

1985 December 23

[LORIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION.

AEROLESCHI KYPROU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTRY OF COMMUNICATIONS
AND WORKS,
2. THE MINISTRY OF FINANCE,

Respondents.

(Case No. 214/83).

Legitimate interest—Society registered under the Societies and Institutions Law 57/72—Definition of “Society” in s. 2—S. 370 of the Companies Law, Cap. 113—In view of the provisions of said section such a Society is not allowed to carry on business for gain—Tender—Society submitting a tender which if successful would involve the society in the carrying on of business for gain—Society unsuccessful tenderer—Society does not possess legitimate interest to challenge the decision awarding the tender to somebody else.

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10 *Tenders—The Government Store Regulations, Regs. 20(c) and (d).*

The Companies Law, Cap. 113, s. 370.

The Societies and Institutions Law 57/72, ss. 2 and 6.

15 *Words and Phrases: “Gain” in s. 2 of Law 57/72 and in s. 370 of Cap. 113.*

The applicants are a Society formed and registered under the Societies and Institutions Law 57/72. The applicants were among those who in response to an invitation for the submission of tenders published in the Official Ga-

zette of 16.7.82 submitted a tender for the training of "up to six" traffic controllers to the standard of Private Pilot's Licence.

The relevant contract was originally awarded to a company registered under the Companies Law, Cap. 113, but on 31.1.83 such contract was terminated by the Government for breaches of fundamental terms, whereupon the President of the Tender Board acting under reg. 20(c) and (d) of the Government Stores Regulations accepted the original tender of another company registered under Cap. 113, namely Wings Aviation Ltd., the interested party in this recourse. 5
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By letter dated 9.2.1983 the applicants were informed that the Tender Board did not adjudicate the tender to them "owing to impediment emanating from their charter". 15

As a result applicants filed the present recourse. Counsel for the respondents raised the issue of applicants' legitimate interest. In short he submitted that in view of the definition of Society in s. 2* of Law 57/72 and s. 370** of the Companies Law, Cap. 113 and as if the tender had been awarded to the applicants they would have been engaged in a business whose object will be the acquisition of gain, the applicants, if the tender had been awarded to them, would have become an illegal association. 20
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Held, dismissing the recourse:

(1) In this case the contract to be performed by the applicants if they had been successful in their tender would involve the receipt by the applicants of £18.900 mils for every hour of flight in consideration of the use by any person, whether a member of the applicant Society or not, of a plane of the Society for training purposes in flights. 30

(2) In the light of the authorities whereby the words "acquisition of gain" received judicial interpretation. (In 35

* This section is quoted at p. 2708.

** This section is quoted at p. 2709.

5 *re Arthur Average Association for British, Foreign and Colonial Ships, Ex parte Hargrove and Co. X* [1874-1875] Ch. App. 542 and *Greenberg v. Cooperstein*, [1926] Ch. 657) the amount of £18,900 mils which would have been charged by the applicants, had they been awarded the tender, is a "gain" within the meaning of s. 2 of Law 57/72 and s. 370 of Cap. 113. It is immaterial whether such a "gain" is not acquired by the individual members of the Society, but goes to and it is exclusively used by the Association as such. In the light of the evidence ad-
10 duced though such a "gain" may not be properly termed as a "commercial profit" it is nevertheless a "profit".

15 (3) The applicant Society's powers to use every means for the promotion of its objects, namely "the promotion of aerathletics" and "the training leading to the grant of various types of Pilot's Certificates" is subject to the qualification that such means do not involve the Society in the carrying on of business for gain.

20 (4) It follows that applicants do not possess a legitimate interest to challenge the sub judice decision.

Recourse dismissed.

No order as to costs.

Cases referred to:

25 *In Re Arthur Average Association for British, Foreign and Colonial Ships, ex parte Hargrove and Co. X* [1874-1875] Ch. App. 542;

Greenberg v. Cooperstein, [1926] Ch. 657.

Recourse.

30 Recourse against the decision of the respondents not to accept applicant's tender for the training "up to six" traffic controllers to the standard of Private Pilot's Licence and against the award of the tender to the interested party.

A. S. Angelides, for the applicant.

M. Tsiappa (Mrs.), for the respondents.

35 *E. Vrahimi (Mrs.)*, for the interested party.

Cur. adv. vult.

