

Weakening of a Right as a More Specific Manifestation of the Abusive Exercise of a Right, in the Light of the Greek and Cypriot Property Law

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Abstract

The purpose of this study is to further investigate the concept of the weakening of a right in the field of property law. The weakening of a right is applied by reference to the particular circumstances of a case, including an unreasonable and unexplained long period of plaintiff's delay in exercising his/her right, which causally prejudices the defendant's position. The analysis of the conditions and consequences of the weakening of a right is undertaken on the basis of the doctrine and case law of the Greek and Cypriot property law, in order to identify in a comparative law way the dynamic elements of each individual legal order and to shed light on the process of using the findings in the assessment and handling of real life cases covered by the above issue.

Keywords: abuse of a right, constructive trust, estoppel by laches, principle of proportionality, property law, proprietary estoppel, resulting trust, right in rem, weakening of a right

Weakening of a Right under Greek Property Law

Prohibition of Abusive Exercise of a Right

Under the mandatory provision of article 281 of the Civil Code (CC), an abusive exercise of rights is prohibited if it manifestly exceeds the bounds of good faith (objective good faith in transactions), morality or the economic or social purpose of that right (establishment of alternative criteria and, in particular, objective ones, i.e. abuse of right is not dependent on the existence of fault), which are vague legal concepts specified in concreto by the judge in the light of particular social perceptions²).³

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² Ap. Georgiades, *General Principles of Civil Law*, 4th edn (Athens: P. N. Sakkoulas, 2012) (in Greek), § 23, No. 26-31.

³ The Prohibition of Abusive Exercise Has a Constitutional Basis as there Is an Explicit Prohibition in Article 25 § 3 of the Greek Constitution.

Rights in rem⁴ (property rights) and claims in rem (property claims) or in personam (personal claims) arising therefrom,⁵ in addition to other private rights, are subject to the control of CC 281. In particular, rights controlled for abusive exercise are ownership⁶ and the resulting powers (e.g. rei vindicatio⁷ or action for a declaration of ownership,⁸ action for a negative declaration,⁹ right to planting trees,¹⁰ right to construct a wall obstructing the view of the neighbouring property to the sea,¹¹ etc.), appurtenant¹² or personal¹³ easements, registration of mortgage,¹⁴

⁴ For the Abuse of Rights in Rem, see in detail Ap. Georgiades, (2016) 'Article 281' (in Greek), at *CC Georgiades/Stathopoulos, General Principles, Volume IB (Articles 127-286)*, 2nd edn (Athens: P. N. Sakkoulas, 2016), No. 45-48; N. Georgiades, (2010) 'Article 281' (in Greek), in Ap. Georgiades, *Brief Interpretation of Civil Code I (Articles 1-946)* (Athens: P. N. Sakkoulas, 2010), No. 5.

⁵ Ap. Georgiades, *Property Law*, 2nd edn (Athens-Thessaloniki: Sakkoulas Editions, 2010), § 7, No. 12 (in Greek).

⁶ *Ibid.*, § 29, No. 8.

⁷ *Ibid.*, § 58, No. 47.

⁸ AP (Areios Pagos, Hellenic Supreme Civil and Criminal Court) 107/2011, *ABA (Athens Bar Association) Legal Database = Nomiko Vima* 2011, 1303; AP 1456/2010, *ABA Legal Database = Nomiko Vima* 2011, 774; AP 720/2010, *Nomos Legal Database*; AP 2038/2009, *ABA Legal Database = Nomiko Vima* 2010, 985; AP 679/2009, *Nomos Legal Database = Chronicles of Private Law* 2010, 96 = *Elliniki Dikaiosyni (Hellenic Justice)* 2011, 423; Patras Court of Appeal, 34/2003, *Achaiki Nomologia* 2004, 616.

⁹ AP 1516/2009, *ABA Legal Database*.

¹⁰ Court of Appeal of Larisa 787/2010, *ABA Legal Database*.

¹¹ Ap. Georgiades (no 5).

¹² I. Karakostas, *The Abuse of Right in Proprietary Relations: Exploitation of Property Items, as a Legal Instrument of Social Justice & Well-Being* (Athens: P. N. Sakkoulas, 2005) (in Greek), 99-102; AP 1796/2009, *ABA Legal Database = Nomiko Vima* 2010, 734 on abusive easement of way, since the dominant real estate ensured direct access to a public road; AP 1265/2007, *ABA Legal Database = Nomiko Vima* 2008, 172; AP 977/2002, *Nomos Legal Database*, which considered that the broad interpretation of CC 1017, in combination with the weakening of the right of CC 281, can enable the abolition (elimination) of the right of way in less than 20 years, due to inactivity, when the omission of use is accompanied by incidents that convince the court it is unlikely for the easement to be exercised in the future; AP 28/1999, *ABA Legal Database*; AP 273/1990, *Hellenic Justice* 1991, 974 = *Epitheorisi Dikaiou Polykatoikias (Apartment Building Law Review)* 1991, 149 = *Nomos Legal Database*; AP 1002/1983, *Efimeris Ellinon Nomikon (Greek Jurists Review)* 1984, 428 = *ABA Legal Database*; Dodecanese Court of Appeal 45/2003, *ABA Legal Database*; Larisa Court of Appeal 597/2002, *ABA Legal Database*; Piraeus Court of Appeal 689/1996, *Hellenic Justice* 1997, 665 = *Nomos Legal Database*; Piraeus Court of Appeal 1164/1995, *Hellenic Justice* 1996, 1122 = *Nomos Legal Database*; Piraeus Court of Appeal 100/1994, *Hellenic Justice* 1994, 1698; Multi-member Court of First Instance of Agrinio, 248/1999, *Armenopoulos* 2000, 36 = *ABA Legal Database*.

¹³ Athens Court of Appeal 6131/1997, *Nomos Legal Database* and *Armenopoulos* 2001, 1043 on abuse of the right to use another's property as residence.

¹⁴ AP 1946/2009, *ABA Legal Database*: registering a mortgage on behalf of the Bank on a debtor's property has been adjudicated as non-abusive; Thessaloniki Court of Appeal 51/1999, *Nomos Legal*

rights under law of neighbours (e.g. CC 1003, 1008),¹⁵ etc. It is therefore abusive to claim real estate when the plaintiff has sold it lawfully but raises a claim because registration of the sale has not yet been completed (objection of property sold and delivered).¹⁶ Especially in the case of actions in rem (e.g. rei vindicatio), by which the plaintiff demands the actual possession of the property, it is argued that the key socio-economic criterion for establishing abuse of right by the plaintiff is the long term financial exploitation and development of the property by the defendant, in contrast to the indifference of the plaintiff.¹⁷

The control of abuse under CC 281 is also of interest in cases of division of jointly-owned property (community of interests between the joint owners (CC 1113, 785 et seq. and 790 (a), which dictates the management and use of jointly-owned property in a manner that is appropriate and respects all joint owners). In this case, the exercise of the right of any joint owner to ask for the dissolution of the property under joint ownership as per CC 795 is subject to the control of CC 281,¹⁸ depending on the conditions required (an indication of abuse may be the fact that the joint owner has effectively recognised as definitive and existing a priori informal dissolution agreement, which he/she subsequently contests because it no longer serves his/her economic interests).¹⁹

Database = Dikaio Epicheiriseon kai Etairion (Business and Company Law) 1999, 629 = Nomiko Vima 1999, 632.

¹⁵ Ap. Georgiades (no 5), § 31, No. 15 and § 33, § 4.

¹⁶ Ibid, § 58, No. 42.

¹⁷ See also the practical issue, which is set out together with the solution to Ap. Georgiades, *General Principles of Civil Law, Practical Issues with Solutions, 3rd edn* (Athens: P. N. Sakkoulas 2013) (in Greek), Example No. 64, 95 [the seller of a property by a private agreement after 33 years invokes the invalidity of the transfer on grounds of non-compliance with the legal procedure (CC 159 § 1, 180 in conjunction with CC 369, 1033) and requests the recognition of his ownership and the return of the property, although in the meantime the buyer has made use of the property in front of the eyes of the owner of the neighbouring property-seller, based on statements made by the seller (in the presence of third parties) that he does not intend to challenge ownership despite the lack of a notarial deed of the sale and transfer of the immovable property]; see also AP 1482/1979, *Legal Database and Nomiko Vima* 1980, 1063.

