

1983 March 26

[TRIANTAFYLIDIS, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

OTHON GALANOS & SON LTD.,

Applicants,

v.

THE CYPRUS BROADCASTING CORPORATION,

Respondent.

(Case No. 267/82).

*Act or decision in the sence of Article 146.1 of the Constitution—
Cyprus Broadcasting Corporation—Refusal to grant “frequency
discount” in respect of television advertisements—A decision
relating to exercise of powers of the Corporation under section
5 17(2)(1) of the Cyprus Broadcasting Corporation Law, Cap.
300A in the commercial sphere of its activities, in the domain
of private, and not of public law—It does not come within the
ambit of the above Article 146.1 and cannot be challenged by a
recourse made thereunder.*

10 The applicants challenged a decision of the respondent Corpo-
ration turning down their application for a “frequency discount”
in respect of television advertisements.

15 *On the preliminary objection of the respondent that its activities
in the field of advertising are not of a public law nature, as in
this field the respondent is operating as a commercial entity in
the domain of private law and, consequently, such activities are
not subject to judicial control by a recourse under the said Article
146:*

20 *Held, that the refusal of the respondent to grant to the
applicants a “frequency discount” is a decision taken in the
context of negotiations relating to the exercise of the powers
under section 17(2)(1), of the Cyprus Broadcasting Corporation
Law, Cap. 300A in the commercial sphere of the activities of
the respondent, in the domain of private, and not of public*

Law, and, therefore, such refusal does not come within the ambit of Article 146.1 of the Constitution and cannot be challenged by a recourse made under such Article; accordingly the recourse should be dismissed. (*Constantinides v. The Cyprus Broadcasting Corporation*, 5 R.S.C.C. 34 at pp. 39, 40 followed). 5
Application dismissed.

Cases referred to:

Constantinides v. Cyprus Broadcasting Corporation, 5 R.S.C.C. 34 at pp. 39, 40.

Recourse. 10

Recourse against the decision of the respondent whereby applicants' application for a "frequency discount" was turned down.

A. Skordis, for the applicants.

P. Polyviou, for the respondent. 15

Cur. adv. vult.

TRIANAFYLLIDES P. read the following judgment. By the present recourse the applicants challenge a decision of the respondent Cyprus Broadcasting Corporation which is contained in communications addressed by telex to the applicants by the respondent on 24th April 1982 and 26th April 1982; by means of such decision an application made on 24th February 1982 by the applicants for a "frequency discount" was turned down by the respondent. 20

The applicants are a commercial concern which is the exclusive importer and distributor in Cyprus of various foreign products and wish to advertise such products by television advertisements. 25

It seems that in accordance with the existing practice of the respondent, which has been embodied in relevant internal regulations, a "frequency discount" is granted only for advertisements in respect of the products of one and the same manufacturer. 30

On the present occasion the applicants had requested to be granted the "frequency discount" in respect of advertisements of products of different manufacturers; though such discount was refused by the respondent on the basis of the existing, as aforesaid, practice, the respondent offered to the applicants a 35

number of "free spots" on television in respect of their products. but this offer was not accepted by the applicants.

5 Counsel for the respondent argued, by way of preliminary objection, that any decision of the respondent in the process
of negotiations preceding an agreement for television advertising
is a preparatory act which is not of an executory nature and,
therefore, it cannot be challenged by a recourse under Article
146 of the Constitution; and that, in any event, the activities
10 of the respondent in the field of advertising are not of a public
law nature, as in this field the respondent is operating as a
commercial entity in the domain of private law and, consequently,
such activities are not subject to judicial control
by a recourse under the said Article 146.

15 Counsel for the applicants has contested the validity of the
above contentions of counsel for the respondent.

In *Constantinides v. The Cyprus Broadcasting Corporation*,
5 R.S.C.C. 34, there were stated the following (at pp. 39, 40):

20 "Under section 17 of the Cyprus Broadcasting Corporation
Law, CAP. 300A, it is part of the duties of Respondent
'(1)(a) to operate by sound or television a public broad-
casting service for reception by the public' and also '(1)
(d) to promote the development of the Broadcasting service
whether in Cyprus or abroad, in accordance, as far as
practicable, with recognized international standard
25 practice'; further, in doing so, the Respondent is, inter
alia, empowered, but not also obliged, to '(2)(e) provide
and receive from other persons matter to be broadcast'.

The aforesaid duties (1) (a) and (1) (d) are, in the opinion
of the Court, public duties.

