

1982 June 5

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHARALAMBOS CHARALAMBIDES,

Applicant,

v.

1. THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF COMMERCE AND INDUSTRY,
2. CYPRUS TOURISM ORGANIZATION (K.O.T.)

Respondents.

(Case No. 424/81).

Act or decision in the sense of Article 146.1 of the Constitution—
Which can be made the subject of a recourse thereunder—Is
a decision which is the result of exercise of an “executive or admi-
nistrative authority” in the sense in which such words are used
5 in Article 146.1—And must be a decision in the domain of public
law and not of private law—Lease by Cyprus Tourism Organiza-
tion to applicant of Government property under a contract of
lease—Applicant requested by Organization to deliver vacant
possession of the premises by virtue of express provisions of the
10 contract—Organization did not exercise any executive or admi-
nistrative authority—Its said request no more than an act of a
private landlord—Not an expression of government action or
policy in a matter of touristic development and as such predomi-
nantly intended to serve a public purpose—But an exercise of
15 private legal rights—Is within domain of private law and cannot
be made the subject of a recourse under the above Article.

By a private contract of lease dated 31.5.1979 the Cyprus
Tourism Organization (“K.O.T.”) let to the applicant “Dolphin”,
a bar-restaurant at Troodos, owned by the Government of the
20 Republic of Cyprus and managed by K.O.T. for the period
1.6.1979–31.12.1980. The duration of the tenancy could be
extended from year to year, but for not more than two years,
by the landlord under terms and conditions to be agreed by the

parties. The duration of the tenancy was extended for one year from 1.1.1981–31.12.1981. By letter dated 16.9.1981 K.O.T. reminded the applicant that the tenancy agreement expired on 31.12.1981 and invited him to deliver possession of the premises. There followed other correspondence between the parties and on 17.11.1981 applicant filed the present recourse for a declaration, inter alia, that the decision of the respondents whereby he was required to deliver possession of “Dolphin” was null and void and of no effect whatsoever.

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The respondents raised the objection that this Court had no competence to entertain this recourse as the act or decision complained of was not an act or decision in the sense of Article 146 of the Constitution.

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On the objection:

Held, that a decision or act may be the subject of a recourse to this Court if it is the result of exercise of an “executive or administrative authority” in the sense in which such words are used in paragraph 1 of Article 146; that the aforesaid words must be understood in a strict sense; that an “act” or “decision” in the sense of paragraph 1 of Article 146 is an act or decision in the domain only of public law; that civil law rights in immovable property are, as a rule, matters in the domain of private law; that acts relating to the management of private property of the state, that give rise to civil disputes of civil nature, are within the exclusive competence of the civil Courts; that the lease of immovable property is such an act of management; that the decisions and/or acts, subject-matter of this recourse, were no more than acts of an ordinary private landlord; that they were done in virtue of express provisions of this bilateral agreement; that they were not an expression of governmental action or policy in a matter of touristic development and as such predominantly intended to serve a public purpose, but an exercise of private legal rights derived from the agreement; that K.O.T. did not exercise any executive or administrative authority; that, therefore, the subject decisions are within the domain of private law and cannot be the subject of a recourse under Article 146.1 of the Constitution; accordingly this recourse is dismissed for lack of competence of this Court.

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Application dismissed.

Cases referred to:

- Papaphilippou v. Republic*, 1 R.S.C.C. 62;
HadjiKyriacou v. Theologia Hadjiapostolou and Others, 3 R.S.C.C. 89;
- 5 *Valana v. Republic*, 3 R.S.C.C. 91;
Stamatiou v. The Electricity Authority of Cyprus, 3 R.S.C.C. 44 at pp. 45-46;
Greek Registrar of the Co-operative Societies v. Nicolaides, (1965) 3 C.L.R. 164;
- 10 *Silentsia Farms v. Republic* (1981) 3 C.L.R. 450 at p. 455;
Charalambides v. Republic, 4 R.S.C.C. 24;
I.W.S. Nominee Co. Ltd. v. The Republic (1967) 3 C.L.R. 582;
Mustafa v. Republic (1973) 3 C.L.R. 47;
Poyadjis v. Republic (1975) 3 C.L.R. 378;
- 15 *Decisions of the Greek Council of State in Cases No. 1087/1934, 3267/1970, 211/1929.*

Recourse.