¹⁸ Ap. Georgiades (no 4), No. 47; AP 1099/2014, *Nomos Legal Database*; AP 1080/2012, *Nomos Legal Database*; AP 1188/2010, *ABA Legal Database*; AP 971/2010, *ABA Legal Database*; AP 1878/2007, *ABA Legal Database*; AP 473/2001, *ABA Legal Database*: the partition of jointly-owned real estate adjudicated as abusive because one of the joint owners living in it was facing a housing problem; Thessaloniki Court of Appeal 301/2010, *ABA Legal Database = Armenopoulos* 2011, 764.

¹⁹ AP 711/1982, *Nomos Legal Database = Nomiko Vima* 1983, 660; Court of Appeal of Crete 4/2006, *ABA Legal Database*.

Moreover, in horizontal property relations, testing for abuse under CC 281²⁰ is useful (for example, rights derived from the apartment building regulations may be exercised abusively,²¹ in view of current technical, economic, building and environmental developments,²² if they are directed against an act²³ or omission that causes neither significant damage²⁴ nor disturbance²⁵ to the joint owners nor does

²⁰ Ap. Georgiades (no 4), No. 48; AP 1481/2005, *ABA Legal Database*; AP 1592/2003, *Nomiko Vima* 2004, 974 = *Nomos Legal Database*; AP 6881/1998, *Nomiko Vima* 1999, 1302 with comment by K.A. Christakakou; ΑΠ 884/1995, *ABA Legal Database*: Abusive claim of heating costs; AP 699/1986, *Nomiko Vima* 1987, 727: Abusive claim of common expenses; Athens Court of Appeal 58/1994, *Nomos Legal Database* = *Apartment Building Law Review* 1994, 55: Abusive claim for a long-term exclusive use of parking places; AP 989/1980, *Nomiko Vima* 1981, 324 = *Nomos Legal Database*: Abusive claim for recovering the possession of a part of the external common area of an apartment building, which would result in the demolition of a central concrete pillar that supported the entire building structure; see also I. Karakostas (no 12), 83 and 90-99 with extensive case-law; I. Karakostas, (2007) 'Modification of Horizontal Property from Residence to a Store—Abuse in Invoking Apartment Building Regulations—Judicial Adjustment of the Contractual Obligations of Co-Owners' (in Greek), *Chronicles of Private Law*, 462 et seq.; see, however, AP 1555/1985, *Nomiko Vima* 1986 = *Nomos Legal Database*: non-abusive obligation to restore the facade of an apartment building following modifications in the external appearance of the building in breach of the regulation; Piraeus Court of Appeal 986/1998, *Apartment Building Law Review* 1999, 36 = *Nomos Legal Database*: Non-abusive claim by the co-owners to annul a deed of horizontal property for a car parking spot in the pilotis area.

²¹ AP 974/2010, *ABA Legal Database* = *Nomiko Vima* 2010, 2495; AP 1842/1999, *ABA Legal Database*: Non- weakening of the right to use the pilotis; Court of Appeal of Larisa 489/2006, *ABA Legal Database*: Abusive refusal of an owner to consent to the operation of a drink and food store.

²² Athens Court of Appeal 1677/1994, *Nomos Legal Database* = *Apartment Building Law Review* 1994, 206: abusive invocation of a ban based on the regulation regarding the fitting of solar water heater on the terrace; Athens Court of Appeal, 3695/1990, *Nomos Legal Database* = *Apartment Building Law Review* 1990, 265; Athens Court of Appeal 1208/1990, *Nomos Legal Database* = *Apartment Building Law Review* 1990, 116: Abusive claim for the removal of an advertising panel from a horizontal property, as all the apartments in the surrounding apartment buildings are no longer inhabited and converted into shops or offices; Athens Court of Appeal 12892/1988, *Nomos Legal Database* = *Apartment Building Law Review* 1989, 45: Changing the nature of the area from purely urban to intensely commercial area; see also I. Karakostas (no 12), 90-99.

²³ AP 802/2009, *ABA Legal Database* = *Nomiko Vima* 2009, 2167: Use of an apartment as an ophthalmologist's practice for ten years in contravention of the apartment building regulation.

²⁴ AP 974/2010, *ABA Legal Database* = *Nomiko Vima* 2010, 2495; AP 1598/1997, *Nomiko Vima* 1998, 1072 = *Apartment Building Law Review* 1998, 34 and *Nomos Legal Database*; AP 1570/1987, *ABA Legal Database*; Court of Appeal of Larisa 498/2006, *ABA Legal Database*; Athens Court of Appeal 5224/2000, *Apartment Building Law Review* 2001, 29 = *Nomos Legal Database*.

²⁵ AP 1598/1997, *Nomiko Vima* 1998, 1072 and *Apartment Building Law Review* 1998, 34 = *Nomos Legal Database*; Athens Court of Appeal 1208/1990, *Nomos Legal Database* = *Apartment Building Law Review* 1990, 116.

it hamper the use of common areas²⁶ or create problems of static²⁷ or aesthetic²⁸ nature or damages²⁹ in the apartment building, nor does it reduce the safety of individual apartments,³⁰ nor affects any other legal interest of the joint owners, on the contrary, it is particularly beneficial for the liable party;³¹ in particular, among joint owners of apartment buildings it is abusive to exercise any right, from which only damage to the defendant is caused without any expectation of benefit to the plaintiff).³²

Weakening of a Right: Meaning, Conditions, Consequences

The weakening of a right (Verwirkung in German law/estoppel by laches in Anglo-Saxon law) constitutes a particular case of abusive exercise of a right, namely referring to the impairment of the right in such a way that exercise thereof is impossible (the defendant may raise the objection of CC 281 on abusive exercise).³³ The conditions³⁴ governing the weakening of the right, which must be cumulative,

²⁶ AP 974/2010, *ABA Legal Database = Nomiko Vima* 2010, 2495; AP 802/2009, *ABA Legal Database = Nomiko Vima* 2009, 2167; AP 629/2007, *ABA Legal Database = Nomiko Vima* 2007, 1873.

²⁷ Athens Court of Appeal 10105/1999, *Nomos Legal Database = Apartment Building Law Review* 2001, 122; Court of Appeal of Athens 1677/1994, *Nomos Legal Database = Apartment Building Law Review* 1994, 206; Court of Appeal of Athens 12892/1988, *Nomos Legal Database = Apartment Building Law Review* 1989, 45.

²⁸ AP 732/2002, *Nomos Legal Database*.

²⁹ AP 802/2009, *ABA Legal Database = Nomiko Vima* 2009, 2167.

³⁰ Court of Appeal of Larisa 489/2006, *ABA Legal Database*.

³¹ AP 974/2010, *ABA Legal Database = Nomiko Vima* 2010, 2495; Piraeus Court of Appeal 376/2005, *Nomos Legal Database = Peiraiki Nomologia* 2005, 182.

³² AP 1061/1992, *Efimeris Ellinon Nomikon* 1993, 718.

³³ Ap. Georgiades (no 2), § 23, No. 35; Ap. Georgiades (no 4), No. 255; AP 891/1980, *Efimeris Ellinon Nomikon* 1981, 43 = *ABA Legal Database* and AP 907/1982, *Efimeris Ellinon Nomikon* 1983, 480 = *ABA Legal Database*, which expressly name abuse in the specific case as weakening of a right; Ap. Georgiades (no 4) 'Introductory Remarks to Articles 247-280', No. 29-30 on the limitation and the weakening of a right, and 'Article 281' to distinguish waiver from weakening of a right (see also Patras Court of Appeal, 1019/2004, *ABA Legal Database = Achaiiki Nomologia* 2005, 25; Small Claims Court of Larisa 111/2010, *ABA Legal Database*).