LORIS J. read the following judgment. The undisputed facts of the present case are briefly as follows:

By a publication in the Official Gazette of the Republic of 16.7.82, (Appendix 1 attached to the opposition) tenders were invited by the Republic for the training "up to six" traffic controllers to the standard of Private Pilot's Licence. 5

In pursuance thereof tenders were submitted by:

1. D.S.D. Aviation Centre Ltd., a limited company registered under the Companies Law Cap. 113 (Appendix 2 attached to the opposition). 10
2. The Applicants, a Society formed and registered under the Societies and Institutions Law of 1972—Law No. 57/72—(Appendix 3 attached to the opposition).
3. Wings Aviation Ltd., a limited company registered under the Companies Law Cap. 113 (Appendix 4 attached to the opposition). 15

On 25.8.82 the Tender Board accepted the tender of D.S.D. Aviation Centre Ltd. (Appendix 6 attached to the opposition) and an agreement to that effect between the Director of the Department of Civil Aviation for and on behalf of the Republic and the aforesaid company was signed on 4.10.82 (Appendix 7 attached to the opposition). 20

Applicants who were amongst the unsuccessful tenderers having obviously no notice of the adjudication of the tender to D.S.D. Aviation Ltd. up to 5.2.83, addressed a letter to respondent No. 2 enquiring of the fate of their aforesaid tender. 25

Respondent No. 2 on 9.2.83 addressed a letter to the applicants in reply (Appendix 11 attached to the opposition) informing them that the Tender Board did not adjudicate the tender to their association "owing to impediment emanating from their Charter. «λόγω κωλύματος που πηγάζει από το καταστατικό της»»). 30

In the meantime the contract between the Government and D.S.D. Aviation Centre Ltd. was terminated by the Government on 31.1.83 for breaches of fundamental terms 35

of the contract by the above company (Appendix 9 attached to the opposition).

As it appears from Appendix 8 attached to the opposition and the evidence of the President of the Tender Board
 5 namely Pogos Paltayan given viva voce before me, upon the termination by the Government on 31.1.83 of the contract with D.S.D. Aviation Centre Ltd. (the lowest tenderer), the President of the Tender Board acting alone (on 31.1. 1983) under the provisions of regulation 20 (c) and (d) of
 10 the Government Stores Regulations* decided due to the urgency of the matter and the particular circumstances of his case not to invite new tenders but instead accepted the original tender of Wings Aviation Ltd., the interested party in the present case, excluding at the same time the
 15 original tender of the applicants (which was the second best) on the ground that the applicants were a society registered under Law 57/72 as such "for the purpose of achieving a specific object not involving the acquisition of gain", whilst the tender in question if accepted would un-
 20 avoidably involve the society into the carrying on of a business for gain.

The relevant minute appears at the bottom of page 2 in Appendix 8 attached to the opposition and the signature thereon after the letters "para (c) to be excluded" is that
 25 of Mr. Paltayan, the President of the Tender Board. It may as well be added here that Mr. Paltayan in giving evidence before me stated that in excluding the tender of

* Regulation 20(c) and (d) of the Government Stores Regulations as amended reads as follows:

«20. The tender procedure may be waived in the following instances:

- (a)
- (b)
- (c) if the stores in question are proprietary articles or if there is known to be only one supplier;
- (d) if considerations of urgency or special reasons render the procedure of calling for tenders undesirable;
- (e)

Provided that prior to purchase as in (c) and (d) above written approval of the President of the Main Tender Board is obtained.»

the applicants, he had the prior legal advice of a Senior Counsel of the Republic. A legal advice in writing dated 21.2.83, on the same lines was produced before me at the clarification stage and it is exhibit "B".

In order to complete the picture it may be stated that on 2.2.83 a new contract was entered into between the Director of the Department of Civil Aviation for and on behalf of the Republic and the Wings Aviation Ltd., the interested party in the present case. 5

The applicants by means of the present recourse impugn the decision of the respondents as aforesaid and apply for declaratory judgments to the effect that (a) the refusal of the respondents not to accept the relevant tender of the applicants (b) the relevant letter of respondent No. 2 dated 9.3.83, (c) the adjudication of the tender to the interested party, be declared null and devoid of any legal effect. 10 15

The grounds of Law on which the applicants rely are stated extensively in the application and I need not repeat them.

