

1987 November 21

[PIKIS J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION
THE FREESHOPS LTD ,

Applicants.

v

THE REPUBLIC OF CYPRUS, THROUGH
THE DIRECTOR OF CUSTOMS DEPARTMENT.

Respondent

(Case No 632/86)

Acts or decisions in the sense of Art 146 1 of the Constitution — The test applicable in order to determine whether an act belongs to the domain of public or private law — Acts originating from and incidental to the exercise of private law rights of the State — Do not belong to the domain of public law

5 In virtue of a written agreement dated 16th January, 1984 the Government of Cyprus agreed to let to the Freeshops Ltd , the applicants the duty free shops at the Larnaca and Paphos airports for the storage and sale of duty free goods to passengers travelling abroad

10 The agreement would be for the duration of three years The Government was entitled in case the licencees defaulted in their financial obligations under the agreement and failed to remedy the default after 30 days notice addressed to that end to terminate the agreement

15 Following the execution of the agreement and as an incident thereto the Director of Customs authorized the use of the premises as a bonded warehouse for the storage therein of duty free goods

20 In exercise of the rights vested in them under the aforesaid term the Government of Cyprus terminated the agreement by notice dated 30 9 86 A while later the Director of Customs withdrew the licence earlier granted for the use of the premises as a bonded warehouse He founded his decision on the fact of termination of the agreement and the terms under which the applicants were authorized to use the premises as a bonded warehouse

The Freeshops Ltd. disputed the validity of the act of termination of the agreement and filed an action before a District Court for damages for breach of contract. The present proceedings are solely directed against the said decision of the Director of Customs.

Held, dismissing the recourse. (1) The first issue is whether the sub judge decision can be extincated from the contractual relationship of the parties. In other words we must determine whether it is an act sounding in the domain of public or private law. The test applied in Cyprus for the classification of acts for the purposes of the jurisdiction of the Supreme Court under Article 146.1 is substantive, not formal. 5 10

(2) The principles underlying the classification of acts of the Administration with a view to determining the domain to which they belong are the following: Acts of the Administration originating from and incidental to the exercise of the private law rights of the State lack the element of unilateral expression of the will of the Administration as the determining force for the genesis of rights and obligations cognizable in law 15

(3) Tested in another way the non-justiciability of the sub judge decision becomes more apparent still. Supposing we assumed jurisdiction to review the sub judge decision, to test its legality; we would inevitably be driven back to examination of the rights and obligations of the parties flowing from their contractual arrangement. 20

Recourse dismissed.
No order as to costs.

Cases referred to:

Frangos v. Medical Disciplinary Board (1983) 1 C.L.R. 258; 25
Decisions of Greek Council of State Nos 335/49, 320/31, 1139/57, 70/36 399/54.

Recourse.

Recourse against the decision of the respondent to withdraw the licence granted to the applicants to use the premises of the airports as bonded warehouses. 30

T. Papadopoulos, for the applicants.

A. Evangelou, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult. 35

PIKIS J. read the following judgment. In virtue of a written agreement dated 16th January, 1984, the Government of Cyprus

agreed to let to the Freeshops Ltd., the applicants, the duty free shops at the Larnaca and Paphos airports for the storage and sale of duty free goods to passengers travelling abroad. For the use of the premises and the facilities afforded thereby the applicants
5 would pay by way of rent the moneys stipulated for in the agreement. Counsel for the Republic acknowledged great care was taken to avoid the use of terms ordinarily employed to signify an agreement of lease in order to avoid the implications of Rent Control legislation, if at all relevant to this type of agreement.
10 Consequently the lease of the premises was described as a licence whereas the monetary consideration provided for therein was not termed rent.

The agreement would be for the duration of three years expiring on 31st January, 1987, unless the airports or either of them ceased
15 to operate prior to that date or the agreement was terminated by the Government in exercise of the rights vested in them by clause 15 of the contract. That term permitted the owners to terminate the agreement if the licencees defaulted in their financial obligations under the agreement and failed to remedy the default
20 after 30 days notice addressed to that end.

Following the execution of the agreement and as an incident thereto the Director of Customs authorized* on 27th January, 1984, the use of the premises as a bonded warehouse for the storage therein of duty free goods. The authorization was tied to
25 the duration of the agreement between the parties and subject to its expiration by the effluxion of time or its termination in accordance with the terms of the agreement. Sequentially to the execution of the aforementioned agreement and the authorization of the Director for the use of the premises as a bonded warehouse
30 the applicant moved in possession of the premises and began trading thereof in duty free goods.

A dispute arose between the contracting parties affecting the financial obligations of the applicants under the agreement of 16th January, 1984. In the contention of the Government of Cyprus,
35 the applicants became indebted to them for an amount of £676,314.00 that they omitted or refused to pay. The applicants were invited to remedy the default and a notice to that end was addressed to them on 15th September, 1986, inviting them to

* Pursuant to the provisions of s. 71 of the Customs and Excise Law, 1967 (82/67)

meet their outstanding obligations under the agreement within 14 days. The applicants denied they were indebted to the Government of Cyprus for any amount. Their response was set out in a letter of their counsel of 26th September, 1986 refuting liability and denying indebtedness for any amount whatever. 5

