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EUROPEAN COMMISSION OF HUMAN RIGHTS

SECOND CHAMBER

Application No. 20641/92

Terra Woningen B. V.

against

the Netherlands

REPORT OF THE COMMISSION

(adopted on 5 April 1995)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a Dutch company with limited liability having its registered seat in The Hague. It was represented before the Commission by Mr. Wilhelmus M.P.M. Weerdesteijn, a lawyer practising in Rotterdam.

3. The application is directed against the Netherlands. The respondent Government were represented by their Agent, Mr. Karel de Vey Mestdagh, of the Netherlands Ministry of Foreign Affairs.

4. The case concerns civil proceedings in which the District Court judge reduced the rent of an apartment owned by the applicant company by about 50% as the soil under the apartment building was found to be polluted. In the determination of the rent the District Court judge considered himself bound by an assessment of the gravity of the soil pollution by the provincial authorities. The applicant company invokes Article 6 para. 1 and Article 13 of the Convention.

B. The proceedings

5. The application was introduced on 9 September 1992 and registered on 16 September 1992.

6. On 8 January 1993 the Commission (Second Chamber) decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7. The Government's observations were submitted on 2 April 1993. The applicant company replied on 10 August 1993.

8. On 5 July 1994 the Commission declared admissible the applicant company's complaints under Article 6 para. 1 and Article 13 of the Convention. It declared the remainder of the application inadmissible.

9. The text of the Commission's decision on admissibility was sent to the parties on 20 July 1994 and they were invited to submit such further information or observations on the merits as they wished. The applicant company submitted observations on 23 September 1994, 15 November 1994 and 4 January 1995.

10. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

11. The present Report has been drawn up by the Commission (Second Chamber) in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

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Mr. H. DANELIUS, President
Mrs. G. H. THUNE
MM. G. JÖRUNDSSON
S. TRECHSEL
J.-C. SOYER
H. G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M. A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

12. The text of this Report was adopted on 5 April 1995 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

13. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- (i) to establish the facts, and
- (ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

14. The Commission's decision on the admissibility of the application is attached as an Appendix.

15. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

16. The applicant company owns six apartment buildings, in which there are 288 flats. The buildings are situated at the Merellaan in the Municipality of Maassluis. On 18 April 1990 the applicant company concluded an agreement with Mr. W. under which the latter rented a flat on the third floor in one of the buildings from 1 May 1990, the rent being 790,25 Dutch guilders per month.

17. On 9 July 1990 Mr. W. asked the Rent Board (Huurcommissie) of Schiedam for a decision as to whether the rent was reasonable, in view of, inter alia, the soil pollution in the area where the buildings are located.

18. On 17 April 1991 the Rent Board, assessing the quality of the flat under the housing accommodation point-rating system (woning-waarderingsstelsel) as set out in Annex I to the Ordinance implementing the Act on Rents for Housing Accommodation (Besluit Huurprijzenwet Woonruimte) at 134 points, found that the agreed rent was excessive and decided that a monthly rent of 783,07 Dutch guilders was reasonable.

19. The applicant company then requested the District Court judge (kantonrechter) of Schiedam to confirm the rent which had been agreed between the parties, i.e. 790,25 Dutch guilders, increased by permissible annual supplements to 832,14 Dutch guilders. However, on 10 March 1992 the District Court judge determined the rent at 399,75 Dutch guilders per month.

20. The District Court judge based his decision on certain principles laid down in the Ordinance implementing the Act on Rents for Housing

Accommodation.

21. Annex IV to this Ordinance contains a list of particularly serious deficiencies, the so-called "absolute zero conditions" (absoluut nulpunt) which could lead to a reduction of the rent to a minimum reasonable level. Point 4 of this Annex reads:

[Dutch]

"Het nader onderzoek in het kader van de Interimwet bodemsanering heeft aangegeven dat er sprake is van een zodanige verontreiniging van de bodem onder of in de directe omgeving van de woning, dat er ernstig gevaar voor de volksgezondheid of het milieu bestaat."

[Translation]

"The further investigation in accordance with the Interim Act on Soil Cleaning has shown the existence of such pollution of the soil under or in the direct vicinity of the dwelling as to constitute a serious threat to public health or environment."

