

1986 March 22

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

HELLENIC BANK LIMITED,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE MINISTER OF COMMERCE AND INDUSTRY,
2. THE OFFICIAL RECEIVER AND REGISTRAR,

Respondents.

(Case No. 425/85).

Revisional Jurisdiction—Constitution, Article 146—The Jurisdiction thereunder is confined to acts of the Administration in the domain of public Law—Principles applicable for the determination of the question whether an act of the Administration falls within the domain of public or private law—The Companies Law, Cap. 113—Refusal to register a mortgage pursuant to powers vested in the Registrar of Companies under Part III of the said law—Such refusal is within the domain of private law.

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By means of this recourse the applicants impugn the decision of the Registrar of Companies, whereby, pursuant to his powers under Part III of the Companies Law, Cap. 113, he refused registration of a mortgage, executed by a private company in favour of the applicants for monies advanced on the ground that the mortgage was void.

Invited by the Court to argue the justiciability of the sub judice decision under Article 146 of the Constitution, counsel argued that the said decision falls within the domain of public law.

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Held, dismissing the recourse (1) Our case law shows that: (a) A substantive, as opposed to a formal, test is

applied for the classification of administrative acts to determine their justiciability;

(b) Public interest in the purposes of administrative action is dependent, *inter alia*, on the social climate and is not for that reason a constant factor; and, 5

(c) Decisions of the same body or authority in different areas of administrative action may fall in the domain of public or private law depending on the intrinsic nature of the decision and the interest of the public in the matter.

(2) The purpose or purposes promoted by a decision and the corresponding interest of the public or noticeable sections of it in the fulfilment of those purposes is the foremost consideration for determining the question whether a particular act of the administration falls within the domain of public or private law. 10 15

The interest of the public is greater where a large element of discretion resides with the Administration and decisions in the particular area reflect administrative policy. The public no doubt has a keen interest in the availability of proper machinery for scrutinising the exercise of such discretionary powers. On the other hand, decisions of the Administration, depending on the ascertainment of the disputed facts with a view to applying well-defined principles of civil law to the true circumstances of the case; involve no element of administrative policy and have, as a rule, no repercussions other than solving the immediate dispute in the interest of the peaceful enjoyment of property rights. 20 25

(3) Part III of the Companies Law, Cap. 113 is no doubt a most welcome piece of legislation, intended to ensure the supply of information about the creditworthiness of legal persons. And as such it serves a public purpose. But the crucial question is not whether the legislation under which the decision is taken serves a public purpose, but whether the particular decision does so. 30 35

(4) The *sub judice* decision is only of interest to the parties immediately affected thereby: The Company, the

mortgagees (i.e. the applicants) and the creditors of the company. Its foremost purpose is the determination of the rights of competing creditors to the assets of the company and as such aims to regulate principally property rights.

- 5 (5) In the light of the above the Court cannot assume jurisdiction under Article 146 as such jurisdiction is confined to acts of the Administration in the domain of public law.

Recourse dismissed.

- 10 *No order as to costs.*

Cases referred to:

- Antoniou and Others v. The Republic* (1984) 3 C.L.R. 623;
Mahlouzarides v. The Republic (1985) 3 C.L.R. 2342;
Asproftas v. The Republic (1973) 3 C.L.R. 366;
 15 *HjiKyriacou v. HjiApostolou and Others*, 3 R.S.C.C. 89;
Valana v. Republic, 3 R.S.C.C. 91;
Silentsia Farms Ltd., v. Republic (1981) 3 C.L.R. 450;
Frangos v. Medical Disciplinary Board (1983) 1 C.L.R. 256;
Republic v. MDM Estate (1982) 3 C.L.R. 642;
 20 *Kalisperas v. Ministry of Interior* (1982) 3 C.L.R. 509;
The Greek Registrar of the Cooperative Societies etc. v. Nicolaides (1965) 3 C.L.R. 164;
IWS Nominee Company Limited v. Republic (1967) 3 C.L.R. 582;
 25 *Charalambides v. The Republic* 4 R.S.C.C. 24.

Recourse.

- Recourse against the decision of respondent No. 2 refusing registration of a mortgage pursuant to the powers vested in him under Part III of the Companies Law, Cap.
 30 113.

G. Triantafyllides, for the applicant.

St. Ioannides (Mrs.), for the respondents.

Cur. adv. vult.