The respondents in their opposition raise the preliminary objection that the applicants "have no existing legitimate interest adversely and directly affected by the decision complained of." 20

Learned counsel for the respondents elaborating on the above preliminary objection submitted in support thereof, in her written address, as well as viva voce at the clarification stage, the following: 25

(a) If the tender and eventually the contract were to be awarded to the applicants, the latter would in effect be carrying on a business whose object would be the acquisition of gain. 30

In view of the definition of "Society", in s. 2 of the Societies and Institutions Law No. 57/72* and the provi-

* The definition of «Society in s.2 of Law 57/72 reads as follows: «Society means an organised union of at least twenty persons for the purpose of achieving a specific object not involving the acquisition of gain».

sions of s. 370 of the Companies Law, Cap. 113*, the Society of the applicants registered under the provisions of s. 6 of Law 57/72, consisting of more than twenty persons, will become an illegal association by carrying on
5 business for gain, whilst not registered as a Company under the provisions of the Companies Law, Cap. 113.

(b) In spite of the fact that the object of the Society of the applicants, referred to in Article 1 of its Charter, is generally "the promotion of aerathletics by every means" and in particular inter alia—Article 1(a)—"the training
10 leading to the grant of various types of Pilot's Certificates". the Society's power to use every means for the promotion of its aforesaid objects in subject to the qualification that such means do not involve the Society in the carrying on of
15 business for gain.

Applicants contend that they are not precluded either by their Charter or by the law from submitting the relevant tender and eventually having the relevant contract awarded to them as:

(a) One of the main objects of their Charter (Article 1(a)) is the training leading to the grant of various types of pilot's certificates; in achieving this end, the applicants maintain that they can employ their planes for the training in flights of any person, whether such a person is a
20 member of the society or not. For such training, they say (vide page 5 of the written address of the applicants) they debit an amount from which they obtain an income (αποκομιζουv έσοδο) which is employed exclusively for the objects of their Society.

(b) The objects of their Society do not involve the acquisition of gain, as the profits are not being distributed between the members of the Society but they are employed exclusively with a view to promoting the objects of their
30 Society.

* Section 370 of the Companies Law Cap. 113 reads as follows:

«370. No association consisting of more than twenty persons shall be formed for the purpose of carrying on any business (other than the business of banking) that has for its object the acquisition of gain by the association, or by the individual members thereof, unless it is registered as a company under this Law, or is formed in pursuance of some other law, in force for the time being».

In this connection learned counsel for applicants repeatedly laid stress to the provisions of Article 15.2 of the Society's Charter which was produced before me (vide ex. "B") by the Chairman of the applicant Society namely Michael Evangelides who gave evidence as A.W.1.

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Article 15.2 of the Charter reads as follows:

«15.2. Εἰς περίπτωσηιν ἀποφάσεως διαλύσεως συμφώνως τῆς παραγράφου (1) τοῦ παρόντος ἄρθρου ἡ περιουσία θὰ διατίθεται κατόπιν ἀποφάσεως τῆς Ἐκτάκτου Γενικῆς Συνελεύσεως εἰς τὸν Κυπριακὸν Ὀργανισμόν Ἀθλητισμοῦ ἢ εἰς οἰονδήποτε κοινωφελές ἴδρυμα μέ προτίμησιν εἰς ὑφιστάμενα ἴδρύματα τὰ ὁποῖα προωθοῦν τοὺς σκοποὺς τοῦ ἀεραθλητισμοῦ».

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("15.2. In case of a resolution for dissolution under paragraph (1) of this Article the property shall be disposed in accordance with a resolution of the Extraordinary General Meeting to the Cyprus Sports Organisation or to any charitable institution (κοινωφελές ἴδρυμα) with preference to existing institutions which promote the objects of aerathletics").

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As the recourse of every applicant is doomed to failure in case of absence of "legitimate interest" envisaged by Article 146.2 of our Constitution, I shall proceed to examine this issue, which goes to the root of the recourse, first.

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The first thing I have to consider is what is the position of an association of this kind? It is common ground that the applicants are an association of over twenty persons, which was formed and registered under the provisions of the Societies and Institutions Law No. 57/72 and not under the Companies Law Cap. 113. The definition of "Society" in section 2 of Law 57/72, set out earlier on in the present judgment, excludes the acquisition of gain in achieving a specific object by such a Society.

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The question then is, whether the tender in question and eventually the contract to be performed—if the applicants were successful—by the applicants would involve the carry-

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ing on of business having for its object the "acquisition of gain" or not.

