IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CYPRUS FLOUR MILLS CO. LTD., AND ANOTHER,

Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH THE COUNCIL OF MINISTERS AND ANOTHER,

Respondents.

(Case Nos. 256/65 and 257/65*).*

Administrative and Constitutional Law—Recourse under Article 146 *of the Constitution—Competence of the Court on such recourse—Article* 146, *paragraph* 1*—Acts or decisions which can be made the subject of a recourse under that Article—They must be* «ἐκτελεσταὶ» *(executory)—Acts or decisions arising out of a contract cannot be made the subject of such recourse—"Omission" within Article* 146, *paragraph* 1*—It must be an omission to do an act or take a decision which could be made the subject of a recourse under that Article—Otherwise the Court has no competence to deal with such omission on a recourse under Article* 146*—Agreement between the Minister of Commerce and Industry and flour millers for reduction in price of flour pending investigation into flour-milling costs—Decisions and alleged omission of Minister in connection with, and arising out of, the aforesaid agreement—Outside the scope of Article* 146 *of the Constitution—The doctrine of* «ἀποσπάσεως τῶν πράξεων»*—See, also, herebelow.*

Acts or decisions under paragraph 1 *of Article* 146 *of the constitution—Executory acts or decisions only can be made the subject of a recourse under that Article—Acts or decisions arising out of a contract not amenable within the competence of the Court on a recourse under Article* 146*—So is it with omissions to do acts or to take decisions which cannot be made the subject of such a recourse—The doctrine of detachable acts or the doctrine of* «ἀποσπάσεως τῶν πράξεων»*—The doctrine applies only to acts which both are executory* (ἐκτελεσταὶ) *and preceded the contract—It follows that in the*

present cases the doctrine is of no avail to the Applicants—Because the decisions complained of as well as not being «ἐκτελεσταὶ» (executory) came after the conclusion of the agreement in question—See, also, above.

'Εκτελεστὴ πρᾶξις ἢ ἀπόφασις—*See above.*

«'Απόσπασις πράξεων»—*The doctrine of—See above.*

Contract—Decisions arising out of contract—See above.

Omission within paragraph 1 of Article 146 of the Constitution—See above.

The Applicants in these two cases are, and at all material times have been, a company carrying on the business of flour-milling. Up to and including February 23, 1963 they had been selling their flour at 53 mils per oke. They further allege that on or about that date, at the express request of the Respondents, they agreed to reduce temporarily the sale price of the flour supplied by them to the public for breadmaking from 53 mils to 51 mils per oke "pending the finding of a committee of inquiry into the cost of flour—milling which was to be appointed by the Respondents". The Applicants further allege that it was an express term of that agreement that the Respondent would compensate the Applicants for any loss "which they would have suffered in case the finding of the committee of inquiry were to the effect that the sale price of the breadmaking flour at 51 mils per oke..... would not afford reasonable margin of profit to the flour—millers and/or the Applicants"; such compensation not to exceed two mils per oke "which was the difference resulting from the reduction of price made as above stated. In reliance on that agreement the Applicants allege that beginning from February 25, 1963 reduced the price of flour sold by them to 51 mils per oke as aforesaid. On or about *October* 29 1965, the Applicants received Exhibit 1, i.e. a letter from the Minister of Commerce and Industry, addressed to "Cyprus Flour-Millers Association", stating that "in accordance with the arrangement made on *February* 23, 1963, the Government appointed an ad hoc committee to investigate flour-milling costs"; that the Committee has submitted its report; and that "the Government having studied this report reaches the conclusion that the prices at which the products of the flour-milling industry are sold

afford adequate margins of profit and therefore the payment to the flour-millers of more than 51/— per bag (of fifty okes) of flour is not warranted".

The Applicants replied to the Minister by Exhibit 2, i.e. a letter dated November 4, 1965, expressing great regret and surprise at the conclusion reached by the Government; asking, also, the Minister to communicate to them the contents of the report and requesting the Government, failing such disclosure, "to be good enough to give (the Applicants) its own view as to what sum it, for its part, regards as being the sum which should be added to the costs of milling as a reasonable profit so that the two sums together may make up the 'reasonable milling charge' ".

