1986 April 29

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

PROVITA LTD.,

Applicants,

v.

THE GRAIN COMMISSION OF CYPRUS,

Respondents.

(Case No. 384/85).

Revisional Jurisdiction—Justiciability of an act, decision or omission of the administration—Depends on whether such act, decision or omission falls within the domain of public law—Test to be applied—Principles applicable to drawing the line of demarcation between public and private law—A marked commercial element colours a transaction which is the by-product of negotiations—In such a case the decision falls within the domain of private law.

Time within which to file a recourse—Constitution, Article 146.3—Its provisions are mandatory—The Executory decision should not be confused with the performance of any contract arising therefrom.

Legitimate Interest—Acceptance of an administrative act—Deprives acceptor of the right to question it.

The respondents are a public corporation responsible, inter alia, to maintain adequate supplies of cereals and animal feeds. It was their practice from 1979 onwards to purchase pellets of animal feed from Cypriot manufactures. The applicants are among the manufacturers who successfully bid as from 1981 for the supply of part of the animal feed required by the respondents. In fact in the years 1981, 1982 and 1983 the supplies were apportioned among three

manufacturers. The ratio of the applicants in 1983 was 16%.

As regards 1984 applicants requested an increase in the price and of the supply allotted to them. The respondents rejected the first request, but proceeded to a minor adjustment in the distribution of the supplies among the three manufacturers, thereby increasing applicants ratio to 18% of the total.

The decision of the respondents was communicated to the applicants on 12.3.84 and the applicants took notice of it about the middle of the same month. The applicant accepted the offer and laid stress on the undertaking of the Chairman of the Board of the respondents that their percentage would be increased. Ultimately, however, the applicants accepted respondents' offer unreservedly.

By this recourse, filed on 16.3.85, the applicants move the Court for a declaration that the allotment of the said contracts for 1984 is invalid for breach of Article 28 of the Constitution, abuse and excess of power.

Counsel for the applicants submitted that the recourse is not out of time, because the relevant date, when time began to run, was the 31.12.84, because, until then, the applicants did not know whether the respondents would honour their promise to increase the percentage of their contract during 1984.

Held, dismissing the recourse: (1) The recourse is out of time. What is in issue is the allotment of the contract for the supply of animal feed. The only decision on the subject was taken on 22.2.84 and the only date relevant to its review is the date when the applicants came to know of it. Counsel evidently confused the alleged executory decision reviewabe by this Court with the performance of any contract arising therefrom, a matter solely amenable to the jurisdiction of a civil court. The provisions of Article 146.3 are mandatory and cannot be waived by the parties or ignored by the Court.

(2) Acceptance of an administrative act whether direct

or implied as well as assent to its issuance deprives the acceptor of a right to question it. In that situation he has no legitimate interest to the review of the relevant act or decision. In this case the applicant unreservedly accepted the decision in question. Their hope to improve the terms of the agreement does not diminish the effect of such acceptance.

(3) To be justiciable an act, decision or omission of the Administration must fall in the domain of public law. A substantive, as opposed to a formal test, is applied in order to decide the question. A pragmatic approach is favoured ultimately depending on the intrinsic characteristics of the act, its impact and implications on the public. (*Hellenic Bank* v. *The Repubic* (1986) 3 C.L.R. 481, expounding the principles relevant to the drawing of the line of demarcation between the two domains, adopted and followed). Actions of the administration with a distinct commercial element fall in the domain of private law (*Galanos* v. *C.B.C.* (1984) 3 C.L.R. 742 followed). A marked commercial element colours every transaction which is the by-product of negotiations. Such a decision does not in any true sense import the unilateral will of the administration as the determinant of rights. In the light of the above principles the sub-judice decision does not fall within the domain of pubic law.

Recourse dismissed.
No order as to costs.

Cases referred to:

Christofides Trading v. *The Republic* (1985) 3 C.L.R. 546;

Moran v. *The Republic*, 1 R.S.C.C. 10;

Christodoulou v. *The Republic* (1983) 3 C.L.R. 668;

Shafkalis v. *Cyprus Theatrical Organisation* (1984) 3 C.L.R. 1382;

Frangos v. *Medical Disciplinary Board* (1983) 1 C.L.R. 256;

Mahlouzarides v. *The Republic* (1985) 3 C.L.R. 2342;

Antoniou and Other v. *The Republic* (1984) 3 C.L.R. 623;

Hellenic Bank v. *The Republic* (1986) 3 C.L.R. 481;

Hadjikyriacou v. *HadjiApostolou and others,* 3 R.S.C.C. 89;

Valana v. *Republic,* 3 R.S.C.C. 91;

Charalambous v. *Republic,* 4 R.S.C.C. 24;

The Greek Registrar of Co-operative Societies v. *Nicolaides* (1965) 3 C.L.R. 164;

IWS Nominee Co. Ltd. v. *Republic* (1967) 3 C.L.R. 582;

Asproftas v. *Republic* (1973) 3 C.L.R. 366;

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

Republic v. *MDM Estate* (1982) 3 C.L.R. 642;

Kalisperas v. *Ministry of Interior* (1982) 3 C.L.R. 509;

Galanos v. *C.B.C.* (1984) 3 C.L.R. 742.

