AS TO THE ADMISSIBILITY OF

Application No. 25366/94
by POLYCARPOU BROS Ltd.
against Cyprus

The European Commission of Human Rights sitting in private on 15 January 1996, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. J.-C. GEUS
M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 30 August 1994 by POLYCARPOU BROS Ltd. against Cyprus and registered on 5 October 1994 under file No. 25366/94;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to :

- the Commission's decision of 3 April 1995 to communicate the application ;

- the observations submitted by the respondent Government on 31 July 1995 and the observations in reply submitted by the applicant on 6 October 1995 ;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a company registered in Cyprus. In the proceedings before the Commission it is represented by Mr. Achilleas

Demetriades, a barrister practising in Nicosia, Cyprus.

The facts of the case, as they have been submitted by the parties, may be summarised as follows:

A. Particular circumstances of the case

On 10 May 1974 an agreement was drawn up for the purchase by the applicant company of two plots of land (referred to as plots No. 5 and 21) situated in Finigoudia in Engomi and belonging to the Holy Monastery of Kykkos, at the price of 42,487 Cyprus pounds. The document was signed by the representatives of the applicant company, but not by the representatives of the monastery.

On 2 June 1974 the applicant company paid 500 pounds to the monastery, receipt of which was acknowledged by the monastery.

On 28 May 1985 the monastery wrote to the applicant company claiming payment of the outstanding sum. It also warned the applicant company that failure to do so would entail the invalidation of the agreement of 10 May 1974. The monastery sent the applicant company reminders on 31 December 1989 and 26 September 1990. On 7 November 1990, the applicant company sent a letter to the monastery by which it contested its obligation to pay interest on its debt invoking the legislation concerning persons affected by the Turkish invasion of July 1974.

On 31 December 1990, 30 June 1991 and 31 December 1991 the monastery sent further reminders to the applicant company. On 6 March 1992 the applicant company wrote to the monastery asking the monastery to recalculate the sum owed in the light of law 24/79 which had frozen the applicant company's debts. The monastery sent the applicant company another reminder on 9 July 1992.

On 11 January 1993 the representatives of the applicant company addressed a letter to the monastery offering to pay the outstanding amount and asking for the transfer of the ownership of the two plots of land within thirty days. The applicant company claimed (a) that its debt to the monastery remained frozen as from 14 August 1974 by virtue of law 24/79 and (b) that the agreed total surface of the two plots of land was 21,000 square feet and not 15,450 square feet, as it had been noted in the margin of the above-mentioned draft agreement without its consent.

In a further letter addressed to the monastery on 8 March 1993 the applicant company offered to pay interest on its debt, notwithstanding the provisions of law 24/79. On 27 July 1993 the applicant company proposed to the monastery the appointment of an expert who would estimate the current value of the two plots of land; it also offered to pay his fees.

On 29 December 1994 the applicant company renewed its offer declaring at the same time its intention to institute legal proceedings against the monastery. In this connection it requested the monastery's consent to the institution of such proceedings in accordance with Article 23 para. 9 of the Constitution.

In a letter dated 4 January 1995 addressed to the applicant company the monastery claimed (a) that no contract had ever been concluded, (b) that the applicants had paid the sum of 500 pounds with a view to reserving two of the plots (No. 5 and 21) into which the land of the monastery in Finigoudia would have been divided if the monastery had been successful in obtaining the necessary planning permission, (c) that the plans of the monastery to sell its land in Finigoudia were cancelled as a result of its failure to obtain such a permission and (d) that the sum of 500 pounds had always been at the disposal of the applicant company, which had refused to recover it. The monastery

further informed the applicant company that it did not consent to the institution of proceedings against it.

On 6 October 1995 the applicant company wrote to the monastery claiming that the document drawn up on 10 May 1974 was not a draft but a final agreement. It also claimed that it was standard practice for the monastery not to sign the agreements it concluded. The applicant company further referred to the monastery's letter of 28 May 1985 by which the monastery had accepted the existence of an agreement.

B. Relevant domestic law

Article 23 of the Constitution of Cyprus provides as follows:

"1. Every person, alone or jointly with others, has the right to acquire, own, possess, enjoy or dispose of any movable or immovable property and has the right to respect for such right.

...

2. No deprivation or restriction or limitation of any such right shall be made except as provided in this Article.

3. Restrictions or limitations which are absolutely necessary in the interest of the public safety or the public health or the public morals or the town and country planning or the development and utilization of any property to the promotion of the public benefit or for the protection of the rights of others may be imposed by law on the exercise of such right.

Just compensation shall be promptly paid for any such restrictions or limitations which materially decrease the economic value of such property: such compensation to be determined in case of disagreement by a civil court.

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 utility 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.

...

7. Nothing in paragraphs 3 and 4 of this Article contained shall affect the provisions of any law made for the purpose of levying execution in respect of any tax or

penalty, executing any judgment, enforcing any contractual obligation or for the prevention of danger to life or property.

...