³⁴ Ap. Georgiades (no 2), § 23, No. 36; Ap. Georgiades (no 4) 'Introductory Remarks to Articles 247-280', 26-27 and 'Article 281', 263-274; I. Karakostas (no 12), 78-80; N. Georgiades (no 4), 43-47; M.-Th. Marinos, (2003) 'The Objection of Weakening of a Right in the New Trademark Law' (in Greek), *Chronicles of Private Law*, 865 et seq.; S. Ioakeimidis, (2011) Observations to AP 1512/2010 (in Greek), *Chronicles of Private Law 2011*, 175 et seq.; P. Alikakos, *Abuse of a Right in Rem: Case Law Developments in the Abuse of Acquisition and Exercise of a Right in Rem* (Athens-Thessaloniki: Sakkoulas Editions, 2007) (in Greek), 38-47 for the theory views on weakening and 104-123 in relation to case-law positions regarding weakening; A. Karampatzos, *The Waiver of the Right to Reserved Portion, A Methodological Contribution to the Field of Inheritance Law* (Athens-Komotini: Ant. N. Sakkoulas

are: (a) the inaction of the holder of the right,³⁵ i.e. failure to exercise the right that is not due to any reasonable cause or inability³⁶ (examples of reasonable cause could be inexperience, no fault lack of knowledge, existence of affinity³⁷ or friendship³⁸ between the plaintiff and the defendant, an employment relationship or an economic relationship or a hierarchical dependence³⁹ between the plaintiff and the defendant, right under a condition precedent or deadline); (b) inaction over a long period of time, but less than the limitation or prescription period;⁴⁰ and

Editions 2011) (in Greek), 186-187, which states that, as a result of the weakening of the right, the legal order aims to reward that person who holds an item for the purpose of economic and productive exploitation, in addition to protect the legitimate expectations of a person in a factual situation created by the behaviour of another person, that is to say, trust in the continuation of the same conduct and thus in the preservation of the factual situation in the future, to which the person has justifiably invested primarily in a financial perspective ('trust investment'); AP Plenary 8/2018, *Nomos Legal Database*; AP Plenary 10/2012, *Chronicles of Private Law* 2013, 433; AP Plenary 8/2001, *Nomos Legal Database = Hellenic Justice* 2001, 382 = *Episkopisi Emporikou Dikaiou (Commercial Law Review)* 2001, 392 = *Chronicles of Private Law* 2001, 217 with comments by G. Iatrou; AP Plenary 62/1990, *Nomos Legal Database = Hellenic Justice* 1991, 501 = *Efimeris Ellinon Nomikon* 1991, 320 = *Nomiko Vima* 1991, 389; AP 414/2018, *Nomos Legal Database*; AP 383/2010, *Nomos Legal Database*; AP 1708/2009, *ABA Legal Database = Nomiko Vima* 2010, 725; AP 1986/2009, *ABA Legal Database = Nomiko Vima* 2010, 977; AP 494/2009, *Nomos Legal Database = Efarmoges Astikou Dikaiou (Civil Law Applications)* 2010, 531 = *Chronicles of Private Law* 2011, 418 with comment by E. Poulou; AP 395/2009, *Nomos Legal Database = Hellenic Justice* 2010, 420; AP 1217/2008, *Nomos Legal Database*; AP 1947/2007, *Nomos Legal Database*; AP 1913/2007, *Nomos Legal Database*; AP 1173/2007, *Nomos Legal Database*; AP 223/2007, *Nomos Legal Database*; AP 628/2004, *Nomos Legal Database = Hellenic Justice* 2006, 125.

³⁵ Inaction does not exist, when the plaintiff has repeatedly raised the matter with the defendant (Small Claims Court of Larisa 111/2010, *ABA Legal Database*) or has directly exercised his/her legal rights from the moment he/she became aware that the debtor is impinging them (Appeal Court of Larisa 141/2010, *Legal Database ABA*) or protests before third parties (Appeal Court of Athens 8263/2007, *ABA Legal Database = Business and Company Law* 2008, 1115) or complaints to the authorities (Appeal Court of Larisa 141/2010, *ABA Legal Database*), see to that effect Ap. Georgiades (no 4) 'Article 281', No. 265.

³⁶ However, there is no fault requirement for the right to be weakened, see Ap. Georgiades (no 4) 'Article 281', No. 263; P. Alikakos (no 34), 44.

³⁷ See also AP 423/1999, *ABA Legal Database*.

³⁸ Athens Court of Appeal, 8263/2007, *ABA Legal Database = Business and Company Law* 2008, 1115.

³⁹ *Ibid.*

⁴⁰ The sole lapsing of a long period of time it is not sufficient, even if the defendant, acting in good faith has been convinced that the relevant right is not to be exercised; other incidents or special circumstances as well as coinciding events are required, relating to the behaviour of the plaintiff or defendant as a whole: see Ap. Georgiades (no 4), No. 267; P. Alikakos (no 34), 106-113; AP 259/2011, *ABA Legal Database = Nomiko Vima* 2011, 1889, 2164 = *Armenopoulos* 2012, 493; AP 227/2011, *ABA Legal Database = Nomiko Vima* 2011, 1614; AP 107/2011, *ABA Legal Database = Nomiko Vima* 2011, 1303; AP 823/2010, *ABA Legal Database = Nomiko Vima* 2010, 2480; AP 720/2010, *ABA Legal Database*

(c) that the inaction of the plaintiff has reasonably convinced the defendant, either that the right does not exist or that it is not going to be exercised anymore.⁴¹ For the determination of the third condition, other specific instances or circumstances relating mainly to the person of the plaintiff should be taken into account (e.g. the plaintiff was aware or should have been aware⁴² of the situation that was formed and has not reacted or given his consent to the execution of specific actions; he failed to bring legal claims, even though the defendant had invited the plaintiff to submit his/her objections⁴³ in writing; there were explicit assurances of a mandatory heir to a co-heir that he/she unconditionally recognises the disputed will⁴⁴ as valid; there was voluntary delivery of the possession of immovable property,⁴⁵ etc.), but also to the person of the defendant (for example, he made expenses on the basis of the plaintiff's behaviour).⁴⁶ The extent, intensity, etc. of such circumstances is a decisive criterion in determining the plaintiff's direct or indirect assurance to the defendant that the former does not wish to enjoy the benefits of his/her right.⁴⁷ The situation created in favour of the defendant and his/her conviction should be in a causal link with the plaintiff's previous behaviour.⁴⁸

= *Nomiko Vima* 2010, 2337; AP 383/2010, *ABA Legal Database* = *Nomiko Vima* 2010, 1756; AP 9/2010, *ABA Legal Database*; AP 1133/2009, *ABA Legal Database* = *Nomiko Vima* 2009, 2348, 2398; AP 1915/2007, *Nomiko Vima* 2008, 964 = *ABA Legal Database*; AP 1901/2007, *ABA Legal Database* = *Nomiko Vima* 2008, 964; AP 1111/2007, *ABA Legal Database*; AP 223/2007, *ABA Legal Database* = *Nomiko Vima* 2007, 1396; AP 138/2007, *ABA Legal Database*; AP 379/2006, *ABA Legal Database*; AP 1536/2005, *ABA Legal Database* = *Nomiko Vima* 2006, 401; AP 90/2004, *Chronicles of Private Law* 2004, 601; AP 205/2001, *ABA Legal Database* = *Hellenic Justice* 2001, 1572.

⁴¹ Ap. Georgiades (no 4) 'Article 281', No. 269-270; AP 259/2011, *ABA Legal Database* = *Nomiko Vima* 2011, 1889, 2164 = *Armenopoulos* 2012, 493; AP 823/2010, *ABA Legal Database* = *Nomiko Vima* 2010, 2480; AP 316/2005, *ABA Legal Database*; AP 111/2005, *Hellenic Justice* 2006, 1693 = *ABA Legal Database*.

⁴² Patras Court of Appeal 34/2003, *Nomos Legal Database* = *Achaiki Nomologia* 2004, 616.

⁴³ AP 269/2009, *ABA Legal Database* = *Nomiko Vima* 2009, 1419.

⁴⁴ AP 1513/1981, *Nomiko Vima* 1982, 919.

⁴⁵ AP 720/2010, *ABA Legal Database* = *Nomiko Vima* 2010, 2337.

⁴⁶ AP Plenary 8/2001, *Nomos Legal Database* = *Hellenic Justice* 2001, 382 = *Commercial Law Review* 2001, 392 = *Chronicles of Private Law* 2001, 217 with comments by G. Iatrou.

⁴⁷ Specifically, for conditions or circumstances to be taken into consideration in determining whether or not 'reasonable conviction of the defendant' is established, see Ap. Georgiades, (2016) 'Article 281' (in Greek), at *CC Georgiades/Stathopoulos*, No. 270. Especially in the case of affinity between the plaintiff and the defendant, see AP 448/2010, *ABA Legal Database* = *Nomiko Vima* 2010, 2052 and 2011, 717; see also AP 9/2010, *ABA Legal Database*, as well as AP 423/1999, *ABA Legal Database*, where affinity is estimated in the opposite way, i.e. as sufficient justification for the plaintiff and his/her predecessor not raising an objection to the exclusive use by the defendant of the common domicile.