22. The building concerned is located in an area where, following an indicative examination of the soil in 1985, the Central Environmental Management Service Rijnmond (Dienst Centraal Milieubeheer Rijnmond) carried out an investigation of the soil under the Interim Act on Soil Cleaning (Interimwet Bodemsanering). A report on the subsequent further investigation by the Central Environmental Management Service Rijnmond under the Interim Act on Soil Cleaning was completed in July 1990.

23. On the basis of the results of this investigation the Provincial Executive (Gedeputeerde Staten) of Zuid-Holland decided that the soil should be cleaned and, by letter of 1 November 1990, the Provincial Executive informed the inhabitants of the area about the pollution of the soil and about the decision of principle to undertake clean-up measures.

24. On 26 March 1991 the Provincial Executive transmitted the final report on the soil investigation to the Mayor and Aldermen (Burgemeester en Wethouders) of Maassluis and informed them that "the Provincial Executive finds it desirable to carry out an investigation regarding the cleaning of the area". In a provincial soil cleaning programme for 1992 the area was indicated as being subject to the Interim Act on Soil Cleaning.

25. On this basis, the District Court judge found that this was a case where the soil is, or risks being, polluted to such an extent that there is a serious danger to public health or environment within the meaning of the second sentence of Section 2 para. 1 of the Interim Act on Soil Cleaning.

26. In the proceedings before the District Court judge, the applicant company, while referring to the findings in the report on the investigation of the soil of July 1990 (see para. 22 above) - which stated, inter alia, that on the basis of the present information the pollution at issue would not lead to noticeable or measurable health damage -, had objected that no such danger to public health or environment in fact existed. It had further argued that the decision of the Provincial Executive under the Interim Act on Soil Cleaning should not automatically lead to the conclusion that there was a so-called "absolute zero condition" as mentioned under point 4 of Annex IV of the Ordinance implementing the Act on Rents for Housing Accommodation.

27. In his judgment the District Court judge, however, held that it was not his task to determine directly or indirectly whether or not the Provincial Executive's decision was correct and well-founded. He considered the existence of a serious threat to public health or environment, an "absolute zero condition", to be a fact established by

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the Provincial Executive's decision that a soil cleaning operation should be carried out in this area. The judgment reads in this regard as follows:

[Dutch]

"8.3. Met Onze ambtgenoot, in diens door beide partijen aangehaalde beschikking van 5 juni 1990 (gepubliceerd in Woonrecht 1990, nr 87), zijn Wij van oordeel, dat het niet aan Ons is om te onderzoeken of Gedeputeerde Staten terecht en op goede gronden het besluit hebben genomen, zoals bedoeld in artikel 2 lid 1, tweede volzin van de IBS. Ook niet op indirecte wijze, door (van geval tot geval) de conclusies van het nader onderzoek te wegen in het kader van de vaststelling of aanwezig is het (absolute) nul punt, geformuleerd sub 4 van Bijlage IV van het BHW

8.4. Het "ernstig gevaar etc." in de polder is gegeven met de beslissing van Gedeputeerde Staten tot aanwijzing van deze locatie als saneringsgeval, en daarmee staat tevens vast, dat zich dit (identiek geformuleerd) absoluut nul punt voordoet."

[Translation]

"8.3. Like Our colleague, in his decision of 5 June 1990 referred to by both parties (published in Woonrecht 1990, No. 87), We are of the opinion that it is not Our task to examine whether the Provincial Executive has been right in taking the decision, or has taken it on good grounds, under Section 2 para. 1, second sentence of the Interim Act on Soil Cleaning. Not even indirectly by weighing the conclusions of the investigation (on a case to case basis) within the framework of establishing whether the (absolute) zero condition, as formulated under point 4 of Annex IV to the Ordinance implementing the Act on Rents for Housing Accommodation, is satisfied

8.4. The "serious threat etc." in the polder is an established fact when the Provincial Executive has decided that this site shall be subject to cleaning, and it is thereby also established that the absolute zero condition (as formulated in an identical manner) is satisfied."

28. The District Court judge subsequently found in favour of the tenant concerned by deciding to deduct the maximum number of 20 points for a particularly serious deficiency from the number of points the flat was assessed at under the residential accommodation point-rating system. He further set the rent at the minimum reasonable rent corresponding to the number of points thus determined, i.e. a rent of 399,75 Dutch guilders as from 1 May 1990.