That letter was answered by Exhibit 3, i.e. by a letter from the Ministry dated December 4, 1965, stating that: "Your... memorandum was placed before the Council of Ministers which decided that the report prepared by the *ad hoc* committee appointed by the Government was of a confidential nature, the contents of which unfortunately cannot be communicated to you"; and that "the Government having studied the report..... reached the conclusion that the prices at which the products of the flour-milling industry are disposed afford adequate margins of profit...".

Hence the present recourses under Article 146 of the Constitution, whereby the Applicants, in effect, seek:-

(*a*) Declaration that the decision of the Respondents contained in Exhibits 1 and 3 *(supra)* not to pay to the Applicants the difference of two mils per oke of flour sold by the latter during the period February 25, 1963, onwards in implementation of the agreement reached between the Applicants and Respondents as aforesaid, is null and void;

(*b*) declaration that the decision of the Respondents contained in the same letters (Exhibits 1 and 3, *supra*) to the effect that the price of 51 mils per oke of flour (or 51 shillings per bag of 50 okes) affords adequate marging of profit is null and void;

(*c*) declaration that the omission of the Respondents to decide promptly the matters in prayers (a) and (b) herein above ought not to have been made;

(*d*) declaration that the decision of the Respondents contained in their letter Exhibit 3 (*supra*) not to communicate to the Applicants the report prepared by the *ad hoc* committee of inquiry into the cost of flour-milling is null and void.

It was contended by the Respondents that:

(*a*) No decision apart from information is contained in the aforesaid letters Exhibits 1 and 3 (*supra*).

(*b*) Even if it is assumed that there exists a decision as alleged, such decision was not taken by an organ, authority or person in the exercise of any *executive* or *administrative* authority within Article 146, paragraph 1, of the Constitution and, therefore, no recourse under this Article lies in respect of such decision.

(*c*) For the same reasons the omission alleged by the Applicants in their prayer (c) (*supra*) does not constitute an "omission" within the meaning of the aforesaid Article 146, paragraph 1, and, therefore, no recourse lies in respect thereof either.

Paragraph 1 of Article 146 of the Constitution reads as follows:

"1. The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person".

In dismissing the recourse as not maintainable under Article 146 of the Constitution, the Court:-

Held, (1) (*a*). Exhibit 1 (*supra*) expressly states that "payment to the flour-millers of more than 51 shillings per bag is not warranted", which in the context of the agreed facts, amounts to a decision not to make any payment to the Applicants in connection with the agreement.

(*b*) In exhibit 3 (*supra*) it is stated that "the contents (of the committee's report) unfortunately cannot be com-

municated to you" and that "the Government having studied the report of the Committee..... reached the conclusion that the prices at which the products of the flour-milling industry are disposed afford adequate margin of profit.....". In the same context those statements amount respectively to a decision not to communicate to the Applicants any of the contents of the committee's report and to reaffirmation of the previous decision to make no payment to them.

(2) In Greece only «ἐκτελεσταὶ πράξεις» (executory acts) may be made the subject of a recourse before the Council of State for annulment. And questions or decisions arising out of contracts are excluded from the control by way of annulment vested in the Council of State (see Tsatsos «Τὸ Ἔνδικον Μέσον τῆς Αἰτήσεως Ἀκυρώσεως ἐνώπιον τοῦ Συμβουλίου τῆς Ἐπικρατείας», 2nd ed. para. 67 pp. 101, 102).

(3) (*a*) The requirement of «ἐκτελεστότης» is nowhere expressly laid down in our Constitution, nor in any of our Laws or other legislation. But it has been expressly recognised as to both "acts" and "decisions", by this Court, both in the exercise of its original jurisdiction and on appeal: see *Kolokassides and The Republic* (1965) 3 C.L.R. 549, affirmed on appeal, (1965) 3 C.L.R. 542; *Kythreotis and The Republic* (1965) 3 C.L.R. 437; *Mavromatis (No. 2) and The Republic* (1966) 3 C.L.R. 431; *Pitsillos and The Republic* (1966) 3 C.L.R. 589 and 884; affirmed on appeal (1967) 3 C.L.R., 236.

(*b*) In the light of the principles laid down by Triantafyllides J. in *Kolokassides'* case in the first instance *supra* at p. 551 and following the passage relied upon by him from «Πορίσματα Νομολογίας τοῦ Συμβουλίου Ἐπικρατείας» 1929-1959, at p. 237 (the passage is set out in the judgment, post), I am clearly of opinion that neither of the decisions complained of is «ἐκτελεστὴ» (executory).

