

1987 June 26  
[PIKIS, J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

YORK INTERNATIONAL SECURITIES LTD ,

*Applicants,*

v

THE REPUBLIC OF CYPRUS, THROUGH  
THE MINISTER OF COMMERCE AND INDUSTRY,

*Respondent*

*(Case No 492/87)*

*Acts or decisions in the sense of Art 146 1 of the Constitution — Companies — The Companies Law, Cap 113, section 159(b) — Decision to appoint inspectors for investigating the affairs of a company — Not justiciable under Art 146 1*

*Companies — The Companies Law, Cap 113 — Section 159(b) — Appointment of inspectors for investigating a company's affairs — Objects of aforesaid section*

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By means of this recourse the applicants, an offshore company, challenge the decision of the Minister of Commerce, taken in pursuance to section 159(b) of the Companies Law, Cap 113, whereby inspectors were appointed to investigate their affairs. The applicants have, also, applied for a provisional order, suspending enforcement of the sub-judice decision, pending determination of the recourse

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Held, *dismissing the recourse* (1) Section 159(b) of Cap 113 forms part of a section of the Companies Law designed to provide for official inspection of the affairs of a company. Not only s 159(b) throws light on the purpose for which the power to direct inspection is conferred, but s 163 of the same law does likewise, laying down that depending on the outcome of inspection, a criminal prosecution for fraudulent conduct may be instituted, as well as proceedings for the winding up of the company and an action for damages (as provided in subsection 4)

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(2) The foremost object of s 159(b) is to authorize an official inspection of the affairs of a company with a view to determining whether its business is managed with a view to defrauding the creditors or any other person or for a fraudulent or unlawful purpose. Also inspection may be authorized with a

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5 view to determining whether the business of the company is conducted in a manner oppressive to any part of its members or whether information is withheld from the members respecting the management of the affairs of the company. Lastly, an inspection may be authorized with a view to identifying the circumstances of formation or the management of the affairs of the company in order to determine whether any particular person has been guilty of fraud, misfeasance or any other misconduct.

10 (3) To the extent that s. 159(b) is intended to elicit the existence of evidence about the commission of a criminal offence, the power given thereby is of an investigatory nature inextricably connected with the power to mount a prosecution under s. 163 of the same law and, therefore, though the public as in every action investigatory of a crime, has a noticeable interest, the relevant action is both on principle and on authority outside the ambit of Art 146 I of the Constitution.

15 (4) To the extent that s. 159(b) aims to protect the interests of the shareholders, with a view to winding up the company or instituting an action for damages, the power is directly connected with the protection of private rights and as such is outside the domain of public law.

20 (5) In the light of the above this Court has no jurisdiction to entertain the recourse.

*Recourse dismissed  
No order as to costs*

*Cases referred to*

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

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

*Antoniou and Others v The Republic* (1984) 3 C L R 623,

25 *Mahlouzaneds v The Republic* (1985) 3 C L R 2342,

*Republic v M D M Estate* (1982) 3 C L R 642,

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

*Kynakides v The Republic*, 1 R S C C 66,

*Xenophonotos v The Republic*, 2 R S C C 89

30 **Recourse.**

Recourse against the decision of the respondent to appoint inspectors, under the provisions of s. 159(b) of the Companies Law, Cap. 113 to investigate into the affairs of the applicants

*T. Papadopoulos with P. Ioannides*, for the applicants

*Cur. adv. vult*

PIKIS J. read the following judgment. The applicants, an offshore company, challenge a decision of the Minister of Commerce communicated by the Registrar of Companies taken under and in pursuance to the provisions of s. 159(b) of the Companies Law, Cap. 113, whereby inspectors were appointed to investigate its affairs. And a provisional order is sought to suspend the enforcement of the decision (communicated on 27.5.1987) pending adjudication on the validity of the sub judice decision. Before examining the application for a provisional order, I invited argument on the competence of the Court to take cognizance on the subject-matter of the recourse. Specifically arguments were invited whether the impugned decision constitutes action of the administration in the domain of public law, a prerequisite for the assumption of jurisdiction to review the action under Art. 146.1 of the Constitution.

In response, Mr. Papadopoulos referred us to cases shedding light on the attributes of administrative action in the domain of public law and a detailed analysis was made of the provisions of s. 159(b) and the interest of the public in the way these powers are exercised by the Administration. He submitted s. 159(b) is intended to serve an important public purpose and that the public has a constant and an abiding interest in the promotion of the purposes that s. 159(b) is designed to serve. To illuminate the background to s. 159(b), counsel referred the Court to s. 165(b) of the Companies Act 1948 (English) and the additional powers conferred by s. 109 of the English Companies Act 1967.