30 The discharge of duty (1)(a), above, does not appear
to be involved, in this Case. Concerning duty (1)(d),
above, it has been considered by the Court whether or
not the non-acceptance of a contribution might, in certain
circumstances, amount to a breach of such duty which
35 could vest a corresponding right in the author thereof.
The Court has reached the conclusion that the said duty
(1)(d) is, by its very nature, a duty due only to the State,
which has certain powers in the matter, and no rights of

private persons arise in relation thereto. This view is also borne out by the fact that CAP. 300A has made, wherever this was intended to be so, specific provision concerning rights to the service to be provided by Respondent, as e.g. under sub-section (3) of section 19, in relation to political parties. 5

Coming now to the enabling provisions of section 17(2)(e), above, the Court is of the opinion that they do not involve the performance of a public duty by Respondent. In accordance with the evidence of the Director of the Greek Programmes of Respondent, which on this point has not been contested, the reception of matter to be broadcast, presumably pursuant to the said provisions, is made under a special agreement entered into specifically for each particular contribution. The Respondent contracts for contributions in the same manner as it may contract for other means necessary for the performance of its public duties; in deciding whether or not so to contract the Respondent is not acting in the domain of public law but in the domain of private law, because the process of seeking, selecting and accepting contributions for its programmes is not part of the public duties of Respondent but a preparatory step which is part and parcel of the commercial activities of Respondent, as such activities have already been recognized by this Court, concerning the Electricity Authority of Cyprus, in the Case of *Andreas Marcoullides and The Republic*, 3 R.S.C.C. p. 30 at p. 34. 10 15 20 25

Under a contract for a contribution, as aforesaid, the Respondent and the contributor meet in a legal situation where both parties are on an equal footing, as in any other private law contractual transaction, and not in an unequal relationship such as existing where a governmental organ exercises power towards a person governed; such latter relationship is indispensable, as a rule, to the notion of an administrative act or decision in the sphere of public law. 30 35

In the light of the above, and as the circumstances in which the contributions of Applicant have not been

accepted did not involve any decision by Respondent upon a public competition for the purpose, in which case somewhat different considerations might have arisen, the Court is of the opinion that the non acceptance by
5 Respondent of the contributions of Applicant, as complained of, is not a matter of public law and does not amount to the exercise of administrative or executive authority in the sense of Article 146.1 with the result that this Court has no jurisdiction in this Case”.

10 In the *Constantinides* case, supra, the Court was dealing with a complaint related to the exercise of the powers of the respondent under section 17(2)(e) of Cap. 300A. In the present case we are concerned with another enabling provision, paragraph (1) of section 17(2) of Cap. 300A, which reads as follows:

15 “(1) Accept advertisements for broadcasting with or without charge provided that they do not conflict with the general policy of the Corporation;”

In the light of the approach adopted in the *Constantinides* case, supra, I am of the opinion that the complained of refusal
20 of the respondent to grant to the applicants a “frequency discount” is a decision taken in the context of negotiations relating to the exercise of the powers under section 17(2)(1), above, in the commercial sphere of the activities of the respondent, in the domain of private, and not of public law, and, therefore,
25 such refusal does not come within the ambit of Article 146.1 of the Constitution and cannot be challenged by a recourse made under such Article.

I might add that if I had found, contrary to my above opinion, that this was an instance of action in the domain of public
30 law then, again, I would have to find that it could not be challenged by means of a recourse for annulment under Article 146, because, in the light of the particular circumstances of this case, the said refusal is obviously an act of merely preparatory and informative nature, in the course of negotiations
35 exploring the possibility of concluding an advertising agreement, and as such it lacks the executory nature which could make it possible to challenge it by a recourse under Article 146 of the Constitution, if it was otherwise within the ambit of this Article.

Before concluding this judgment I might observe that it is abundantly clear that on this occasion we are not concerned with an outright refusal of the respondent, for ulterior motives entirely foreign to the exercise of its relevant powers under section 17(2)(1) of Cap. 300A, to accept, under any conditions, an advertisement; and, therefore, I leave entirely open the question of whether such a totally arbitrary, and not in good faith, refusal might be so inconsistent with the proper exercise of the relevant powers vested, under the said section 17(2)(1), in the respondent that it might possibly be argued that it could conceivably be treated as going beyond the outer limits of the realm of private law and as falling within the domain of public law, and thus be subject to judicial control under Article 146 of the Constitution.

In the light of all the foregoing this recourse fails and has to be dismissed; but in view of the novelty of its nature I make no order as to its costs.

Recourse dismissed. No order as to costs.