"Acquisition of gain" received judicial interpretation in the motion by way of Appeal, In re ARTHUR AVERAGE ASSOCIATION FOR BRITISH, FOREIGN, AND COLONIAL SHIPS. Ex parte HARGROVE & CO. X [1874 - 1875] Ch. App. 542 where at pages 546 and 547 the following are stated:

10 "Now, if you come to the meaning of the word 'gain', it means acquisition. It has no other meaning that I am aware of. Gain is something obtained or acquired. It is not limited to pecuniary gain. We should have to add the word "pecuniary" so to limit it. And still less it is limited to commercial profits. The word
15 used, it must be observed, is not "gains" but "gain" in the singular. Commercial profits, no doubt, are gain, but I cannot find anything limiting gain simply to a commercial profit. I take the words as referring to a company which is formed to acquire something, or in
20 which the individual members are simply to give something away or to spend something, and not to gain anything."

In *Greenberg v. Cooperstein* [1926] Ch. 657 it was also stated (at p. 663) that "it has, I think, been laid down
25 that the 'acquisition of gain' does not necessarily mean the acquisition of a commercial profit."

In the case under consideration the contract to be performed by applicants—if they were to be successful in their tender— would involve the receipt by the applicant
30 Society of the sum of £18.900 mils for every hour of flight in consideration of the use by any person, whether such a person is a member of the society or not, of a plane of the Society for training purposes in flights. It is true that according to their tender, the applicant Society would not
35 be getting an additional fee for the instructor (vide appendix 3 attached to the opposition) but at the same time we must not lose sight of the fact that the successful original tender was providing (a) for a sum of £16.500 for the use of the plane without instructor per hour (b) £18.- per hour

for use of the plane plus the services of an instructor. (Vide appendix 2 attached to the opposition).

Having considered the present case in the light of the authorities cited above, I hold the view that the amount of £18.900 mils charged by the applicants for every hour of flight with an instructor, is a "gain" within the meaning of s. 370 of the Companies Law, Cap. 113 and the definition of 'society' in s. 2 of Law 57/72; and it is immaterial whether such a "gain", is not acquired by the individual members of the association but it goes to and it is exclusively used by the association as such, with a view to promoting its objects, as s. 370 of the Companies Law Cap. 113 prohibits both the acquisition of gain "by the association or by the individual members thereof" unless such an association is registered as a company "under the Companies Law Cap. 113 whilst the applicant association is not so registered as aforesaid."

Although I am inclined to the view that such a "gain" may not be properly termed as a "commercial profit" it is nevertheless a "profit" in view: (a) of the evidence of the chairman of the applicant association namely Michael Evangelides who gave evidence before me as A.W.1 (b) of the statement set out at page 5 of the written address filed on behalf of the applicants to the effect that the applicant society for the purpose of training in flights "debits an amount from which they obtain an income" which is employed exclusively for achieving its objects.

Mr. Evangelides (A.W.1) stated inter alia in his examination in chief that the word "profit" was a problem always puzzling the applicant society; he would, as an accountant, define "profit" as the excess of income over expenditure; the witness added that all clubs and organisations, in order to function properly, must have an excess of income over expenditure, in order to achieve their objects.

As stated earlier on in the present judgment applicants contend that they are not precluded either by this Charter or by Law from submitting the relevant tender and eventually having the relevant contract awarded to them.

It is true that object of the Society of the applicants referred to in Article 1 of its Charter is generally "the promotion of aerathletics by every means" and in particular inter alia—Article 1 (a)—"the training leading to the grant
5 of various types of Pilot's Certificates" but the Society's power to use every means for the promotion of its afore-said objects is subject to the qualification that such means do not involve the Society in the carrying on of business for gain; that is, so long as the applicant society is registered under the provisions of s. 6 of Law 57/72.
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Having found as I did, if the tender and eventually the contract were to be awarded to the applicants, the latter would in effect be carrying on a business whose object would be the acquisition of gain contrary to the provisions of s. 370 of the Companies Law, Cap. 113 and the
15 definition of "Society" in s. 2 of the Societies and Institutions Law No. 57/72. Therefore the applicants were rightly precluded by the Tender Board and/or the President thereof from obtaining the relevant tender.

20 In the result, the applicants did not at any material time have an existing interest adversely and directly affected by the sub judice decision and their present recourse therefore fails and is accordingly dismissed.

25 In the circumstances I shall not make any order in respect of the costs hereof.

*Recourse dismissed.
No order as to costs.*