(4) Faced with the fact that the decisions in question arose out of the agreement (*supra*) counsel for the Applicants invoked the so-called "theory of detachable acts" («θεωρία τῆς ἀποσπάσεως τῶν πράξεων».) It is clear, however, from the passage in Stasinopoulos on «Δίκαιον τῶν Διοικητικῶν Διαφορῶν» 4th ed. at p. 184 (see this passage in the judgment, *post*) that the doctrine applies

only to acts which both are ἐκτελεσταὶ (executory) and precede the agreement. But in the present cases both decisions as well as not being ἐκτελεσταὶ came after the conclusion of the agreement. It follows that the doctrine does not avail the Applicants.

(5)(*a*) Coming now to the issue raised by prayer under (c) (*supra*) "omission" in Article 146 of the Constitution must mean what in Greece is called παράλειψις ὀφειλομένης ἐνεργείας, as to which Kyriakopoulos in his Διοικητικὸν Ἑλληνικὸν Δίκαιον 4th edn. Vol. 3 p. 104, para. 9 says: (see this passage in the judgment, post).

(*b*) As the decisions on the matters to which the alleged omission relates cannot be made the subject of a recourse under Article 146 of the Constitution it follows, in the light of the aforesaid passage from Kyriakopoulos, that the omission itself cannot either. Therefore prayer under (*c*) also fails.

Held: As to costs:-

For the purposes of costs the question whether the Minister, regardless of the existence or otherwise of a legal duty in that behalf, should have disclosed to the Applicants the contents of the committee's report, or any part thereof that might be sufficient to enable them to defend their interests under the agreement, is relevant, and my view on that question being that he should have done so, I award no costs.

Applications dismissed.
No order as to costs.

Cases referred to:

Kolokassides and The Republic (1965) 3 C.L.R. 549; affirmed on appeal: (1965) 3 C.L.R. 542;

Kythreotis and The Republic (1965) 3 C.L.R. 437;

Mavromatis (No. 2) and The Republic (1966) 3 C.L.R. 431;

Pitsillos and The Republic (1966) 3 C.L.R. 589 and 884; affirmed on appeal (1967) 3 C.L.R. 236.

Recourse.

Recourse for a declaration, *inter alia*, that the decision of the Respondents not to pay to the Applicants the difference of two mils per oke of flour sold by the latter during the period February 25, 1963, onwards in implementation of an

agreement reached between the Applicants and the Respondents is *null* and *void.*

A. Triantafyllides, for the Applicants.

M. Spanos, Counsel of the Republic, for the Respondents.

Cur. adv. vult.

The following Judgment* was delivered by:-

STAVRINIDES, J.: In each of these applications I reserved judgment on certain questions raised by the opposition. In so far as these questions are concerned the facts in the applications are identical, and when, the hearing of that numbered 256/65 having been concluded, the other one was called, Mr. Triantafyllides, who appeared for the Applicants, and Mr. Spanos who appeared for the Respondent, in both cases, were content to adopt the argument they had respectively put forward in the former case. Hence the judgment I am about to deliver is my judgment in both cases.

The following is a summary of the averments contained in paras. 1-8 inclusive of the statement of facts in each application and of the contents of the exhibits thereto, which are admitted by para. 1 of the statement of facts in the respective opposition "subject to what is stated" therein "below". The Applicants are, and at all times have been, a company carrying on the business of flour-milling. "Up to and including February 23, 1963", they had been selling their flour at 53 mils per oke. "On or about" that date the Applicants, at the express request of "the Respondents", agreed to reduce temporarily the sale price of the flour supplied by them "to the public" for breadmaking from 53 mils to 51 mils per oke "pending the finding of a committee of inquiry into the cost of flour-milling which was to be appointed by Respondents". It was an express term of the agreement that "the Respondents" would compensate the Applicants for any loss "which they would have suffered in case the finding of the committee of inquiry were to the effect that the sale price of the breadmaking flour at 51 mils per oke (and of all other by-products of wheat at the then ruling prices) would not afford reasonable margin of profit to the flour-millers and/or Applicants"; such compensation not to