29. Subsequently 269 other tenants of the applicant company have introduced proceedings in order to have their rents reduced in the same way. The applicant company alleges that this will mean an annual loss of rent income amounting to about 1.300.000 Dutch guilders.

30. On 21 July 1992 the District Court judge of Schiedam, in another case between a tenant and an owner of a house in Maassluis, decided not to reduce the rent since the Provincial Executive had not yet taken a decision within the meaning of the second sentence of Section 2 para. 1 of the Interim Act on Soil Cleaning.

B. Relevant domestic law

31. The Act on Rents for Housing Accommodation (Huurprijzenwet Woonruimte) lays down the rights and obligations between tenants and landlords in respect of the rents charged for housing accommodation. The aim of the system adopted in the Act on Rents for Housing Accommodation is that the rent should as far as possible reflect the quality of the housing accommodation.

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32. Pursuant to Section 5 para. 1(a) of the Ordinance implementing the Act on Rents for Housing Accommodation the quality will be assessed on the basis of a housing accommodation point-rating system, which system is set out in Annex I to the Ordinance. Point 11 of Annex I contains rules for assessing the quality of housing accommodation in cases where there is a high nuisance level in the neighbourhood which has a negative influence on the enjoyment of the accommodation, such as, inter alia, traffic or industrial noise, serious deterioration of the neighbourhood or non-incident al pollution of the air or soil, which could affect the health of residents. If this is the case a maximum of 20 points can be deducted from the points awarded to the accommodation.

33. Annex IV to the Ordinance contains a list of particularly serious deficiencies, the so-called "absolute zero conditions", which are used in disputes concerning rent increases or reductions. The presence of such an "absolute zero condition" makes a rent increase impossible and can lead to a reduction of the rent to the minimum reasonable level pertaining to the determined number of points of a particular accommodation. The minimum reasonable level of rent belonging to a given number of points is set on a yearly basis and can be found in Annex III to the Ordinance.

34. Under Section 17 of the Act on Rents for Housing Accommodation new tenants, within three months following the conclusion of a rent agreement, can request the Rent Board to assess whether the agreed rent is reasonable. Under Sections 20 and 23 of the Act both tenants and landlords can request the Rent Board to determine whether a proposed change of the rent is reasonable.

35. Both tenants and landlords can file an appeal against the Rent Board's decisions with the District Court. The District Court may fully review a decision of the Rent Board but, like the Rent Board, must observe the criteria for assessing whether the rent is reasonable as set out in the Ordinance, i.e. the point rating scale and the zero condition system. It is, however, within the discretion of the District Court to assess whether or not a specific soil pollution constitutes a serious health risk for tenants. No appeal lies against the decision of the District Court.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

36. The Commission has declared admissible the applicant company's complaints that, in the determination of its civil rights and obligations within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention in the proceedings before the District Court judge, it did not receive an effective judicial review, as the District Court judge considered himself bound by the position taken by the Provincial Executive in respect of the soil pollution and its effects on public health and environment, and that it was also deprived of an effective remedy within the meaning of Article 13 (Art. 13) of the Convention against the decision of the Provincial Executive which affected its property rights.

B. Points at issue

37. The issues to be determined are:

- whether there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention, and
- whether there has been a violation of Article 13 (Art. 13) of the Convention.

C. As regards Article 6 para. 1 (Art. 6-1) of the Convention

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38. The applicant company complains under Article 6 para. 1 (Art. 6-1) of the Convention that it did not receive an effective judicial review in the proceedings before the District Court judge concerning a rent dispute, as the District Court judge considered himself bound by the position taken by the Provincial Executive in respect of the soil pollution and its effects on public health and environment

39. Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, reads:

"In the determination of his civil rights and obligations (...), everyone is entitled to a fair (...) hearing (...) by an independent and impartial tribunal established by law."

40. The applicant company submits that in the present proceedings the District Court judge failed to make an assessment of his own as to the factual effects of the soil pollution, as he considered himself bound by the position taken by the Provincial Executive in respect of the soil pollution and its effects on public health and environment, thereby barring the applicant company from obtaining a judicial finding on an important part of its legal arguments, since the District Court judge failed to determine whether or not the soil pollution at issue did in fact constitute a threat to the public health or environment of the residents in the area concerned, this being a decisive element in the determination of the rent the applicant company can charge its tenants.