9. Notwithstanding anything contained in this Article no deprivation, restriction or limitation of the right provided in paragraph 1 of this Article in respect of any movable or immovable property belonging to any See, monastery, church or any other ecclesiastical corporation or any right over it or interest therein shall be made except with the written consent of the appropriate ecclesiastical authority being in control of such property and the provisions of paragraphs 3, 4, 7 and 8 of this Article shall be subjected to the provisions of this paragraph:

Provided that restrictions or limitations for the purposes of town and country planning under the provisions of paragraph 3 of this Article are exempted from the provisions of this paragraph."

In its decision of 21 December 1961 in the case of Evlogimenos and the Republic the Supreme Court considered that the right of property safeguarded by Article 23 of the Constitution was not an abstract right, but a right as defined and regulated by the law relating to civil law rights in property. Deprivations or restrictions or limitations imposed under a law regulating civil rights in property were not contrary or inconsistent with Article 23, because Article 23 para. 2 was inapplicable to provisions of law regulating such rights.

These principles were re-affirmed in the Supreme Court's decisions of 19 April 1962 in Re Ali Ratip of Ktima and 28 June 1967 in the case of Chimonidis v. Mangli.

COMPLAINTS

1. The applicant company complains of a violation of Article 6 para. 1 of the Convention in that it is denied access to the courts for the determination of its civil rights under the contract it has concluded with the monastery.

2. The applicant company complains of a violation of its rights under Article 1 of Protocol No. 1 in that it is prevented from obtaining possession of the plots of land it has agreed to purchase, by virtue of Article 23 para. 9 of the Constitution which grants church bodies judicial immunity.

3. The applicant company also complains under Article 13 of the Convention that it does not have any effective remedy against the violation of its rights under the Convention, because all domestic courts are bound by the Constitution.

4. The applicant company finally complains under Article 14 of the Convention that it is discriminated against on religious grounds in that its opponent is in a more favourable position by virtue of being a church body.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 30 August 1994 and registered on 5 October 1994.

On 3 April 1995 the Commission decided to communicate the application to the respondent Government and to request them to submit their written observations on admissibility and merits.

The Government's observations were submitted on 31 July 1995. On 6 October 1995 the applicant company submitted observations in reply.

THE LAW

FIRST ALTERNATIVE

The applicant company complains that, by virtue of Article 23 para. 9 of the Constitution, it cannot sue the monastery in order to obtain possession of the plots of land it has agreed to purchase. It claims that this amounts to a violation of its rights under Articles 6 para. 1, 13 and 14 (Art. 6-1, 13, 14) of the Convention and Article 1 of Protocol No. 1 (P1-1).

The Commission considers that the application centres upon the complaint concerning access to court under Article 6 para. 1 (Art. 6-1) of the Convention, which, insofar as relevant, provides the following:

> "In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing ... by a tribunal ... ."

The Government submit that the applicant is not prevented by Article 23 para. 9 of the Constitution from initiating civil proceedings against the monastery or from enforcing any judgment that may ensue. There is no case-law to the effect that the consent of the Church is required before it can be sued or have a court decision enforced against it in civil law matters. On the contrary, the Supreme Court of Cyprus has repeatedly held that Article 23 of the Constitution cannot be understood as being intended to interfere with matters of civil law, such as rights to property conferred by a law regulating civil law rights. As a result, the deprivation of the right to property which may be effected by virtue of rules protecting rights arising under a contract does not fall within the scope of Article 23 and cannot be affected by any of the provisions of Article 23, including the provisions of para. 9. It follows that the applicant should have tried to exhaust domestic remedies before applying to the Commission.

The applicant company does not agree with the interpretation given to Article 23 of the Constitution by the Government. It relies on the express wording of Article 23 para. 7, to which Article 23 para. 9 refers and stresses that Article 23 para. 7 refers in unambiguous terms to the enforcement of contractual obligations. Moreover, the contractual relationship at issue differs from other contractual relationships because the Constitution has granted special rights to one of the two parties. It is noteworthy that the monastery has already relied on Article 23 para. 9 of the Constitution to refuse its consent for the action intended against it.

The Commission recalls that, in accordance with its case-law, where doubts exist as to the effectiveness of a domestic remedy, that remedy must be tried (No. 6271/73, Dec. 13.5.76, D.R. 6 p. 62; No. 9984/82, Dec. 17.10.85, D.R. 44 p. 54).

The Commission takes note of the case-law of the Supreme Court concerning deprivations, restrictions and limitations imposed under a law regulating civil rights in property and their compatibility with Article 23 of the Constitution. It considers that it has not been established that the refusal of the monastery to consent to the institution of proceedings against it would effectively bar under Article 23 para. 9 of the Constitution the applicant company from suing the monastery under the alleged contract. It follows that the applicant company should have instituted proceedings before the domestic courts, before applying to the Commission.

In these circumstances, the Commission, moreover, considers that

it need not address the purely theoretical issue of whether the monastery could refuse under Article 23 para. 9 of the Constitution to comply with a decision which might have been issued against it if the applicant company had instituted successful proceedings under the contract.

In the light of all the above, the Commission concludes that the applicant company has not exhausted domestic remedies under Article 26 (Art. 26) of the Convention in connection with its complaint concerning lack of access to a court. The same holds true in respect of the applicant company's remaining complaints.

It follows that the application must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (S. TRECHSEL)