to discontinue the free of charge supply of water to their premises in Nicosia.

25 *S. Spyridakis*, for applicants in Cases Nos. 303-307/81, 317/81, 334-337/81, 342/81, 346/81, 347/81, 366/81, 417/81, 418/81, 383/82, 384/82, 411/82, 422/82, 441/82, 472/82 and 45/83.

30 *N. Pelides* with *A. Markides* for applicants in Cases Nos. 319/81 and 339/81.

N. Pelides, for applicants in Cases Nos. 320-323/81, 417/81 and 418/81.

I. Typographos, for applicants in Case No. 326/81.

35 *A. Spyridakis*, for applicants in Cases Nos. 327-331/81, 387/81 and 59/83.

- L. *Georghiadou (Mrs.)*, for applicant in Case No. 338/81.
- C. *Emilianides*, for applicants in Cases Nos. 358/81, 367/81 and 371/81.
- E. *Ejstathiou*, for applicant in Case No. 390/81. 5
- C. *Hadji Ioannou*, for applicant in Case No. 391/81.
- C. *Myriantthis*, for applicants in Cases Nos. 109/82, 110/82, 420/82, and 421/82.
- D. *Papachrysostomou*, for applicant in Case No. 536/82. 10
- M. *Vassiliou*, for applicants in Cases Nos. 14/83 and 15/83.
- G. *Triantafyllides*, for respondent.

Cur. adv. vult.

MALACHTOS J. read the following judgment. In all these 15
fifty two recourses, the applicants complain against the
decision of the respondent Water Board to d'scontinue the
free of charge supply of water to their premises in Nicosia
as from 1.1.82 and claim a declaration of the Court that
the said decision is null and void and of no legal effect 20
whatsoever.

The relevant facts are the following:

Before the creation of the Nicosia Water Board by the
Water Supply (Municipal and Other Areas) Law, Cap. 25
350, which came into force on the 22nd May, 1951, there
existed in Nicosia town five companies, which were the
owners of water sources and water installations. These
companies known as the water undertakers, used to supply
with water the inhabitants of Nicosia town, the consu-
mers. The water undertakers used to assign by virtue 30
of written agreements a quantity of water to consumers
measured by a method known as "sakkorafi" in considera-
tion of payment of an agreed amount. A further amount
varying from ten shillings to £3.- per year was paid by
the consumers to the water undertakers for the maintenance 35

and inspection of the water sources and installations. The assignment of the quantity of water was evidenced by a certificate on which were endorsed the terms of the agreement by which the relationship of the water undertakers and the consumers was regulated. These terms, although in certain respects varied from company to company, had a common characteristic in that the undertakers were not responsible for the reduction of the flow of water due to force majeure. This term for two out of the five companies went further and expressly covered cases of complete stoppage of the flow of water for any reason not due to the negligence of the undertakers.

In or about 1951 by an Order-in-Council pursuant to the provisions of section 19(1) of the Law, Cap. 350, the Water Board of Nicosia compulsorily acquired the various water undertakings and a certain amount of compensation was paid to the water undertakers pursuant to sections 20 and 21 of the Law. Thus, the Water Board stepped into the shoes of the water undertakers, as it is expressly provided in section 20(c) and (d) of the Law. As regards the rights of the consumers, who are the applicants in the present recourses and had a right in the water by virtue of the contracts, as aforesaid, this right is regulated by section 22 of the Law.

Sections 19(1), 20, 21 and 22 of the Law read as follows:

"19. (1) A Board may, with the authority of the Governor in Council, acquire compulsorily as a going concern the undertaking of any water undertaker, whether operating within the area of supply or outside, in any case where it deems it necessary so to do in the public interest and, in particular, in order to promote the simplification and standardization of methods of a supply of water within the area of supply:

Provided that the Governor in Council may, before granting his authority for the compulsory acquisition of an undertaking, require the compensation to be paid in respect thereof to be first ascertained in the

manner provided by the immediately following provisions of this section.

20. Where a Board has been authorised by the Governor in Council under section 19 to acquire the undertaking of any water undertaker, such Board shall serve on such undertaker, either personally or by double registered post, a notice in writing specifying the date on which the Board proposes to acquire the undertaking (in this Law referred to as 'the date of acquisition') and, as from such date, -

- (a) the undertaking shall be transferred to, and vest in, the Board free from all charges and encumbrances whatsoever, including all property and assets of the water undertaker in connection with the undertaking;
- (b) all book debts and other monies owing to the former water undertaker on account of the undertaking and the right to sue for, recover and give receipts for such debts and monies shall be transferred to, and vest in, the Board;
- (c) the rights and liabilities of the former water undertaker under any contract in respect of a work in connection with the undertaking which is in the course of construction, extension or repair shall be transferred to, and vest in, the Board;
- (d) the rights and liabilities of the former water undertaker under any contract in respect of the supply of water shall be transferred to, and vest in, the Board.