Recourse against the decision of the respondent inviting the applicant to deliver possession of "Dolphin" restaurant.

- 20 *Chr. Triantafyllides*, for the applicant.
S. Papasavvas, Counsel of the Republic, for the respondent.
Cur. adv. vult.

25 STYLIANIDES J. read the following judgment. Cyprus Tourism Organization (hereinafter referred to as "K.O.T.") is a corporation of public law established by Law No. 54/69. It exercises administrative power and also manages government immovable property.

30 "Dolphin", a bar-restaurant at Troodos, owned by the Government of the Republic of Cyprus, is managed by K.O.T. By a private contract of lease dated 31.5.1979 (exhibit No. 1) K.O.T. let to the applicant "Dolphin" for the period 1.6.1979—31.12.1980. The duration of the tenancy could be extended from year to year, but not more than two years, by the landlord under terms and conditions to be agreed by the parties.

35 The duration of the tenancy was extended for one year from 1.1.1981—31.12.1981. (See exhibit No. 2). K.O.T. by letter

dated 16.9.1981 (exhibit No. 3) reminded the applicant that the tenancy agreement expired on 31.12.1981 and invited him on such date to attend "Dolphin" and deliver to them possession of the premises and the furniture as per Clause No. 14 of the contract (exhibit No. 1). 5

On 17.10.1981 applicant's advocate addressed to K.O.T. a letter (exhibit No. 4) stating that the applicant is a displaced person, that the premises in question were used also as his residence and consequently, as he was protected by the relevant legislation, he was not bound to quit the premises. On 29.10.1981 K.O.T. replied by exhibit No. 5 to the letter of Mr. Triantafyllides (exhibit No. 4). In exhibit No. 5 it is stated that by the contract of lease between the parties the user of the premises was only as "kentron" and not as residence of the tenant. No leave or licence was ever given by K.O.T. for the use of the premises as a dwelling house; the legislation governing dwelling houses of displaced persons was not applicable, and he was requested to deliver possession of the premises at the date of the expiration of the contract, i.e. on 31.12.1981. In the meantime K.O.T. invited through the press tenders for the lease of "Dolphin". 10 15 20

On 30.10.1981 applicant's advocate by exhibit No. 6 reiterated that as his client was a displaced person, he would not vacate the premises and that the invitation for tenders was contrary to law. Soon afterwards the applicant resorted to this Court. 25

By this recourse he seeks a declaration that the decisions contained in the letters of 16.9.1981 and 29.10.1981 (exhibits No. 3 and 5) are null and void and of no effect whatsoever and that the respondents are precluded from asserting that the legislation relating to dwelling houses of displaced persons—obviously Law No. 56/78—is not applicable. 30

The respondents raised the objection that this Court has no competence to entertain this recourse as the act or decision complained of is not an act or decision in the sense of Article 146 of the Constitution. This legal objection, with the consent of both counsel, was heard as preliminary legal issue. 35

Learned counsel for the respondents submitted that the mana-

gement of government property under the rules of private law and the invocation of a clause of a contract of lease are matters of private law. They do not amount to an exercise of an executive or administrative authority. The act or decision
5 complained of was based on a private contract of lease and was not a unilateral act of exercise of power by K.O.T.

Learned counsel for the applicant maintained that, having regard to the nature of the sub-judice decision and the object it purported to attain, namely, the furtherance of public interest,
10 the financial benefit of the State evinced by the invitation of tenders for a new lease and the promotion of tourism, it is an act or decision in the domain of public law and amenable to the jurisdiction of this Court.

A decision or act may be the subject of a recourse to this
15 Court if it is the result of exercise of an "executive or administrative authority" in the sense in which such words are used in paragraph 1 of Article 146. The aforesaid words must be understood in a strict sense. An "act" or "decision" in the sense of paragraph 1 of Article 146 is an act or decision in
20 the domain only of public law. (*George S. Papaphilippou v. The Republic*, 1 R.S.C.C. 62; *Achilleas HadjiKyriacou v. Theologia Hadjiapostolou and Others*, 3 R.S.C.C. 89; *Savvas Yianni Valana v. The Republic*, 3 R.S.C.C. 91).