⁴⁸ Ap. Georgiades (no 2), § 23, No. 36; Ap. Georgiades (no 4), No. 28 and 'Article 281', No. 270; S. Io-

It is questionable⁴⁹ whether a fourth condition should be met, i.e. the overturning

akeimidis (no 34); P. Alikakos (no 34); AP Plenary 8/2018, *Nomos Legal Database*; AP Plenary 10/2012, *Chronicles of Private Law* 2013, 433; AP Plenary 62/1990, *Nomos Legal Database* = *Hellenic Justice* 1991, 501 = *Efimeris Ellinon Nomikon* 1991, 320 = *Nomiko Vima* 1991, 389; AP 414/2018, *Nomos Legal Database*; AP 403/2013, *ABA Legal Database*; AP 1708/2009, *ABA Legal Database* = *Nomiko Vima* 2010, 725; AP 395/2009, *Nomos Legal Database* = *Hellenic Justice* 2010, 420; AP 1217/2008, *Nomos Legal Database*; AP 628/2004, *Nomos Legal Database* = *Hellenic Justice* 2006, 125.

⁴⁹ According to one opinion the overturning of the consolidated situation must be burdensome or particularly/excessively burdensome for the defendant [AP Plenary 62/1990, *Nomos Legal Database* = *Hellenic Justice* 1991, 501 = *Efimeris Ellinon Nomikon* 1991, 320 = *Nomiko Vima* 1991, 389; AP Plenary 2101/1984, *Nomiko Vima* 1985, 648 = *Nomos Legal Database*; AP 383/2010, *Nomos Legal Database*; AP 9/2010, *ABA Legal Database*; AP 1133/2009, *Chronicles of Private Law* 2010, 175 with note by Ev. Nezeriti; AP 494/2009, *Nomos Legal Database* = *Civil Law Applications* 2010, 531 = *Chronicles of Private Law* 2011, 418 with comment by E. Poulou; AP 395/2009, *Nomos Legal Database* = *Hellenic Justice* 2010, 420; AP 2076/2007, *ABA Legal Database* = *Nomiko Vima* 2008, 976, 1266; AP 263/2007, *Nomiko Vima* 2008, 866 = *Nomos Legal Database*; AP 316/2005, *ABA Legal Database*; AP 65/2005, *Hellenic Justice* 2006, 779 = *ABA Legal Database*; AP 733/2003, *ABA Legal Database*; AP 762/2002, *ABA Legal Database*; AP 1073/1997, *ABA Legal Database* = *Efimeris Ellinon Nomikon* 1999, 115, which mentions (simply) burdensome effects; AP 572/2009, *Chronicles of Private Law* 2010, 32, which refers to such onerous consequences to the defendant that, in the light of good faith and morality, it is necessary to sacrifice the right, in order to prevent them; AP 1217/2008, *Nomiko Vima* 2009, 130 = *ABA Legal Database*, which mentions particularly onerous consequences for the defendant, and adds that the finding that the consequences entailed by the exercise of the right are onerous for the defendant, should also be dealt in conjunction with the corresponding consequences that may be suffered by the plaintiff due to the impediment to the satisfaction of his/her right; AP 1394/2007, *Nomos Legal Database*, which mentions excessively onerous consequences for the defendant; AP 1618/2006, *Nomos Legal Database*; AP 379/2006, *ABA Legal Database*, which mentions such onerous consequences for the defendant, that, in the light of good faith and morality, it is necessary to sacrifice the requested right; AP 829/2001, *ABA Legal Database*, referring to consequences for the defendant, not only particularly unfavourable, but also disproportionate to the benefit sought by the plaintiff; AP 205/2001, *Nomos Legal Database*, which mentions intolerable consequences for the defendant; AP 180/2001, *ABA Legal Database* = *Hellenic Justice* 2001, 1642, which refers to 'disproportionately onerous consequences'; Multi-member Thessaloniki Court of First Instance, 33912/2010, *Nomos Legal Database* = *Business and Company Law* 2011, 187]. In another point of view, it is sufficient for the impact on the defendant's interests to be merely unfavourable [AP Plenary 8/2018, *Nomos Legal Database*; AP Plenary 10/2012, *Chronicles of Private Law* 2013, 433; AP Plenary 8/2001, *Nomos Legal Database* = *Hellenic Justice* 2001, 382 = *Commercial Law Review* 2001, 392 = *Chronicles of Private Law* 2001, 217 with comments by G. Iatrou; AP 414/2018, *Nomos Legal Database*; AP 1352/2014, *Nomos Legal Database*; AP 439/2013, *Nomiko Vima* 2013, 1911 = *ABA Legal Database*, which states that merely adverse effects on the interests of the defendant are sufficient, however reversing the consolidated situation should create a disproportionate burden on the defendant in comparison with the plaintiff's benefit; AP 403/2013, *ABA Legal Database*; AP 298/2012, *Nomos Legal Database* = *Business and Company Law* 2013, 855; AP 952/2010, *Nomiko Vima* 2010, 2494 = *ABA Legal Database*; AP 1986/2009, *ABA Legal Database* = *Nomiko Vima* 2010, 977; AP 1708/2009, *ABA Legal Database* = *Nomiko Vima* 2010, 725; AP 1002, 1003/2009, *Nomiko Vima* 2009, 2386 = *ABA Legal Database*; AP 568/2009, *Nomiko Vima* 2009, 1712

of the established situation should lead to an intolerable position or (excessively) burdensome consequences for the defendant. It is more appropriate to accept⁵⁰ that the element of harm to the interests of the defendant is necessary and that the required damage intensity will be assessed in concreto in terms of the degree of fulfillment of the other elements of the right weakening (if the time element is met to a significant degree (e.g. 18 years of inactivity have passed), it is sufficient that the consequences to the defendant by reversing the consolidated situation are unfavourable; if, on the other hand, the plaintiff's inaction is shorter (7 years, for example), then the impact should be particularly burdensome). The elements of the right weakening are *movable*, i.e. they are not merely subject to a different degree of fulfillment, but also can *act* jointly, either as complementary or mutually interchangeable in intensity, developing a variable effect.⁵¹ In any case, however, the *possibility of movement* of the elements of the right weakening does not include the possibility of substitution of one element by another (which is at a very high intensity).⁵²

= ABA Legal Database; AP 489/2009, *Chronicles of Private Law* 2009, 884; AP 1206/2008, *Chronicles of Private Law* 2009, 222; AP 1947/2007, *Nomos Legal Database*; AP 1915/2007, *Nomiko Vima* 2008, 964 = ABA Legal Database; AP 1913/2007, *Nomos Legal Database*; AP 1173/2007, *Nomos Legal Database*; AP 1111/2007, *ABA Legal Database*; AP 223/2007, *Nomiko Vima* 2007, 1396 = ABA Legal Database = *Nomos Legal Database*; AP 1026/2006, *ABA Legal Database*; AP 1412/2005, *ABA Legal Database*].

⁵⁰ Ap. Georgiades (no 2), § 23, No. 37; S. Ioakeimidis (no 34); M.-Th. Marinos (no 34), 865, 870, according to whom the definition of a time period as long depends on the specific circumstances of the case, namely the type and significance of the claim, the conviction that the plaintiff will not reasonably exercise his right, but also the need to protect the defendant (i.e. the limit is not stable); A. Karampatzos (no 34), 191, mentioning that the judgment of establishing right weakening will be the result of an overall in concreto weighting of the conflicting interests of the plaintiff and the defendant, where the judge must always take into account the particular circumstances of the individual case in question.

⁵¹ W. Wilburg, 'Entwicklung eines beweglichen Systems im bürgerlichen Recht' [in German], *Rede, gehalten bei der Inauguration als Rector magnificus der Karl-Franzens-Universität in Graz* (Graz: Kienreich, 1950), passim; P. Papanikolaou, *Private Law Methodology and Interpretation of Legal Acts* (Athens-Komotini: Ant. N. Sakkoulas Editions, 2000) (in Greek), No. 138-139, 141; A. Karampatzos (no 34), 189-190; S. Ioakeimidis (no 34); N. Georgiades (no 4), No. 47; I. Karakostas (no 12), 80; P. Alikakos (no 34), 110.