21. (1) Where an undertaking of a water undertaker has been acquired by the Board under sections 19 and 20, the compensation payable by the Board in respect of the acquisition, if not otherwise agreed upon, shall be determined by arbitration under the Arbitration Law, or any Law amending or substituted for the same, in accordance with the principles set out in subsection (2), by reference to two arbitrators, one to be appointed by each party and every such

reference shall be deemed to constitute an arbitration agreement within the meaning of the said Law.

5 (2) In determining the compensation to be paid under subsection (1), the arbitrators shall, subject to the provisions of section 22, have regard to the following amongst other considerations, and to the bearing of any such consideration upon the others, namely:-

10 (a) the fair market value of the date of acquisition of the immovable property, waterworks, materials and plant of the undertakers suitable to, and used by, them for the purposes of the undertaking, due regard being had to the nature and condition of such immovable property, waterworks, materials and plant and to the state of repair thereof;

(b) the value, as assessed by the arbitrators, of any book debts and other monies and of any rights and liabilities transferred to the Board by operation of paragraphs (b), (c) and (d) of section 20;

20 (c) any amount collected by way of premiums by the undertakers in connection with the undertaking.

25 (3) Where the compensation for the acquisition of any undertaking is determined by arbitration in accordance with the provisions of this section, the Board shall pay interest at the rate of five per centum per annum upon the amount of such compensation or any outstanding balance thereof from the date of the acquisition until the date of payment by the Board of such compensation or balance.

35 (4) Where any property of any undertaking which is compulsorily acquired under the provisions of this Law is subject to any mortgage or any other legal charge whatsoever, the compensation or such part thereof as may be sufficient to discharge the mortgage or other charge, shall be paid to the mortgagee or person in whose favour the charge operates in satis-

fraction in whole or in part of the sum secured by the mortgage or which is subject to the charge.

22. Where there are persons having a share in, or any other right over, the water of any undertaking which is compulsorily acquired under the provisions of this Law, the following provisions shall have effect:- 5

(a) the Board shall, subject to its other commitments and obligations under this Law, continue to supply every such person, during the period for which such person would have been entitled thereto, with the same quantity of water supplied to him, at the time of the acquisition, for his reasonable domestic needs, by the former water undertaker. 10

For the purpose of this paragraph the quantity of water supplied by the former water undertaker to such person at the time of the acquisition for his reasonable domestic needs shall be deemed to be, in default of agreement, the share which he was entitled to receive, in the total quantity of water actually supplied by the former water undertaker to the persons entitled thereto at the time of the acquisition; 15 20

(b) the person so supplied shall pay the same rates or charges paid by him at the time of the acquisition for the period for which such person was entitled to pay rates or charges to the former water undertaker: 25

Provided that if the quantity of the water supplied is more than that supplied to him at the time of the acquisition or if its quality is improved, the Board may impose such additional rates or charges, as it may deem fit, but so that the rates or charges payable by such person shall not exceed the rates or charges payable under this Law by any person, who had no share in, or any other right over, the water of the undertaking: 30 35

5 Provided further that, where no uniform rates or charges were paid, at the time of the acquisition, to the former water undertaker by all persons supplied with water, such person shall be deemed to have paid as rates or charges, for the purposes of this paragraph, an amount representing his share in the total amount actually paid in respect of the annual rates or charges to the former water undertaker at the time of the acquisition;

15 (c) the fair market value at the date of the acquisition of the water so supplied, shall be taken into account in estimating the compensation payable under section 21 and shall be deducted therefrom accordingly;

(d) if any dispute arises as to the quantity of water to be supplied by the Board, such dispute shall be referred by the Board to the Director of Lands and Surveys for his decision:

20 Provided that any party aggrieved by the decision may, within twenty-one days from the communication to him of such decision, appeal to the President of the District Court of the district in which the water is found and the decision of such President shall be final and conclusive on all parties."

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Soon after the completion of the compulsory acquisition, the measurement of the quantity of water by "sakkorafi" was abolished and water metres were installed in the premises of all the consumers by the Water Board. It was also agreed that the consumers should pay rent to the Board for the metres and would be entitled to be supplied free of charge a quantity of water more or less equal to the quantity they were receiving with the "sakkorafi" method, which was about 8 to 10 tons per month. If the consumer consumed more than the agreed quantity he would pay the normal rates for the quantity he consumed in excess. This situation lasted for about 30 years when, on the 4th June, 1981, the Water Board decided to abolish the rights

of the consumers. The relevant minutes of the meeting of the 4th June, 1981, read as follows:

“After discussion with the legal adviser, the Chairman suggested the extinguishment of this eternal problem by notice in writing to the consumers by double registered letters, that their rights are abolished as from 1st January, 1982, due to the exhaustion of the springs of the acquisitioned companies and due to the supply by the Board of much higher service than that contained in the relevant titles and, furthermore, even if a few springs are still in existence their water has been rendered unsuitable.”

Then, the following letter was sent to every consumer:

“I regret to inform you that the up to the present day supply of water to you, free of charge, is definitely terminated as from the 1st January, 1982, due to the fact that the springs from which you were supplied are not any more in existence. Therefore, any quantity of water to you by the Water Board of Nicosia will be debited on the basis of the lawful rates as from the said date.”