In *John Stamatiou v. The Electricity Authority of Cyprus*,
25 3 R.S.C.C. 44, Forsthoff, P., at pp. 45-46 said:-

"Whatever the general and predominant character of the Respondent might precisely be, it is only relevant for the purposes of this case to consider whether, in relation
30 to the particular function which in the subject-matter of this recourse, the Respondent was acting in the capacity of an "organ, authority or person, exercising any executive or administrative authority" in the sense of paragraph 1 of Article 146".

In the case of *The Greek Registrar of the Co-operative Societies v. Nicos A. Nicolaidis*, (1965) 3 C.L.R. 164, the following test was stated:-

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"In the opinion of the Court it is primarily the nature and character of a particular act or decision which deter-

mines whether or not such act or decision comes within the scope of paragraph 1 of Article 146 of the Constitution. Such an issue is one which must be decided on the merits and in the circumstances of each particular case and having due regard to such relevant factors as the office and status of the organ, authority, person or body performing such act or taking such decision, as well as to the circumstances and context in which such act was performed or decision taken. As pointed out by the learned Judge in his Ruling the 'same organ may be acting either in the domain of private law or in the domain of public law, depending on the nature of its action'. Ultimately, what is the important and decisive factor in this respect is the nature and character of the particular function which is the subject-matter of a recourse".

The issue as to whether or not an act or decision comes within the scope of paragraph 1 of Article 146 of the Constitution, is one which must be decided on the merits and in the circumstances of each particular case and having due regard to such relevant factors as the office and status of the organ, as well as to the circumstances and context in which such act was performed or decision taken. (*Silentsia Farms v. Republic*, (1981) 3 C.L.R. 450 at p. 455).

The question of promotion of a public purpose as a determining factor, whether a matter falls within the domain of public or private law, was examined in a number of cases. Reference may be made to *Charalambides v. The Republic*, 4 R.S.C.C. 24; *I.W.S. Nominee Co. Ltd. v. The Republic of Cyprus, through the Registrar of Trade Marks*, (1967) 3 C.L.R. 582, *Mustafa v. The Republic*, (1973) 3 C.L.R. 47; *Poyiadjis v. The Republic*, (1975) 3 C.L.R. 378).

Civil law rights in immovable property are, as a rule, matters in the domain of private law. Acts relating to the management of private property of the State, that give rise to civil disputes of civil nature, are within the exclusive competence of the civil courts. The lease of immovable property is such an act of management. Disputes as to the validity, interpretation, performance and legality of such contracts are within the jurisdiction of the civil courts. (*Conclusions of the Greek Council of State, 1929-1959*, pp. 332-333).

In Spiliotopoulos "Εγχειρίδιον Διοικητικοῦ Δικαίου", 1977 edition, paragraphs 424, 425 and 426, p. 387, we read:—

5 "424. Δὲν περιλαμβάνονται εἰς τὰς διοικητικὰς πράξεις καὶ συνεπῶς δὲν ὑπόκεινται εἰς αἴτησιν ἀκυρώσεως, αἱ πράξεις τῶν ὀργάνων τοῦ Κράτους καὶ τῶν λοιπῶν δημοσίων νομικῶν προσώπων αἱ ἐκδιδόμεναι εἰς τὸ πλαίσιον συμβατικῶν σχέσεων ρυθμιζομένων ὑπὸ τοῦ διοικητικοῦ ἢ τοῦ ἰδιωτικοῦ δικαίου διὰ τῶν ὁποίων δὲν ἀσκεῖται δημοσία ἐξουσία. Αἱ πράξεις αὐταί, ἐὰν διέπωνται ὑπὸ τῶν κανόνων τοῦ ἰδιωτικοῦ δικαίου, 10 δημιουργοῦν διαφοράς ἰδιωτικοῦ δικαίου ὑπαγομένης εἰς τὴν ἀρμοδιότητα τῶν πολιτικῶν δικαστηρίων ἐὰν ἐξεδόθησαν βάσει ἐιδικῶν κανόνων τοῦ διοικητικοῦ δικαίου, δημιουργοῦν διοικητικὰς διαφορὰς οὐσίας ὑπαγομένης εἰς τὰ τακτικὰ διοικητικὰ δικαστήρια ἢ τὰ πολιτικὰ δικαστήρια. Εἰς 15 ἀμφοτέρας τὰς περιπτώσεις αἱ ἀνωτέρω πράξεις δὲν ὑπόκεινται εἰς αἴτησιν ἀκυρώσεως, ἢ ὁποία, τυχὸν ἀσκουμένη κατ' αὐτῶν, εἶναι ἀπαράδεκτος. Αἱ ἐν λόγῳ πράξεις δύναται νὰ καταταγοῦν κατὰ κατηγορίας εἰς:

20 425. α) Πράξεις διαχειρίσεως, ἤτοι πράξεις ἀναφερομένης εἰς τὴν διαχείρισιν τῆς περιουσίας τοῦ Κράτους ἢ τῶν λοιπῶν δημοσίων νομικῶν προσώπων κατὰ τοὺς κανόνας τοῦ ἰδιωτικοῦ δικαίου (ΣΕ 2144/1966).

25 426. β) Συμβάσεις καὶ σχετικὸς μὲ αὐτὰς πράξεις. Οὕτω, τόσον αἱ συμβάσεις εἰς τὰς ὁποίας τὸ Κράτος ἢ τὸ δημόσιον νομικὸν πρόσωπον εἶναι συμβαλλόμενον, ὅσον καὶ αἱ πράξεις τῶν ὀργάνων τοῦ συμβαλλομένου Κράτους ἢ ἄλλου δημοσίου νομικοῦ προσώπου, αἱ ἀφορῶσαι τὴν ἐρμηνείαν ἢ τὴν ἐκτέλεσιν, ἐφαρμογὴν καὶ λύσιν αὐτῶν, δὲν προσβάλλονται δι' αἰτήσεως ἀκυρώσεως ὑπὸ τοῦ ἀντισυμβαλλομένου ἐν 30 πᾶσιν περιπτώσει καὶ κατ' ἀρχὴν ὑπὸ τῶν τρίτων μὴ συμβαλλομένου (ΣΕ 1711, 1713/1964). Αἱ προηγηθεῖσαι τῆς συμβάσεως πράξεις (διακηρύξεις, ἐγκρίσεις, κατακυρώσεις), ἐφ' ὅσον ἐξεδόθησαν βάσει ἐιδικῶν κανόνων τοῦ διοικητικοῦ δικαίου, ἀποσπῶμεναι ἐκ τῆς συμβάσεως ἔχουν χαρακτῆρα 35 διοικητικῆς πράξεως καὶ προσβάλλονται παραδεκτῶς δι' αἰτήσεως ἀκυρώσεως (ΣΕ 1265/1964, 2410/1965). Ἐὰν αἱ προηγηθεῖσαι τῆς συμβάσεως πράξεις ἐγένοντο βάσει τῶν κοινῶν κανόνων τοῦ ἰδιωτικοῦ δικαίου, ἢ κατ' αὐτῶν αἴτησις ἀκυρώσεως εἶναι ἀπαράδεκτος (ΣΕ 2046/1970). 40 Αἱ δημιουργούμεναι ἐκ τῶν ἀνωτέρω συμβάσεων διαφοραί,

ἐὰν μὲν ἡ σύμβασις διέπεται ὑπὸ τῶν κοινῶν διατάξεων τοῦ ἰδιωτικοῦ δικαίου, ἔχουν χαρακτῆρα ἰδιωτικῶν διαφορῶν καὶ ὑπάγονται ἐν πάσῃ περιπτώσει εἰς τὰ πολιτικά δικαστήρια (ΣΕ 4149/1973). Ἐὰν ὁμοῦς ἡ σύμβασις διέπεται ὑπὸ εἰδικῶν κανόνων τοῦ διοικητικοῦ δικαίου, ἡ ἐξ αὐτῆς δημιουργουμένη διαφορά ἀποτελεῖ διοικητικὴν διαφοράν οὐσίας ὑπαγομένην εἰς τὰ τακτικά διοικητικά δικαστήρια ἢ προσωρινῶς εἰς τὰ πολιτικά δικαστήρια (ΣΕ 316, 413/1972, 1491/1973)".

("424. They are not included in administrative acts and therefore are not subject to a recourse for annulment, acts of State organs and other public corporations which are issued within the framework of contractual relations regulated by administrative or private law by which no public power is exercised. These acts, if governed by the rules of private law, create disputes of private law which are subject to the jurisdiction of the civil courts if they were issued by virtue of special rules of administrative law, they create administrative disputes of substance which are subject to the jurisdiction of the ordinary administrative Court or the Civil Courts. In both instances the above acts are not subject to a recourse for annulment, which if directed against them, is unacceptable. The said acts may be classified in categories as:

425. (a) Administration acts, i.e. acts which refer to the administration of the property of the state or other public corporations according to the rules of private law (C.S. 2144/1966).