Recourse.

Recourse against the allotment by the respondents of the contracts among the suppliers of pellets of animal feed for 1984.

D. Michaelidou (Mrs.), for the applicant.

C. Velaris, for the respondent.

Cur. adv. vult

PIKIS J. read the following judgment. We are moved to declare the decision of the respondents for the allotment of contracts among a number of suppliers of pellets of animal feed for 1984 invalid for breach of the provisions of Article 28, abuse and excess of power. The respondents are a public corporation responsible, inter alia, to maintain adequate supplies of cereals and animal feeds. It was their practice from 1979 onwards to purchase pellets of animal feed from Cypriot manufacturers in their effort to ensure adequacy of supplies and proper distribution among animal breeders.

The applicants, manufacturers of animal feeds, were among the contractors who successfully bid as from 1981 for the supply of part of the animal feed required by the respondents. In the years 1981, 1982 and 1983 the contracts were apportioned among three manufacturers, that is, the applicants, SOPAZ, a co-operative society, and KYKNOS, another manufacturing company of animal feeds. In 1983 the three manufacturers supplied the needs of the appellants at the following ratio:

SOPAZ 65%

KYKNOS 19%

Applicants 16%

As far as we may gather from the material before the Court the quantities to be supplied were not specified apriori with exactitude. They might be broadly pre-estimated but not precisely calculated.

Applicants expressed readiness to continue supplying the respondents with animal feeds for 1984 subject to an increase of £1.- per ton in the price. They also requested that the percentage of the supply allotted to them should be increased. The respondents reviewed their needs for 1984 for animal feeds and the allocation of contracts among interested suppliers. They refused the request of the applicants for an increase in the price of the product but agreed upon a minor adjustment in the distribution of the supplies among the three manufacturers. Thus SOPAZ would be required to supply them with 60%, KYKNOS with 22% and applicants with 18% of their needs in animal feeds. As in previous years the quantity was not specified in advance. Their decision was communicated to the applicants on 12th March, 1984, and as may be safely inferred from the events that followed, it came to their notice about the middle of March 1984. Applicants replied favourably on 28th March, 1984, and subject to minor reservations accepted the offer of the respondents. In the first place they accepted the offer of the respondents with regard to the price; they laid stress on the undertaking of Mr. Kyris, the Chairman of the Board of the Commission,

that their percentage of the whole contract would be increased. However, ultimately they accepted the offer unreservedly and furnished the guarantee required of them for faithful performance of their obligations. This is an appropriate stage to pause and examine the validity of the submission of counsel for the respondents, made at the end of the proceedings, that the recourse is out of time. The reply made on behalf of the applicants is that the recourse had been taken in time for the relevant date for determining the viability of the present proceedings timewise is the 31st December 1984; therefore, the recourse having been made on 16th March, 1984, was taken in time. The answer given to the Court by Mrs. Michaelidou appearing for the applicants, at the stage of clarifications, reveals, I believe, the misconception under which she labours as to the subject-matter of the decision of this recourse. By the plain terms of the declaration sought, what is at issue is the decision of the respondents respecting the allotment of contracts for the supply of animal feeds. The only decision bearing on the subject is that of 22nd February, 1984, and the only date relevant to its review is the 15th March, 1984, the time at which knowledge of the decision was gained by the applicants. Mrs. Michaelidou argued her clients could not be certain whether respondents would honour their promise to increase the percentage of their contract before the expiration of the year of supply, that is, 1984. Evidently she is confusing the allegedly executory decision reviewable by this Court and the performance of any contract arising therefrom, a matter solely amenable to the jurisdiction of a civil court. If the decision of the respondents is reviewable at all and that in turn will depend on whether it was taken in the domain of public law, only that part of it is amenable to review by a Court of Revisional Jurisdiction that affects the decision and the unilateral declaration thereby of the will of the administration to follow a given course. Contracts arising from the implementation of that decision are solely governed by private law and any grievance in relation to performance can only be ventilated before a civil court(1). The provisions of para. 3 of Article 146 ordaining a time limit of 75 days from the date of publica-

(1) Christofides Trading v. Republic (1985) 3 C.L.R. 546.

tion or communication of the decision, are mandatory and cannot be waived by the parties or ignored by the Court. They aim to sustain certainty in public affairs as well as effective planning on the part of the administration(1).