PIKIS J. read the following judgment. Before assuming jurisdiction to inquire into the merits of the sub judge decision, a decision of the Registrar of Companies refusing registration of a mortgage pursuant to the powers vested him under Part III of the Companies Law—Cap. 113, I invited argument on the justiciability of the decision being in doubt as to its reviewability. Being a matter of competence the Court can refuse assumption of jurisdiction on its own motion if it appears that the subject matter of the recourse is outside its jurisdiction under Article 146 of the Constitution. It is trite law that the revisional jurisdiction of the Court, under Article 146, is confined to executory acts in the sphere of public law. My reservations in this case relate to the domain in which the decision was taken, in particular, whether it operates in public or private law. A question of jurisdiction must appropriately be gone into before examination of any other aspect of the case. To air the question I invited argument on the nature of the act with a view to deciding whether the review of the decision of the Registrar lies in the competence of the Supreme Court, under Article 146.

Notwithstanding the consensus of counsel that the decision challenged lies in the domain of public law. I remain wholly unpersuaded this is so and for that reason I propose to decline jurisdiction. Below, I explain my reasons for reaching this conclusion.

The disputed act is a decision of the Registrar of Companies refusing registration of a mortgage at the instance of the mortgagees executed by a private company in favour of the applicants as security for monies advanced. Applicants applied for the registration of the mortgage in the register envisaged by s. 93 of the Companies Law, kept for the purposes of registration of the mortgages and charges registrable under s. 90 of the same law. A mortgage may be registered at the request of a mortgagee, while the mortgagor, the company, is under duty to furnish parti-

culars of the mortgage for registration in accordance with s. 91—Cap. 113. Failure on the part of the company to comply with this duty renders them liable to the penal sanctions provided for in s. 91(4). Here, registration was
5 apparently sought by the mortgagees, no doubt in order to safeguard their interests vis-a-vis other creditors of the mortgagors, namely, Stelios S. Constantinides Limited, a private company. The Registrar refused registration on the ground that the mortgage was void.

10 Counsel argued the Register of Charges on company property is intended to serve a public purpose and aims to protect the public in its dealings with corporate entities. And they submitted the Court should assume jurisdiction to review the legality of the decision here under considera-
15 tion. In so doing they did not invite the Court to depart from precedent but on the contrary apply the principles approved by the caselaw of the Supreme Court for the classification of an act, decision or omission, as amenable to review under Article 146. They referred me, in the first
20 place, to the judgment in *Antoniou and Others v. Republic*¹, as containing an accurate statement of the law on the test to be applied to distinguish acts in the domain of public law from those in the domain of private law: a statement that can be regarded as authoritative as well, after its ap-
25 proval and adoption by the Full Bench of the Supreme Court in *Mahlouzarides v. Republic*². What is, therefore, at issue, is the nature and characteristics of the decision impugned, examined in the context of the decision-making power vested in the Registrar under Part III of the Compa-
30 nies Law.

The Supreme Constitutional Court, as well as its successor, the Supreme Court³, have consistently pronounced that decisions of the Administration regulating or adjusting
35 rights accruing under private law, fall outside the revisional jurisdiction of the Court under Article 146. Because the jurisdiction of the Court thereunder is confined to decisions

¹ (1984) 3 C.L.R. 623—A decision of first instance.

² (decided on 9/12/85—published in (1985) 3 C.L.R. 2342).

³ See Law 33/64.

of the Administration in the domain of public law. Decisions of the Administration, definitive of property rights of citizens under civil law, have been held, without exception, to operate in the domain of private law and as such cannot be made the subject of review under Article 146. Thus, decisions of administrative authorities entailing the resolution of -

- (a) boundary disputes¹ under s. 80 - Cap. 224,
- (b) the correction of errors or omission in the register or books of the Lands and Surveys Department, under s. 61², and
- (c) determination of applications for the grant of a right of way, under s. 11 (A) of Cap. 224 (as amended by Laws 10/66 and 16/80³),

have all been held to operate in the domain of private law: for their objects concern matters in which the wider public has little interest. Even when the decision affects incidentally rights of the wider public, its character remains unaltered so long as the primary purpose of the decision is the adjustment of private law rights. In *George Asproftas v. Republic*⁴, resolution of an application for the registration of a strip of land was held to sound in the sphere of private law notwithstanding the fact that it affected the boundary of the public road at the particular locality as well.

In the interest of comprehensive analysis of our caselaw in this field, we may add that -

- (a) A substantive, as opposed to a formal, test is applied for the classification of administrative acts to determine their justiciability⁵.
- (b) Public interest in the purposes of administrative

¹ See, *Achilleas Hadjikyriakou v Theologia Hadjiapostolou and Others*, 3 R.S.C.C. 89.

² See, *Savvas Yianni Valana v. Republic* (Department of Lands and Surveys), 3 R.S.C.C. 91).