⁵² Ap. Georgiades (no 2), § 23, § 37 [but he himself, (2016) 'Article 281' (in Greek), at *CC Georgiades/Stathopoulos*, No. 263 states that the constitutive elements of the weakening of a right should be taken as 'elastic', which may show a different degree of fulfillment or intensity, and that, in the absence of any of the necessary conditions, the judge can accept the existence of a weakening of the right, provided that the other conditions or at least one of them are met to a particularly large extent (e.g. the plaintiff's inaction lasted for 19 years and six months; the defendant's reasonable belief relies on the plaintiff's written assurance; thus, P. Papanikolaou (no 51), No. 141; N. Georgiades (no 4), No. 47]; S. Ioakeimidis,

The exercise of the right by the plaintiff, when the conditions for the weakening of the right are met, is contrary to good faith and morality in the context of CC 281, and is therefore abusive. The consequences of weakening are the same as the consequences of an abuse of right.⁵³ Its practical use lies primarily with rights not subject to prescription or limitation (e.g. a right to the annulment of a marriage as a result of an impediment as per CC 1372, 1380, § 1; invoking nullity as per CC 180, since they are not subject to any time-bar (limitation or prescription periods)).⁵⁴ If the weakened right is transferred or inherited, its exercise by the successor will also be deemed to be abusive even if he/she has not been inactive in its exercise, as he/she enters into the legal relationship that has already been created on the basis of the weakening between the predecessor and the defendant.⁵⁵ If, until the death of the holder of the right, there has not been a period of inactivity sufficiently long so as to determine that the conditions for the weakening of the right have been met, however, his/her heirs continue to remain inactive until such period has been completed, the exercise of the right by the latter has to be regarded as abusive.⁵⁶

(no 34), stating that in another scenario we would end up with incorrect application of the CC 281, as it would be sufficient to accept the weakening of the right of less data than necessary for its implementation, whereas in some cases (on rights subject to a limitation) the institution of limitation could be circumvented; AP 695/2010, *ABA Legal Database = Nomiko Vima* 2010, 2336; AP 1536/2005, *ABA Legal Database = Nomiko Vima* 2006, 401; Appeal Court of Patras, 1019/2004, *ABA Legal Database = Achaiki Nomologia* 2005, 25.

⁵³ Ap. Georgiades (no 2), § 23, No. 38; Ap. Georgiades (no 4), No. 276, where the right still exists, but the exercise of that right is restricted vis-à-vis a certain defendant (and not vis-à-vis everyone) [inter partes action]. However, exceptional cases should not be excluded where the right is restored vis-à-vis the defendant (e.g. because of the defendant's later behaviour, which gives a plaintiff's reasonable confidence that the defendant will comply with the plaintiff's claim), see Ap. Georgiades (no 4), No. 276, footnote 1029; N. Georgiades (no 4), No. 48; A. Karampatzos (no 34), 194-195, stating that the right exists now informally [only formally?], after having become inactive [the objection of weakening of the right is a defence tool, an objection to the abuse of a right, the defendant however may be entitled to compensation under tort law (CC 914 et seq.)]; P. Alikakos (no 34), 39 and 161-168, stating that rights in rem cannot per se be impaired, but only the claims resulting therefrom, which is why the legal weakening of the rights in rem is not possible but only their 'real weakening'.

⁵⁴ Ap. Georgiades (no 2), § 23, No. 38.

⁵⁵ Ap. Georgiades (no 4), No. 279-281, with reference to the relevant theory and case law; Ap. Georgiades (no 2), § 23, No. 39, 40; G. Iatrou, 217, 220; P. Alikakos (no 34), 112-113 and 121-123 on the common attitude towards inactivity of the plaintiff and his/her predecessor.

⁵⁶ Ap. Georgiades (no 2), § 23, No. 39; Ap. Georgiades (no 4), No. 282; AP 830/1995, *ABA Legal Database = Efimeris Ellinon Nomikon* 1996, 728; Patras Court of Appeal 34/2003, *Nomos Legal Database = Achaiki Nomologia* 2004, 616.

Caseload of Weakened Rights

Incidents that may lead to impairment of a right shall be the following:⁵⁷ (a) The defendant, under the gaze of the plaintiff, possesses and enjoys the disputed property as his/her own, making a number of expenses or engaging in other forms of utilisation (e.g. drilling, planting, repairs, land shaping and rearrangement, house construction, water tank construction, house renovation and development of the surrounding domain, personal work, etc.);⁵⁸ (b) The defendant proceeded to improve the property sold to him/her (built a house, shaped the garden, constructed a cabin for the electrical installation, constructed a bridge over a passing torrent, to enable communication with the disputed property), to the knowledge of the plaintiffs and without any protest or objection, in such a way as to create to the defendant the reasonable confidence that they will not in the future exercise their right to joint ownership;⁵⁹ (c) In the case of fictitious sale of real estate and development, improvement and productive exploitation of the purchased property (replacing old trees with new ones, planting of new trees, constructing an irrigation pipeline and a wall to avoid flooding of the properties by the surrounding river, etc.), the seller's subsequent claim on the real estate by lodging an action for recognition of the fictitious character of the sale after 15 years of inactivity was considered abusive;⁶⁰ (d) Abuse of right was also found⁶¹ in the plaintiffs' claim for the recovery of an expropriated real estate after five years from the withdrawal of the expropriation, with refund of the compensation, which had lost a very large

⁵⁷ Ap. Georgiades (no 4), No. 275; I. Karakostas (no 12), 127-139; P. Alikakos (no 34), 124-133.

⁵⁸ AP Plenary 1407/1984, *Nomiko Vima* 1984, 829 = *Nomiko Vima* 1985, 103 = *ABA Legal Database*; AP 1536/2005, *ABA Legal Database* = *Nomiko Vima* 2006, 401; AP 1142/2002, *ABA Legal Database*; AP 142/2002, *Hellenic Justice* 2002, 1042 = *ABA Legal Database*; AP 475/2001, *Nomiko Vima* 2002, 518 = *Nomos Legal Database*; AP 222/2001, *Nomos Legal Database*; AP 808/2000, *ABA Legal Database*; AP 409/2000, *ABA Legal Database*; AP 830/1995, *ABA Legal Database* = *Efimeris Ellinon Nomikon* 1996, 728; AP 1387/1989 *Efimeris Ellinon Nomikon* 1990, 572 = *Nomos Legal Database*: informal sale of land and financial investments of the new possessor; AP 940/1986, *Nomiko Vima* 1987, 1220 = *Nomos Legal Database*; Thessaloniki Court of Appeal, 1592/2003, *Armenopoulos* 2003, 1265 = *ABA Legal Database*.

⁵⁹ AP 13/1994, *Efimeris Ellinon Nomikon* 1995, 16 = *Nomiko Vima* 1994, 1146 = *Nomiko Vima* 1996, 33 = *Nomos Legal Database*; AP 2085/1983, *Nomiko Vima* 1985, 35 = *Nomos Legal Database*: The informal division of real estate between the heirs-siblings and a claim for joint ownership on the informally divided property after several years; Athens Multi-member Court of First Instance 7340/1990, *Apartment Building Law Review* 1997, 221 = *Nomos Legal Database*.

⁶⁰ AP 921/1979, *Nomiko Vima* 1980, 268 = *Nomos Legal Database*.

⁶¹ AP Plenary 4/1991, *Archeio Nomologias (Case law records)* 1992, 42 = *Efimeris Ellinon Nomikon* 92/1998 = *Nomiko Vima* 91, 1080 = *Nomos Legal Database*.

part of its original value due to inflation (the plaintiffs did not exercise their right to recover the property earlier, i.e. when they refused to reply to a related question of the opposing parties, who, due to the inactivity of the plaintiffs implicitly accepted the non-reversal of the expropriation and made use of the property); (e) Abuse was also established⁶² in a landowner's *rei vindicatio* against the buyer of horizontal property from a contractor of an apartment building built on the land on the basis of an exchange-in-kind contract (the buyer had paid almost the full price and proceeded to complete the property and settled in, immediately after the contractor's *default of payment*, incurring significant expenses, with the knowledge of the landowner, who had expressly reassured her of the definitive transfer of ownership of the property for the payment of a small additional price); and (f) A plaintiff abusively raises claims over the property at issue that was transferred by a private agreement in view of the revaluation of the land in the wider area in recent years, since the defendant had fenced the property, placed posts, planted trees, under the gaze of the seller, who lived nearby and never objected.⁶³ With regard to the adverse effects to the defendant as a result of the late exercise of the right, it is accepted⁶⁴ that they occur in particular where the defendant has incurred costs⁶⁵

⁶² AP Plenary 56/1990, *Hellenic Justice* 1991, 494 = *Apartment Building Law Review* 1990, 317 = *Nomiko Vima*, 1991, 382 = *Nomos Legal Database*; see, however, AP 938/2003, *Chronicles of Private Law* 2004, 40.