In exercise of the rights vested in them by clause 15 of the contract of 16th January, 1984, the Government of Cyprus terminated the agreement by notice dated 30th September, 1986. A while later the Director of Customs withdrew the licence earlier granted for the use of the premises as a bonded warehouse. He 10
founded his decision on the fact of termination of the agreement and the terms under which the applicants were authorized to use the premises as a bonded warehouse*. The Freeshops Ltd. 15
disputed the validity of the act of termination of the agreement and raised an action before the District Court of Nicosia against the Government of Cyprus for damages for breach of contract. The present proceedings are solely directed against the decision of the Director of Customs of 10th October, 1986 taken, as explained above, sequentially to the termination of the agreement of 16th 20
January, 1984. In the submission of applicants the decision of 10th October, 1986, constitutes an act of the administration separate and distinct from the termination of the agreement referable to the exercise of the statutory powers vested in the Director of Customs. As such it amounted to an act in the domain of public law 25
reviewable under the provisions of Article 146.1 of the Constitution. Counsel for the Republic while acknowledging that the subject decision of the Director of Customs is on the face of it an act in the domain of public law, he argued it is not of itself justiciable in view of what had preceded it, notably the termination of the agreement and consequently forfeiture of every right on the 30
part of the applicants to make any use of the property. The decision of the Director of Customs was merely informative formalizing a situation that had crystallised by the termination of the agreement. It was, he pointed out, a term of the licence that it would expire coincidentally with the termination of the 35
agreement.

The competence of the Court to take cognizance of a recourse is always at issue. It affects the justiciability of the decision under

* See section 81 of Law 82/87.

review and as such must be resolved before any other question. The first issue I must determine is whether the decision of the Director of Customs of 10th October, 1986 can be extricated from the contractual relationship of the parties. In other words we must
 5 determine whether it is an act sounding in the domain of public or private law. In the former case it can be made the subject of review provided the decision is executory, creative of rights in law. The test applied in Cyprus for the classification of acts for the purposes of the jurisdiction of the Supreme Court under Article 146 1 is
 10 substantive, not formal*. The intrinsic nature and complexion of the act must be examined in order to determine its justiciability, not merely the source of its origin.

A series of decisions of the Greek Council of State establish the acts of the Administration incidental to its relationship in the field
 15 of private law and inseparable therefrom are solely amenable to the jurisdiction of Civil Courts. Hence the withdrawal of licences sequentially to the termination of a contractual relationship has been held to be exclusively justiciable before Civil Courts. Thus in the decision of the Greek Council of State under 335/49** the
 20 withdrawal of a licence following the termination of a contractual agreement was found to be an incident of that relationship and as such subject to the jurisdiction of a Civil Court. To the same effect is the decision of the Greek Council of State in case 320/31***. It was decided that a dispute basically referable to the interpretation
 25 of the terms of an agreement including matters incidental thereto was referable to the jurisdiction of a civil court. Of greater importance still is the decision of the Greek Council of State in case 1139/57**** in which the point is made that action of the Administration signifying its position as a contracting party is
 30 exclusively amenable to the jurisdiction of the Civil Courts. To classify justicially the domain of acts of the Administration, it was pointed out by the Greek Council of State in Case 70/36*****, we must look at the substance of the act, an exercise entailing, to my understanding, identification of the substantive cause generating
 35 the action of the Administration. Similar principles derive from the

* *Frangos v. Medical Disciplinary Board* (1983) 1 C.L.R. 258 (FB)

** *Decisions of the Greek Council of State* 1949A, p. 554

*** *Decisions of the Greek Council of State* 1931, p. 954

**** *Decisions of the Greek Council of State* 1957B, p. 437

***** *Decisions of the Greek Council of State*, 1936A 1 172

decision of the Greek Council of State in Case 399/54*. A synopsis of the principles emerging from relevant Greek caselaw appears in Conclusions of the Greek Council of State (1929-1959)**.

The principles underlying the classification of the Administration with a view to determining the domain to which they belong are, as I perceive them, the following: Acts of the administration originating from and incidental to the exercise of the private law rights of the State lack the element of unilateral expression of the will of the Administration as the determining force for the genesis of rights and obligations cognizable in law. (The nature of acts of the Administration in the domain of public law is the subject of discussion in «*The Administrative Act*» by Professor Forsthoff, pages 3-13). Such unilateral action on the part of the Administration is an expression of the imperium of the State in the exercise of the powers vested by law in the Administration for the promotion and fulfilment of the ends of the law. Tested in another way the non-justiciability of the sub judice decision becomes more apparent still. Supposing we assumed jurisdiction to review the sub judice decision, to test its legality; we would inevitably be driven back to examination of the rights and obligations of the parties flowing from their contractual arrangement; an examination that would unavoidably require the Court to pronounce on their private law rights, a task beyond the jurisdiction of this Court.

The applicants need not fear suffering any loss on account of lack of jurisdiction on the part of this Court to review the subject-matter of the recourse because any damage to which they might be entitled to in case of wrongful withdrawal of the licence would necessarily be recoverable in the civil action presently pending before the District Court of Nicosia. Such damage would be a direct incident of the breach of contract, assuming such breach is proven before the civil Court.

* *Decisions of the Greek Council of State 1954B. 1136*

** *Decisions of the Greek Council of State 1954B. pp 232-233*

My conclusion is that I have no jurisdiction to take cognizance of and review the sub judge decision. That being the case it is unnecessary to debate and resolve the point made by counsel for the Republic that the sub judge decision is not executory. Though
5 it may be argued that the decision of the Director to withdraw the licence had no impact on the rights of the applicants because they had forfeited, in view of the termination of the agreement, the right to make any use of the premises. The withdrawal of the licence was merely incidental to the demise of the agreement. However, I
10 did not probe the matter to the depth necessary to express a concluded opinion and on that account I refrain from making a formal declaration on that aspect of the case. The recourse is dismissed for lack of jurisdiction on the part of the Court to take cognizance of the sub judge decision. Let there be no order for
15 costs.

*Recourse dismissed.
No order as to costs.*