As a result, the applicants filed the present recourses.

The grounds of law on which these recourses are based may be summarised as follows:

1. The decision of the respondent Board amounts to excess and/or abuse of power and it is contrary to Law, Cap. 350, particularly section 22 thereof and Article 23 of the Constitution.
2. The respondent Board acted on facts which are not correct; and
3. The decision complained of is not duly reasoned.

The grounds of law on which the opposition of the respondent Board is based, which are exactly the same in all recourses, are the following:

1. The decision complained of was legally taken and is

in accordance with the existing legislation, particularly Cap. 350; and

2. The said decision was issued in compliance with the existing principles of Administrative Law and the Constitution and after proper exercise by the respondent Board of its discretionary powers.

In paragraphs 3 and 4 of the facts on which the opposition is based the respondent Board alleges the following:

3. It was an express and/or implied term of the compulsory acquisition on the basis of Cap. 350 that the said supply of water would continue only and while the sources of the five undertakings would continue to supply water to the respondent Board.

4. The above sources either dried out completely or became so inadequate and their water became entirely unsuitable for domestic use as it was contaminated and so they no more supplied any quantity of water to the respondent Board, as a result of which the said Board is suffering yearly a tremendous economic loss due to the supply of water free of charge to the applicants.

When these recourses came on for hearing all counsel appearing for the parties agreed that the following legal issue be heard and determined first:

“Was the respondent Board entitled under the law to discontinue the supply of water free of charge to the applicants assuming that the water sources of the former water undertakers were non-existent?”

Counsel for the respondent Board in support of his argument made two submissions:

His first submission rests entirely on the interpretation of section 22 of the Law which specifies the rights and liabilities of the Board and the consumers who have a share in or any other right over the water of any undertaking which is compulsorily acquired under the provisions of the Law. This section expressly provides that the Board shall continue to supply the persons having a share in the water compulsorily acquired with water during the period

for which they would have been entitled thereto with the same quantity of water supplied to them at the time of the acquisition for their reasonable domestic needs by the former water undertaker. In other words, according always to the submission of counsel for the respondent Board, the Law makes it clear that the supply of water to such persons, like the applicants, will not be for an indefinite period but it will be limited to the period during which they would have been entitled under the contract with the former water undertakers. Since the rights and liabilities of the former water undertakers according to section 20(d) of the Law, under any contract in respect of the supply of water were transferred to and vested in the Board as a result of the acquisition, we have to go to the terms and conditions of the contract between the applicants and the former water undertakers to see whether these former water undertakers would have been today bound to supply the applicants with water free of charge.

Since the former water undertakers were under the contracts not rendered responsible for the diminution of water afortiori they could not be responsible for the complete stoppage of the flow of water due to any reason beyond their control. So, the Water Board could stop the supply of water free of charge to the applicants.

The second submission of counsel for the respondent Board is that even if we were to interpret section 22 of the Law, contrary to his submission, then on the basic principle of the Law of Contract, where the subject matter which is fundamental to the performance of the contract has ceased to exist, then we have a clear case of frustration. In the present cases, according always to his submission, there is no doubt that when the contracts were signed it was assumed that the water sources would exist.

On the other hand, counsel for applicants submitted that the right to be supplied with water is a statutory right given to the applicants by section 22 of the Law which makes no provision depending on the existence of the water. They further submitted that the applicants under the Law were entitled to be supplied with water for an indefinite period.

The Water Supply (Municipal and Other Areas) Law, Cap. 350, was enacted in order to make provision for the control and management of water supplies in municipal and other areas and the establishment of water boards.

5 Section 22 of this Law, with which we are concerned, safeguards the rights and liabilities of the consumers and the Water Board, which Board by the acquisition stepped into the shoes of the water undertakers.

10 It is clear from the wording of this section that the intention of the legislator was to maintain, as far as possible, the status quo that existed at the time of the acquisition. Also, subsection (b) of section 22, which provides that the persons supplied shall pay the same rates or charges paid by them at the time of the acquisition for the period for
15 which such person was entitled to pay such rates or charges to the former water undertakers, makes it clear that the supply of water is not for an indefinite period. In order to find this period we must look at the terms of the contracts between the consumers and the water undertakers which
20 were in force prior to the acquisition. As stated earlier on in this judgment, the water undertakers were not responsible under the contracts for the diminution or for the complete stoppage of the flow of water not due to their own negligence. Therefore, assuming that the sources of water
25 of the former water undertakers were non-existent, the period for which the consumers were entitled should be considered that it came to an end and so the respondent Board was, in my view, entitled to discontinue the free supply of water to the applicants.

30 In view of my above decision, I consider unnecessary to deal with the second submission of counsel for the respondent, i.e. the question of frustration.

These recourses are fixed for continuance of hearing on the factual issue, on the 22nd October, 1986, at 9 a.m.
35 unless an appeal is filed in the meantime.

Order accordingly.