⁶³ AP Plenary 7/2002, *Nomos Legal Database* = *Nomiko Vima* 2003, 648, where '[...] the plaintiffs with the informal distribution of the jointly-owned property, waived their rights to the contested plots and obtained, respectively, other properties, on which the originally defendant brother had joint ownership, who, from the year 1933 until the lodging of the action for distribution in the year 1987, that is to say, for 54 consecutive years, possessed and cultivated the land in question 'animo dominandi', which was known to the plaintiffs, without ever bearing any objections; AP 326/1995, *Nomiko Vima* 1996, 814 = *ABA Legal Database*, which accepted as an abuse criterion the subsequent significant increase in the value of the land; AP 437/1991, *ABA Legal Database*, for the abuse of the plaintiff's right after long-term inactivity and following a multiple increase in the value of the property in recent years; AP 536/1973, *Nomiko Vima* 1973, 1433; Thessaloniki Court of Appeal 850/1989, *Armenopoulos* 1990, 100 = *Nomos Legal Database*: sale of immovable property and subsequent claims by the seller after six years from the date of the establishment of the invalid sale and the delivery of possession to the defendant; Appeal Court of Patras, 1/1984, *Efimeris Ellinon Nomikon* 1985, 314 = *ABA Legal Database*: lodging an action for declaration of ownership against the possessor of a property after 19 years from the time of the informal sale to the latter.

⁶⁴ See also AP 9/2010, *ABA Legal Database*, where the late exercise of the right becomes abusive when the harm to the plaintiff is insignificant in relation to the damage the defendant will suffer; see also the caseload cited by Ap. Georgiades (no 4), (No. 272).

⁶⁵ AP Plenary 1407/1984, *Nomiko Vima* 1984, 829 = *Nomiko Vima* 1985, 103 = *ABA Legal Database*, which accepted the abuse of an action for a negative declaration by the plaintiff, despite the fact that

and efforts (rebuilding a property),⁶⁶ he will be forced to lose a building that he used as a supplementary area of his/her home,⁶⁷ would be required to be deprived of the use of his/her entire house due to static inadequacy,⁶⁸ and would not be able to use his/her buildings contrary to the plaintiff who would not suffer any detriment.⁶⁹

The Weakening of a Right in the Context of Cypriot Property Law

Prohibition of Abusive Exercise of a Right

Under the Cypriot property law, a ban on abusive exercise of rights is either explicitly reflected by the legislator or implied by the ratio legis of the provisions in place. The wording of article 38F (1) of the Immovable Property (Tenure, Registration and Valuation) Law (Chapter 224), states that

[...] the Director [of the Department of Lands and Surveys] may register jointly owned property as a limited jointly owned property, if the refusal of the owner of the unit to consent to the designation of a part of the jointly owned property as limited jointly owned property (which presupposes a decision of the owners of at least 75 % of the jointly owned property, unless otherwise specified in the Regulation) exceeds the limits imposed by good faith or the social or economic purpose of the right [...].

Similarly, in article 14 of Chapter 224, the legislator, with the aim of preventing the abuse of the limited right in rem of easement, entitles the owner of either the dominant or the servient estate to apply to the Director of the Department of Lands and Surveys and request the designation or modification of the position or direction of any such easement of passage, ditch, pipe, tube, etc. in such a way that, the determination or modification will not affect any of the properties less favourably than before. The requested change can refer either to the time or the manner in which the easement functions (e.g. if it concerns an easement of water supply, the supply is to be carried out at night instead of during the day, or using

the defendant's investment was insignificant (field cultivation and pasture use); see however Court of Appeal of Larisa 50/2003, *ABA Legal Database*.

⁶⁶ AP Plenary 2101/1984, *Nomiko Vima*, 1985, 648 = *Nomos Legal Database*: occupation of a plot after an informal agreement and building a complex where a school is operating; AP 1145/2010, *ABA Legal Database*; Court of Appeal of Larisa 207/2004, *ABA Legal Database*: reconstruction of the disputed property with the knowledge of the other joint owners, who did not object.

⁶⁷ AP 1674/2001, *ABA Legal Database*.

⁶⁸ AP 808/2000, *ABA Legal Database*.

⁶⁹ AP 1516/2009, *ABA Legal Database*.

tubes instead of ditches; in the case of a right of way, the owner of the dominant estate has to pass through a different spot of the servient estate, as the owner of the latter wishes to cultivate the part where the easement is currently exercised). The elements that are weighted in order to decide on the change in the way the easement functions, are whether the proposed method of operation is less onerous for the owner of the servient property than the current one, whether the economic purpose of easement is equally achieved by the change requested and whether the claimant for the change advances the necessary costs for it.⁷⁰ If, in addition, there is no longer a need for passage due to the opening of a public road or another route or for any other reason the easement no longer makes sense (in which case the continuation of the easement becomes abusive), the Director of the Department of Lands and Surveys may, on request, proceed with discontinuation thereof [article 12 (3) of Chapter 224]. The ratio legis of article 12 (3) of Chapter 224 requires that it is applied in every case of easement, the exercise of which has become impossible either by an actual (e.g. self-sufficiency of the dominant property) or a legal reason (e.g. the inclusion of the servient property to publicly available property and therefore not subject to easement).

The prohibition of abuse is further achieved through the implementation of equity rules. These rules, which have been developed over time, express fundamental principles of law and take the form of legal *remedies* to fill gaps and address weaknesses in English common law in order to be able to grant justice in concreto.⁷¹ *Gateways* of equity rules in the Cypriot legal system, which are of particular importance in the context of Cypriot property law, are the principle of proprietary estoppel, the constructive trust and the resulting trust.

According to proprietary estoppel, if someone is under the false impression that a piece of land belongs to him/her and, based on this false impression, he/she invests on that land, and the actual owner thereof, while being aware of such activities, does not take any action to inform the former, in order to prevent his/her mistake, then the actual owner is not allowed to refuse the right of the mistaken

⁷⁰ On the conditions for changing the exercise of an easement in the context of Article 1128 of the Greek CC, see Ap. Georgiades (no 5), § 72, No. 3.

⁷¹ M. Nikolatos, (2015) 'The Role of the Cypriot Courts in Defending Morality' (in Greek), *Speech at the 10th Panhellenic Philosophical Conference on 'Law and Ethics'*, Limassol, 30 October 2015, available at www.supremecourt.gov.cy.

person over his/her property, that is he/she is prevented from enjoying the fruit of his/her dishonest behaviour.⁷²

Resulting and constructive trusts are created, operate and are enforced by equity rules by operation of law.⁷³ Constructive trusts are imposed in view of the formed state of affairs and regardless of the intention of the property owner, whether explicit or implicit, in cases where it would be unfair to establish a proprietary interest only for a particular person or that person to deny someone else's interest or in cases where it would constitute an abuse of trust on behalf of the legitimate owner to retain property for his/her own benefit.⁷⁴ A recognised form of constructive trust is

⁷² Ibid; T.-E. Synodinou, *Cypriot Property Law, Immovable Property* (Athens-Thessaloniki: Sakkoulas Editions, 2011) (in Greek), No. 109-110 and 427 footnote 510; see also G. Pikiş, *An Analysis of the English Common Law, Principles of Equity and their Application in a Former British Colony, Cyprus* (Leiden, Boston: Brill/Nijhoff, 2017), 65-66, where it is stated that '[...] Two prerequisites must be satisfied to found an equitable estoppel: (a) clear representation that the representor will not insist on the enforcement of strict legal rights; and (b) in the circumstances it would be inequitable not to allow the representee who has been so influenced by the representation as to warrant the intervention of equity' and 69-70 in particular for the principle of proprietary estoppel; see also Navsika Stylianou and others v. Kyriacos Papacleovoulou and another (1982) 1 *Cyprus Law Reports* 542, under which immovable property could be registered under the application of the equity rules and in particular the proprietary estoppel; Andreas Odysseos v. Pieris Estates and others (1982) 1 *Cyprus Law Reports* 557, which accepted the application of possessory estoppel with regard to the right of property possessor under a sale contract to continue to possess it in the event of a petition for eviction by the registered owner; Agisilaos Tsiialis v. Dora Chatziandreou (2000) 1 *Decisions of the Supreme Court of Cyprus* 1250; Ioannis Chrysostomou s/o Antonios v. Eleni Christou Antonios Fragkou et al. (2000) 1 *Decisions of the Supreme Court of Cyprus* 622, according to which '[...] Minimum requirement for the existence even of a reason for estoppel, is the representation, on behalf of the owner of the land, that s/he waives his/her rights on it, and that the person towards whom it is made, can consider that land to be his/her own property. The wrong impression of the owner as to the boundaries of his/her property does not provide a basis for the establishment of a right [...]'; but see below Vereggaria Papakokkinou and others v. Municipality of Pafos (1998) 1 *Decisions of the Supreme Court of Cyprus* 2398, where it is stated that '[...] The provisions of Chapter 224(4) are restrictive as regards the establishment of privileges on immovable property and prohibitive for the adoption of rules of Common law and Equity. Recognising the establishment of rights on immovable property by means of a proprietary estoppel would be completely at odds with the provisions of article 4, which does not allow the application of the rules of Common law and Equity to the creation of rights on immovable property in Cyprus. The rights that can be obtained may not be other than those expressly laid down in Chapter 224(4) [...]'] [Database: www.cylaw.org].