The events following the acceptance of the agreement by the applicants clearly reveal that a dispute erupted between the parties about the performance of the contract. An exchange of telexes leaves no doubt about this. A letter of the Chairman of the Commission of 9th July, 1984, voices complaints on the part of the respondents as to the quality of the pellets supplied protesting against the mixture of power in the manufacture of the products supplied. Further he informed the applicants that demand for pellets for animal feed dropped. This was the reaction of the respondents to complaints of the applicants for breach of the promises to purchase a bigger quantity of products from the appellants. A series of exchanges followed thereafter (see letter of Mr. Cacoyiannis of 16th July, 1984 and the reply thereto of 31st August, 1984). The telex of the respondents of 6th September, 1984, though it acknowledges the promise of the respondents to purchase bigger quantities of pellets from the applicants it also explains their reasons why this was not possible, reminding at the same time that their agreement did not tie them down to the purchase of any particular quantity of pellets of animal feeds. To complete the factual story, in December 1984, notably on 24th December, 1984, a new decision was taken for the supply of animal feeds for the year 1985. It is evident from the declarations prayed for by this recourse that that decision is not a subject for review in these proceedings. The above narrative of events demonstrates, in my view, that the decision is non reviewable for two other reasons additional to that of the time bar indicated earlier on. They are, acceptance of the impugned act and more important still inamenity to review because it falls outside the domain of public law.

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(1) *Moran v. Republic*, 1 R.S.C.C. 10;
Christodoulou v. Republic (1983) 3 C.L.R. 668;
Shafkalis v. Cyprus Theatrical Organisation (1984) 3 C.L.R. 1382.

Acceptance of the decision.

It is trite law that acceptance of an administrative act whether direct or implied as well as assent to its issuance deprives the acceptor of a right to question it. In that situation he has no ligitimate interest to the review of the act or decision, as the case may be. As the Greek caselaw(1) establishes, implied acceptance may be inferred from the conduct of the applicant after taking cognizance of the decision. The only reasonable inference that may be derived from the conduct of the applicants subsequent to gaining knowledge of the decision particularly the furnishing of the guarantee envisaged as a condition precedent to the activation of the agreement, is that they effectively accepted the decision of 22nd February, 1984. That they hoped to improve the terms of the agreement in the course of performance, does not diminish the effect of the acceptance.

Justiciability of the decision—The realm of public law.

To be justiciable an act, decision or omission of the Administration, must fall in the domain of public law. A substantive(2), as opposed to a formal test, is applied to decide whether the act operates in the domain of public or private law. The principles relevant to the categorization of the act were authoritatively reviewed by the Full Bench in *Mahlouzarides* v. *Republic*(3). The Court adopted the test propounded in *Antoniou and Others* v. *Republic*(4) in drawing the dividing line between the two categories and the criteria relevant to determining whether a particular act is reviewable under Article 146. A pragmatic approach is favoured ultimately depending on the intrinsic characteristics of the act, its impact and implications on the public. More recently in *Hellenic Bank* v. *Republic*(5) I attempted a survey

(1) See, inter alia, Conclusions from the Greek Council of State (1929-1959), p. 260-261.

(2) Frangos v. Medical Disciplinary Board (1983) 1 C.L.R. 266.

(3) Decided on 9.12.1985, published in (1985) 3 C.L.R. 2342.

(4) (1984) 3 C.L.R 623 (Decision of first instance).

(5) Decided on 23.3.1986, now published in (1986) 3 C.L.R. 481.

of the caselaw(1) with a view to detailing further the principles relevant to the drawing of the line of demarcation between the two domains. I distilled the following principles:

"(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

(c) Decisions of the 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."

Immediately relevant to the identification of the nature of the sub judice decision is the decision of the Full Bench of the Supreme Court *Galanos* v. *C.B.C.*(2) deciding that actions of the Administration with a distinct commercial element fall in the domain of private law. A marked commercial element colours every transaction that is essentially the by-product of negotiations. Such a decision of the Administration does not in any true sense import the unilateral expression of the will of the Administration as the determinant of the rights of the subject but is more the offspring of mutual promises, undertakings and understandings. The sub judice decision was preceded by such exchanges and was succeeded by further negotiations as to the details of the transaction. I am unhesitantly of opinion it was not a deci-

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(1) Achilleas Hadjikyriacou v. Theologia Hadjiapostolou & Others, 3 R.S.C.C. 89; Savvas Yianni Valana v. Republic (Dept. of Lands and Surveys), 3 R.S.C.C. 91; Charalambous v. Republic, 4 R.S.C.C. 24 The Greek Registrar of the Cooperative Societies etc. v. Nicolaides (1965) 3 C.L.R. 164, 172, 173; IWS Nominee Co. Ltd. v. Republic (1967) 3 C.L.R. 582; Asproftas v. Republic (1973) 3 C.L.R. 366—A decision of first instance; Silentsia Farms Ltd. v. Republic (1981) 3 C.L.R. 450; Republic v. MDM Estate (1982) 3 C.L.R. 642; Kalisperas v. Ministry of Interior (1982) 3 C.L.R. 509—a decision of first instance.

(2) (1984) 3 C.L.R. 742.

sion in the domain of public law and as such could not be reviewed under Article 146.

For all the above reasons, the recourse is dismissed. Let there be no order as to costs.

Recourse dismissed.
No order as to costs.