³ See, *Silentsia Farms Ltd. v. Republic* (1981) 3 C.L.R. 450.

⁴ (1973) 3 C.L.R. 366—A decision of first instance.

⁵ See, *Frangos v. Medical Disciplinary Board* (1983) 1 C.L.R. 256.

action is dependent, *inter alia*, on the social climate and is not for that reason a constant factor¹; and

- 5 (c) decisions of the same body or authority in different areas of administrative action may fall in the domain of public or private law depending on the intrinsic nature of the decision and the interest of the public in the matter².

Charting the line dividing acts in the domain of public and private law is not, as indicated in *Antoniou, supra*, free from conceptual difficulties. Our Courts have on the whole adopted an empirical approach to the classification of particular acts in their endeavour to apply the principles earlier indicated to the identification of the nature of particular acts, decisions or omissions of the Administration.

15 The purpose or purposes promoted by the decision, and the corresponding interest of the public, or noticeable sections of it in the fulfilment of those purposes, is the foremost consideration. The interest of the public in administrative action is understandably greater where a large element of discretion resides with the Administration and decisions in the particular area reflect administrative policy.

20 The possibility of abuse of power varies in proportion to the magnitude of the discretion vested in the Administration. The natural forum for the review of such decisions is a

25 Court of revisional jurisdiction trusted by the Constitution as the watchdog of administrative legality. The public no doubt has a keen interest in the availability of proper machinery for scrutinising the exercise of such discretionary powers with a view to seeing they are exercised for the

30 promotion of the purposes for which they are given. To take one example, building permits, though of particular interest to those affected thereby, they are, in a sense, of interest to everyone for they affect the shape and character of the environment and reflect planning policy in that area.

35 On the other hand, decisions of the Administration, as pointed out in *Antoniou, supra*, depending on the ascertain-

¹ See, *Republic v MDM Estate* (1982) 3 CLR 642 and *Kalisperas v Ministry of Interior* (1982) 3 CLR 509—a decision of first instance.

² See, *The Greek Registrar of the Cooperative Societies etc v Nicolas A Nicolaidis* (1985) 3 CLR 164, 172, 173 and *IWS Nominee Company Limited v Republic* (1967) 3 CLR 582.

ment of the disputed facts with a view to applying well-defined principles of civil law to the true circumstances of the case, involve no element of administrative policy and have, as a rule, no repercussions other than solving the immediate dispute in the interest of the peaceful enjoyment of property rights. The foremost purpose of the decision of the Registrar in this case, is the determination of the rights of competing creditors to the assets of a private company and as such aims to regulate principally property rights.

I asked counsel, in the course of argument, whether a decision of the Lands Authorities refusing registration of a mortgage would be justiciable in order to elicit the basic nature of the charge they sought to register. He replied it would be justiciable. I cannot agree. On principle (for the reasons explained above), but no less on authority, refusal to register a mortgage for lack of a formality, or any other reason, would not be justiciable. In *Charalambides v. Republic*¹, it was decided that a decision of the Lands Authorities, refusing a request for the postponement of the sale of mortgage property made under s. 4 of the Rules of sale was non justiciable. The reason being that the decision was primarily designed to regulate the interests of the parties immediately affected by the decision.

Part III of the Companies Law—Cap. 113, is no doubt a most welcome piece of legislation, intended to ensure the supply of information about the creditworthiness of legal persons. And as such it serves a public purpose. But the crucial question is not whether the legislation under which the decision is taken serves a public purpose, but whether the particular decision does so. It is in relation to the implications of the decision that I part company with counsel for both sides. The particular decision of the Registrar to accept or refuse registration of a charge or mortgage is of no particular interest to either the public or any section of it. It is only of interest to the parties immediately affected thereby: The company, the mortgagee and its creditors. The decision to refuse registration is not taken by any reference to administrative policy or discretion, but

¹ 4, R.S.C.C. 24.

in accordance with set principles of private law. As counsel for the applicants acknowledged, there is no lack of machinery to ventilate the dispute before the civil courts, the constitutional forum for the resolution of disputes affecting property rights¹. Moreover, the law has stipulated penal sanctions² in the interest of its effective enforcement.

For the reasons indicated above, I cannot assume jurisdiction to review the decision of the Registrar, as I have none; for jurisdiction under Article 146.1 is confined to acts of the Administration in the domain of public law.

The recourse is dismissed. Let there be no order as to costs.

*Recourse dismissed.
No order as to costs.*

¹ Article 152.1 of the Constitution, and Law 14/60

² Section 91(4).