⁷³ According to the case-law of the Supreme Court of Cyprus [see Mr. Andreas Tsaggaris v. Makedonia, Gavriilidou, etc. (2003) 1 *Decisions of the Supreme Court of Cyprus* 472; Christoforou v. Christoforou (1998) 1 *Decisions of the Supreme Court of Cyprus* 1551 (Database: www.cylaw.org)] Articles 4 and 65IE of Chapter 224 do not exclude the application of the principles of equity with respect to constructive trusts and resulting trusts.

⁷⁴ Christos Cliridis v. Herodotus Stavridis (1998) 1 *Decisions of the Supreme Court of Cyprus* 521;

the case in which a retention of property is attempted for proper benefit by means of a fraudulent or unacceptable exploitation or abuse of legislative provisions or other fundamental principles of law, resulting in the use of the law as a tool for fraud (e.g. a person who is in a position of trust in relation to someone else exploits his/her position to gain profit at the expense of the other person (e.g. a company's managing director, taking advantage of the confidential information he has due to his/her position, makes a profit to the detriment of the company, to which he/she has a duty of loyalty); someone committing fraud in order to unlawfully gain assets to the detriment of the person deceived, is presumed to have acquired what he/she obtained on behalf and for the benefit of the deceived person, whom he/she must ultimately render it to).⁷⁵

Georgios Pentafkas v. Anna Pentafka d/o Georgios (1991) 1 *Decisions of the Supreme Court of Cyprus* 547; see also M. Nikolatos (no 71); T.-E. Synodinou (no 72), No. 427, which points out that usually a type of informal agreement is assumed, or at least the mutual acceptance that the beneficiary will have a right or an interest on the property which the trustee denies; in this connection, the constructive trust is similar to the proprietary estoppel. As stated in the judgment of the Supreme Court of Cyprus, Andreas Tsaggaris v. Makedonia Gavriilidou, et al. (2003) 1 *Decisions of the Supreme Court of Cyprus*, 472, '[...], the principle of constructive trust has a wider use appearing "as a matter of conscience, where the facts justify this [...]" without the need for a joint intention" and applies "even where there was no declared or even implicit intention of the parties but the equity system has shielded a particular series of transactions not only with legality but also with accountability" [...]' [Database: www.cylaw.org]; G. Piki (no 72), 51-52.

⁷⁵ M. Nikolatos (no 71); T.-E. Synodinou (no 72), No. 428-429; Christoforou. v. Christoforou (1998) 1 *Decisions of the Supreme Court of Cyprus* 1551; see also Saint George's Car hire Ltd et al. v. Makedonia Gavriilidou, et al. (2006) 1 *Decisions of the Supreme Court of Cyprus* 47, relating to the purchase of apartments in an apartment building built on the basis of an exchange-in-kind contract [the contractor (or else *beneficiary*) undertakes to develop the property with the obligation to transfer a part of the developed property (i.e. apartments of an apartment building) to the landowners], where due to financial difficulties of the construction company, the building remained incomplete and the buyers of the apartments completed them at their own cost; in the refusal of the building owners, namely the registered owners of the real estate, on which the building was built, to recognise property rights to the unfortunate buyers, the Supreme Court opposed the establishment of a constructive trust to the benefit of the buyers; that is, it was acknowledged that the owners of the land were only *trustees* of the disputed sold apartments and held their *legal ownership* for the benefit of the *beneficial owners* of the apartments; see also Iera Moni Machaira et al. v. Maria Papasavva Kouvatzia et al. (2007) 1 *Decisions of the Supreme Court of Cyprus* 436, where in a case of transfer of immovable property of a monk to his blood relatives despite the provision of the Constitutional Charter of the Church of Cyprus and the Monastery Regulations, under which the property of the monks belong to the Monastery, the Supreme Court did not accept the establishment of a constructive trust in favour of the Monastery on the transferred immovable property; At the judgment of the Court, the state of things in the specific case did not indicate that the property was withheld in an unacceptable manner or by abuse of the principles of law [Database: www.cylaw.org].

Resulting trusts, which are created or operate primarily on the basis of the intention presumed by the facts of each case, mostly relate to cases of transfer of ownership in the name of a person, during which a part of the price or even the price in its entirety has not been paid by the buyer, but by another person. In this case, it is recognised that a resulting trust has been established in favour of the person who paid the money, which is based on the presumed absence of intention to make the buyer and registered owner richer.⁷⁶

The right of the beneficiary of the trust is a right in personam (a personal right), directed against the trustee in relation to the execution of his/her duties (no breach of the trust and preservation of the beneficiary's advantage). However, the above right can also develop a right's in rem (property right) force in so far as the beneficiary of the trust may have claim against third parties possessing the property, as well as the person, to whom the trustee has transferred the ownership, if this person is not a buyer in good faith buying the property for a valid consideration.⁷⁷

The Principle of Equity Known as 'Estoppel by Laches'

The origin of the term *laches* lies with the Latin saying 'vigilantibus, et non dormientibus, jura subveniunt' (the law assists those that are vigilant with their rights, and not those that sleep thereupon). This is a principle of equity, according to which a delay in the pursuit of a remedy under the equity law can be an obstacle to the granting of the sought remedy.⁷⁸ To be precise, the principles of equity are not

⁷⁶ M. Nikolatos (no 71) T.-E. Synodinou (no 72), No. 430-431; *Christoforou v. Christoforou* (1998) 1 *Decisions of the Supreme Court of Cyprus* 1551; *Crestar (overseas) Ltd. v. Tatiana Vissotskagia* (2008) 1 *Decisions of the Supreme Court of Cyprus* 942 [Database: www.cylaw.org].

⁷⁷ T.-E. Synodinou (no 72), No. 433; see also *Andreas Pirillos v. Roupinetta Konnari* (2000) 1 *Decisions of the Supreme Court of Cyprus* 1153, which concerned a transfer of immovable property for the purpose of securing a debt, where there was an explicit reference in the parties' written agreement to re-transfer the property to the transferor after the repayment of the debt; according to the judgment of the Court, this agreement, which was not registered to the Land Registry and which did not explicitly refer to a trust, entails the establishment of a constructive trust (the sale by the trustee of the property to a third party while s/he is aware of the substantial property interest of the beneficiary, turns the buyer into a trustee of constructive trust too and s/he cannot be regarded as a bona fide buyer; thus, the buyer was not entitled to burden the property that was subject to the preexisted constructive trust in favour of the plaintiff-beneficiary of the trust, and the latter was entitled to annulment of the sale contract's deposit and registration to the Land Registry for specific performance purposes) [Database: www.cylaw.org].

⁷⁸ See the *Cyprus Telecommunications Authority v. Antonis Kleanthous* (2013) 1 *Decisions of the Supreme Court of Cyprus* 158; *Kleanthi Katerina Grigoriou, et al. v. Michalakis Sianios*, in his capacity as administrator of the estate of the deceased Kyriakos Grigotis Makris (2009) 1 *Decisions of the Supreme Court of Cyprus* 180; also *Yannis Savviziikkis-Karpasitis et al. v. Georgios A. Siokouros*

intended to help the party who, tranquil on its rights, shows undue delay in taking action to safeguard them. The law of equity does not set any specific time limit for the claim of an actionable right, but the court examines the matter in the light of the circumstances of each case, taking into account: (a) the plaintiff's consent to the defendant's infringement of his/her rights from the moment the plaintiff is fully aware of the essential facts; and (b) any change that has occurred in the meantime to the defendant, which adversely affects him.⁷⁹ However, there is no scope for applying this principle, when there are explicit time limits for the claim of civil rights, even if the remedy sought is an equitable remedy.⁸⁰ In other words, if the law provides for a statute of limitations in relation to an actionable right, the plaintiff shall be entitled to the full time period laid down by law before his/her claim becomes unenforceable.

Whether the specific principle of equity is applicable in a particular case is a matter that relates to the discretionary power of the court, a power that is exercised in the interests of justice and to a substantial extent depends on whether or not it would be unreasonable to grant the requested remedy. In addition to the delay, the defendant, should also show such actions in the time elapsed before the claim

(2002) 1 *Decisions of the Supreme Court of Cyprus* 472 where it is noted that the unreasonable delay (laches) as a defense in a lawsuit can be raised in cases where the plaintiff asks for remedy on the basis of equity law (equitable remedy); same opinion in *Hartziotis Trading Co Ltd v. Director of Customs Department* (Civil Appeal No. 94/2011, 22/12/2015), which adds that '[...]In any event, even if it were to be considered that the issue of laches could be raised in an action where the plaintiff seeks remedy citing a right stemming from the law, in the present case the condition that the adjudication of the claimed remedy would be unfair to the defendant today is not fulfilled [...]' [database: www.cylaw.org]; see also G. Pikis no 72), 61.