The case to which lengthier reference was made is the decision in *Hellenic Bank v. Republic*\* with a view to distinguishing it. In that case it was held that a decision of the Registrar of Companies pertaining to the registration of a mortgage under Part III of the Companies Law s. 93 is non-justiciable under Art. 146.1 of the Constitution for the reason that it does not qualify as administrative action in the domain of public law.

Unlike a decision affecting the registration of a charge, the subject of review in the *Hellenic* case, a decision under s. 159(b) involves a large element of discretion with a correspondingly high

\* (1986) 3 C.L.R 481.

interest on the part of the public in its exercise and the promotion of the purposes intended to be served by this provision of the law. A decision under s. 159(b) aims, if this is an accurate abbreviation of the submission of counsel, to protect the interest of the public in the management of the affairs of legal persona and not merely intended to safeguard the interest of those immediately affected thereby, that is, creditors and shareholders. On that account a decision under the relevant provision of the law may properly be classified as administrative action in the domain of public law.

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Extensive reference was made to the criteria adopted or evolved by our caselaw with a view to determining the justiciability of different species of administrative action. A substantive, as opposed to a formal test is applied\* referable to the intrinsic nature of the act and not merely to its apparent attributes or source of emanation. Counsel made reference to the test approved in *Antoniou and Others v. Republic\*\** for the delineation or demarcation of the two domains of law, public and private, treated as authoritative after its approval by the Full Bench in *Mahlouzarides v. Republic\*\*\**. Two other decisions of the Supreme Court were also discussed in some detail, namely, *Republic v. M.D.M. Estate\*\*\*\** and *Kalisperas v. Ministry of Interior\*\*\*\*\** with a view to highlighting the empirical approach of the Court in drawing the line dividing the two domains and the way public interest may wane in particular areas of administrative action on account of changed social circumstances.

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I gave close consideration to the argument raised and made a careful study of the provisions of s. 159(b) in the context in which they appear. Section 159(b) forms part of a section of the Companies Law designed to provide for official inspection of the affairs of a company. Not only s. 159(b) throws light on the purpose for which the power to direct inspection is conferred, but s. 163 of the same law does likewise, laying down that depending on the outcome of inspection a criminal prosecution for fraudulent conduct may be instituted, as well as proceedings for the winding up of the company and an action for damages (as provided in subsection 4). The foremost object of s. 159(b) is to authorize an official inspection of the affairs of a company with a view to

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

\*\* (1984) 3 C.L.R. 623.

\*\*\* (1985) 3 C.L.R. 2342.

\*\*\*\* (1982) 3 C.L.R. 642 (F.B.).

\*\*\*\*\* (1982) 3 C.L.R. 509.

determining whether its business is managed with a view to defrauding the creditors or any other person or for a fraudulent or unlawful purpose. Also inspection may be authorized with a view to determining whether the business of the company is conducted in a manner oppressive to any part of its members or whether information is withheld from the members respecting the management of the affairs of the company. Lastly, an inspection may be authorized with a view to identifying the circumstances of formation or the management of the affairs of the company in order to determine whether any particular person has been guilty of fraud, misfeasance or any other misconduct.

To the extent that s. 159(b) is intended to elicit the existence of evidence about the commission of a criminal offence, the power given thereby to authorize inspection is of an investigatory nature inextricably connected with the power to mount a prosecution under s. 163 of the same law. Evidently because of the nature of the crimes to be investigated, the investigation is entrusted to a body other than the Police, the State authority ordinarily trusted with the investigation of crime. As in every action investigatory of crime, the wider public has a noticeable interest in the process; but the action is not justiciable under Art. 146.1, both on principle, not being action primarily intended to promote a public purpose through the exercise of administrative discretion and on authority too - See, inter alia, *Phedias Kyriakides v. Republic\** and *Charilaos Xenophontos v. Republic\*\**. Criminal prosecution and action preliminary thereto are, under the Constitution (Part VI, Cap. 1), the province of an independent officer of the State, the Attorney-General trusted by the Constitution with the protection of the public interest in the investigation and prosecution of criminal conduct.

On the other hand, as far as s. 159(b) aims to protect, through inspection, the interest of shareholders with a view to winding up the company or instituting an action for damages, the power is directly connected with the protection of private law rights and as such outside the domain of public law. In the latter respect the nature of the power given by s. 159(b) is indistinguishable from the nature of the action reviewed in the *Hellenic case (supra)*. And for much the same reasons it cannot be the subject of review under Art. 146.1 of the Constitution.

\* 1 RSCC 66.

\*\* 2 RSCC 89

Consequently, I have no jurisdiction to take cognizance of the application for a provisional order or of the relief sought in the main application. Therefore, I shall proceed to dismiss the recourse in its entirety and I so order.

**5***Recourse dismissed.*