41. The Government submit that in the proceedings at issue the District Court is fully competent to make its own independent assessment of the question whether or not the soil is polluted to such an extent that this amounts to a serious danger to public health or environment. The District Court, in making this assessment, may rely on the results of the frequently highly complex and technical soil investigations by the competent administrative authorities. In proceedings before the District Court on rent disputes, the question whether the Provincial Executive has made a decision according to Section 2 para. 1 of the Interim Act on Soil Cleaning is in no way a determining factor in deciding whether or not there is a serious threat to health or the environment for the purpose of the determination of the reasonable rent. It appears from Dutch case-law that District Courts do not necessarily follow the findings of the administrative authorities in respect of the effects of soil pollution on public health and environment.

42. The Government further submit that in the present case the District Court judge apparently found that it was not necessary to examine whether the Provincial Executive had taken its decision on good grounds, in view of the results of the soil investigations and the decision to include the area in a soil cleaning programme.

43. The Commission observes at the outset that the applicability of Article 6 para. 1 (Art. 6-1) to the proceedings at issue is not disputed between the parties. Noting that the proceedings were decisive for the rent the applicant company could charge its tenants, the Commission finds that the proceedings involved a determination of the applicant company's civil rights within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

44. The Commission further observes that, in the determination of the rent the applicant company could charge its tenant, the District Court judge found the existence of a serious threat to public health or environment, an "absolute zero condition", to be a fact established by the Provincial Executive's decision that a soil cleaning operation should be carried out in the area where this tenant's apartment was located. The Commission finds no indication that the District Court judge, against whose decision no further appeal lies, made an

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independent assessment of his own as to the effects of this pollution in respect of the specific apartment occupied by this tenant. On the contrary, he stated explicitly that it was not his task to determine whether the Provincial Executive had been right in its assessment that there existed a serious threat to public health or environment.

45. The Commission finds that, in disputes concerning civil rights and obligations, such a limited review cannot be considered to be sufficient to constitute a determination of civil rights within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. There has therefore been a violation of the applicant company's right of access to a court (cf. Eur. Court H.R., Obermeier judgment of 28 June 1990, Series A no. 179, p. 23, para. 70.)

CONCLUSION

46. The Commission concludes, by 12 votes to 1, that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

D. As regards Article 13 (Art. 13) of the Convention

47. The applicant company further complains that the District Court judge's conduct of the proceedings deprived it of an effective remedy within the meaning of Article 13 (Art. 13) of the Convention against the decision of the Provincial Executive which affected its property rights.

48. Having concluded that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention (see para. 46), the Commission finds that it is not necessary to examine the case under Article 13 (Art. 13) of the Convention. The requirements of Article 13 (Art. 13) are less strict than, and are here absorbed by, those of Article 6 (Art. 6) of the Convention (cf. Eur. Court H.R., Pudas judgment of 27 October 1987, Series A no. 125-A, p. 17, para. 43).

CONCLUSION

49. The Commission concludes, by 12 votes to 1, that it is not necessary to examine whether there has been a violation of Article 13 (Art. 13) of the Convention.

E. Recapitulation

50. The Commission concludes, by 12 votes to 1, that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention (para. 46).

51. The Commission concludes, by 12 votes to 1, that it is not necessary to examine whether there has been a violation of Article 13 (Art. 13) of the Convention (para. 49).

Secretary to the Second Chamber
(K. ROGGE)

President of the Second Chamber
(H. DANELIUS)

(Or. English)

DISSENTING OPINION OF MR. S. TRECHSEL

I regret that in the present case I cannot share the view of the majority that there has been a violation of the applicant's rights under Article 6 para. 1 of the Convention.

It is uncontested that the judge was not bound by the assessment of the facts by the Provincial Executive. Unfortunately, the judge committed an error in interpreting the domestic law. However, the Commission has always held that it is not competent to rectify errors

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made by a court in applying domestic law. By finding a violation of Article 6 in the present case, the Commission in my view acts as a fourth instance.

No issue arises under Article 13 as alleged violations of Article 6 do not give rise to a remedy before a national authority. In fact, and in accordance with Article 6, only a higher court could examine whether a judicial organ acted in violation of the Convention. However, no right to appeal is guaranteed by the Convention in civil matters. Article 13 does therefore not apply in the present case.