⁷⁹ *Christofidou Nasa Patapiou v. Dimitris Papachrysostomou*, as manager of the property of Theofili Papadopoulou (2009) 1 *Decisions of the Supreme Court of Cyprus* 1360 [Database: www.cylaw.org]; see also G. Pikis (no 72), 61, stating that '[...] The doctrine of laches is applied by reference to the particular circumstances of a case, including (a) the period of delay and the extent to which defendant's position has been prejudiced by the delay and (b) the extent to which the prejudice was caused by actions of the plaintiff [...]'.

⁸⁰ *Cyprus Telecommunications Authority v. Antonis Kleanthous* (2013) 1 *Decisions of the Supreme Court of Cyprus* 158; also *Kyriakou Kostas v. Therapontas Anastasiou* (2013) 1 *Decisions of the Supreme Court of Cyprus* 148, which states that the defense of laches is only applied to equity law and not when a statutory limitation period is provided, and it concerns cases where a right is being abandoned due to an excessive time lapse before raising a claim when such inaction has affected the rights of the other party, with the loss of evidence in writing or in person; *Christofidou Nasa Patapiou v. Dimitris Papachrysostomou*, as manager of the property of Theofili Papadopoulou (2009) 1 *Decisions of the Supreme Court of Cyprus* 1360 [Database: www.cylaw.org].

is brought, so that the interest of justice is served in concreto by rejecting the requested remedy.⁸¹

Conclusions

The prohibition of abuse of a right, a more specific manifestation of which is the weakening of a right, whether it is provided for by an explicit legislative requirement or arises from the application of the equity rules, expresses and implements the principle of proportionality in the field of proprietary rights.⁸² In the

⁸¹ Cyprus Telecommunications Authority v. Antonis Kleanthous (2013) 1 *Decisions of the Supreme Court of Cyprus* 158; see also *Hartziotis Trading Co Ltd v. Director of Customs Department* (Political Appeal No. 94/2011, 22/12/2015), where it is stated that the indispensable requirement for the defense of laches is for the defendant to show, citing data and facts, that the success of the remedy would be unfair to him/her in the light of the long period of time that has elapsed from the birth of the actionable right till the lodging of the claim; see also *Rena Aristotelous Ltd et al. v. Benfleet Enterprises Ltd etc.*; (2006) 1 *Decisions of the Supreme Court of Cyprus* 280, which states that the invocation of the equitable remedy of laches, firstly presupposes an unreasonable delay in the commencement of the proceedings and secondly, that the consequences of the delay render the adjudication of the requested remedy unfair [Database: www.cylaw.org].

⁸² The principle of proportionality, which is constitutionally enshrined in Article 25 § 1, Sec. D of the Greek Constitution, permeates the entire internal system of private law and entails: a) the principle of adequacy, in the sense of the suitability of the restriction imposed in order to achieve the aim pursued by it, b) the principle of necessity, in the sense that the least burdensome for the subject of the right in question is to be chosen for restrictions of equivalent effectiveness; and c) the principle of stricto sensu proportionality, in the sense that the restriction should be more advantageous of the resulting damage to the interests of the person subject to the right. On the application of the principle of proportionality under Greek private law see Ph. Doris, (2005) 'The Principle of Proportionality in the Case Law of Civil Courts' (in Greek), *Human Rights Review – Issue Out of Series III/2005*, 25-39; Ph. Doris, (2004) 'The Principle of Proportionality in the Field of Regulation of Private Relations and in particular in Civil Law' (in Greek), in *Honorary Volume of the Council of State for its 75 years* (Athens-Thessaloniki: Sakkoulas Editions, 2004), 229-249; Ph. Doris, (2006) 'The Importance of the Principle of Proportionality on Conflicting Rights in Property Law' (in Greek), in *Genethlion Apostolos S. Georgiades Volume I* (Athens-Thessaloniki: Sakkoulas Editions, 2006), 249-277; I. Sontis, *Mandatory Easements in Accordance with the Civil Code* (CC 1012-1017, 1028-1031) (Ant. N. Sakkoulas Editions, 1981), 81-88; F. Nikolaou, (2014) 'Bona Fide Acquisition of Ownership of Stolen or Lost Movables Sold in the Market (CC 1039 Sec. B)' (in Greek), *Civil Law Applications*, p. 822, 823-825; F. Nikolaou, *Acquisition of Ownership of a Movable by a Good Faith Transferee*, (Athens: Nomiki Vivliothiki Law Publications, 2014) (in Greek), 35-41; Ev. Beis, (1999) 'The Principle of Proportionality—from Public to Civil and Administrative Procedural Law and Private Law' (in Greek), *Diki*, Vol. 30, 467-498; see also AP 1512/2010, *Chronicles of Private Law* 2011, 275 with remarks S. Ioakeimidis, who speaks of a disproportionate burden on the defendant to the benefit of the plaintiff; see also article 18 of the ECHR; cf. under German private law C.-W. Canaris, (1989) 'Grundrechtswirkungen und Verhältnismäßigkeitsprinzip in der richterlichen Anwendung und Fortbildung des Privatrechts', *Juristische Schulung*, 161; cf. also Decision of the Supreme

case of weakening of a right, the plaintiff's right recedes (that is, becomes inactive, cannot be exercised) in favour of the defendant's interest and subsequently can either be transferred from the plaintiff to the defendant (e.g. by later validating a non-valid transfer) or be eliminated (e.g. due to prescription). The principle of proportionality is the controlling criterion as to whether the right in question is exercised in an abusive way (and thus weakened), i.e. that is to say whether, on the basis of the specific circumstances of the individual case (e.g. the nature of the right, place and time for the exercise of the right, circumstances occurring in the face of either the plaintiff or the defendant), the limits set by good faith, morality or the socio-economic purpose of the right are exceeded.

In order to give effect to the weakening of the right, it is necessary for the holder of the right to demonstrate unreasonable delay in the exercise of his/her right, fact which has created a causal link with the defendant's belief that the right will not be exercised, so that the exercise of the right damages the interests of the defendant as a result of reversing the established status quo. The element of harm to the interests of the defendant is necessary, but the intensity of the harm required will be judged in concreto by the degree to which the other elements of the weakening are fulfilled. These elements of the weakening are by nature *changeable*, in the sense that depending on the specific circumstances of the individual case in question, they can be met with fluctuating intensity each time.

In the context of Greek property law, weakening can occur either to non-time-barred rights (e.g. the right to invoke the invalidity of a contract for failure to comply with the necessary formalities or due to legal incapacity), as well as time-barred rights (subject to limitation or prescription). In the latter case, however, the plaintiff's inaction should be accompanied by special circumstances, which make it necessary to sacrifice the right, so that the institution of limitation or prescription is not circumvented. Under Cypriot property law, the defendant's protection against the plaintiff's weakened right is mostly fulfilled through the activation of proprietary estoppel, rather than by means of the mechanism of negligence or delay in seeking remedy (estoppel by laches). The latter covers a limited range of cases, as it is established in case law⁸³ only as defense to an action, by which the plaintiff claims

Court, *Henry v. Henry* (2010) 1 All E.R. 988 (s. c.), which states that 'Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application'.

⁸³ See in detail above under footnote 78; see, however, the case of *Hartziotis Trading Co Ltd v. Director of Customs Department* (Political Appeal No. 94/2011, 22/12/2015), which expresses a tolerance of

remedy under the law of equity and only when there is no statutory limitation period of the right. In fact, if we accept that *immovable property* under Cypriot property law (see also article 2 (e) of Chapter 224) covers under its umbrella, not only the right of ownership but also limited proprietary rights (e.g. appurtenant easements, usufruct), the proprietary estoppel may also be applied in cases of abusive exercise (due to weakening) of limited rights in rem (for example, abuse of the right of way after a long unjustified inactivity of the holder of the easement and in any case before the right is time-barred after lack of exercise for a full period of 30 years without interruption in accordance with article 12 (2) of Chapter 224). Finally, it is worth noting that the examination of a right weakening offers useful serviceable tools to diagnose abusive exercise of a right in other more specific forms (e.g. in the case of contradictory behaviour criticised by law (*venire contra factum proprium*)).

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