426. (b) Contracts and acts relating to them. Thus, the contracts in which the State or the public Corporation is a contracting party as well as acts of the organs of the contracting state or other public corporation relating to their interpretation or their execution, enforcement and solution, are not attacked by a recourse for annulment by the other contracting party and in any case and as a rule by third parties who are not parties to the contract (C.S. 1711, 1173/1964). Acts preceding the contract (declarations, approvals, assignments), so long as they were issued on the basis of special rules of administrative law, when detached from the contract have the character

of an administrative act and are admittedly subject to a recourse for annulment. (C.S. 1265/1964, 2410/1965). If the acts preceding the contract were made on the basis of the common rules of private law, the application for annulment against them is unacceptable. (C.S. 2046/1970). The disputes created by the above contracts, if the contract is governed by the common rules of private law, have the character of private disputes and are subject in any case to the jurisdiction of the civil courts (S.C. 4149/1973). But if, however, the contract is governed by special rules of administrative law, the dispute created by it constitutes an administrative dispute of substance subject to the jurisdiction of the ordinary administrative courts or temporarily to the civil courts. (C.S. 316, 413/1972, 1491/1973)".

In Case No. 1087/1934 it was held that the revocation by the Committee for the Management of Public Properties of a previous decision to sell land to the Municipality of Halkida was held to be a breach of contract of private law and the dispute arising therefrom was beyond the competence of the Council of State; the Committee was not acting for the public interest but for the interest of the Committee; it was not exercising power towards an inferior but was acting as a contractee equal to the other party of the contract.

In Case No. 504/1936 it was held that the Council of State had no competence for disputes arising from contracts, the subject-matter of which was the private property of the State, entered into according to the rules of civil law. In that case by virtue of a contract of lease land was let to the applicant for five years. The Ministry of Finance, relying on Clause 14 of the contract of lease, terminated the tenancy on the ground that the land was required by the Ministry. It was held that as the termination was based on an express term of the contract of lease, the dispute was within the domain of private law as it arose out of a contract, the subject-matter of which was the private property of the State. (See also *Decision No. 3267/1970—Decisions of the Greek Council of State*, 1970 ST, p. 5048).

The management of government property in the way carried out by a private owner falls outside the ambit of Article 146.

The Greek Council of State in *Case No. 211/1929 (Decisions of the Council of State, 1929, page 599)* held that a unilateral

executory act of the administration relating to the management of private property of the State in cases of contracts of civil nature, bearing the legal characteristic of sale and entered into by a special administrative procedure, may be challenged by application for annulment as the unilateral act, detached from the contract, is taken by itself as an isolated administrative act. 5

The management of government property may, in certain circumstances, be carried out in such a manner as to cease to amount to the management of private property only, and to become management, the main characteristic of which is the furtherance of a purpose of public nature, and in such a case and to that extent such management takes the character of a public function or service. (*Stassinopoulos—Civil Liability of the State—1950*, p. 197; see also *Kyriacopoulos—Greek Administrative Law—4th edition*, volume 3, p. 103). 10 15

In the present case K.O.T. is a corporation of public law established by statute. It manages government private property. It may exercise executive or administrative authority. The bar-restaurant "Dolphin" in this particular case is Government private property managed by K.O.T. This private property of the State was let to the applicant by a contract governed by private law. The duration of this tenancy is specifically set out therein. It was renewed for one year by virtue of the provisions of the said contract. The decisions and/or acts, subject-matter of this recourse, set out in exhibits No. 3 and 5 are no more than acts of an ordinary private landlord. They were done in virtue of express provisions of this bilateral agreement. They are not an expression of governmental action or policy in a matter of touristic development and as such predominantly intended to serve a public purpose, but an exercise of private legal rights derived from the agreement. K.O.T. did not exercise any executive or administrative authority. 20 25 30

For all the above reasons the subject decisions are within the domain of private law and cannot be the subject of a recourse under Article 146.1 of the Constitution. This recourse, for lack of competence of this Court, is dismissed without order as to costs. 35

Application dismissed. No order as to costs.