*For final decision on Appeal see (1970) 2 J.S.C. 195 to be reported in due course in (1970) 3 C.L.R.

exceed two mils per oke, "which was the difference resulting from the reduction of price made, as above stated, at the express request of Respondents". In reliance on that agreement the Applicants, beginning from February 25, 1963, reduced the price of flour sold by them to 51 mils per oke, "and such reduction is in force till the present day". In case No. 256/65 this is followed by the statement, which does not appear in the other case, that the "Applicants, however, have ceased operating their flour-mill and selling flour to the public since December 23, 1963". On or about October 29, 1965, the Applicants received a letter from the Minister of Commerce and Industry *(exhibit 1)*, addressed to "Cyprus Flour-Millers' Association", stating that "in accordance with the arrangement made on February 23, 1963, the Government appointed an *ad hoc* committee to investigate flour-milling costs"; that the "committee" had submitted its report; and that "the Government having studied this report reaches the conclusion that the prices at which the products of the flour-milling industry are sold afford adequate margins of profit and therefore the payment to the flour-millers of more than 51/- per bag of flour is not warranted". The Applicants replied to the Minister by a letter dated November 4, 1965 *(exhibit 2)*, expressing great regret and surprise at the conclusion reached by the Government; asking the Minister to communicate to them the contents of the report and requesting the Government, failing such disclosure, "to be good enough to give (the Applicants) its own view as to what sum it, for its part, regards as being the sum which should be added to the cost of milling as a reasonable profit so that the two sums together may make up 'the reasonable milling charge' ". It appears from a later para. of that letter that "the said committee's chairman" had, "in good time", communicated the committee's findings relative to the cost of milling to the Applicants; and they "pass over entirely and without comments the fact that those findings were regarded as matter to be communicated, whereas the final finding, which we do not conceal we are sure can only reinforce our views, was considered not to be communicable as being protected by privilege unintelligible to us". The letter also states that ".....if on February 23, 1963, Your Excellency had told us that two years and seven months were to elapse for a Government decision on the inquiry which was to take place to be communicated to us without even the findings of such report being commu-

nicated to us it is very doubtful whether any flour-milling firm would have accepted the agreement concluded". That letter was answered by one from the Ministry dated December 4, 1965 *(exhibit 3)*, stating that "Your..... memorandum was placed before the Council of Ministers, which decided that the report prepared by the *ad hoc* committee appointed by the Government was of a confidential nature, the contents of which unfortunately cannot be communicated to you" and that "the Government having studied the report of the committee of inquiry into the cost of flour-milling reached the conclusion that the prices at which the products of the flour-milling industry are disposed afford adequate margins of profit, which of course vary depending on the capacity of each flour-mill's installations, the proportion of the use of such capacity and the general conditions of operation of the flour-mill".

This concludes the summary. Now for the qualifications to which the admission is subject. Shortly they are as follows: The agreement for a temporary reduction in the price of flour, an inquiry and compensation depending on the result of the inquiry (hereafter "the agreement") was made "in an effort to avoid industrial disturbances" consequent on "a dispute as to the price of bread and..... the price of breadmaking flour". The committee appointed under the agreement (hereafter "the committee") "found that the cost of milling one ton of wheat was not the same for all four flour-mills the accounts of which were investigated but varied substantially from mill to mill and that it was not, therefore, possible to determine a price for flour that would hold good for all of them." "The accounts of each mill were taken either entirely or partly at their face value for the reason that no full verification of figures with vouchers was carried out". The "Respondents having studied the committee's report..... and having carefully considered every material factor and making every possible allowance arrived at the conclusion that the price of 51 mils per oke at which millers sell their flour affords them a reasonable margin of profit and that the payment to them of a higher price did not appear to be justified". The above matters appear in both oppositions. But in case No. 256/65 there is also this paragraph, which has no counterpart in the other:

> "Respondents further allege that Applicants are selling breadmaking flour at a price of 50.534 mils per oke

instead of 51 mils. Applicants also failed to follow the approved rates of extraction and were not selling their products at the prices known to have prevailed during the period that was reviewed".

The application in case No. 256/65 is for

"*(a)* declaration that the decision of the Respondents contained in *exhibits 1* and *3* attached hereto not to pay to Applicants the difference of two mils per oke of flour sold by Applicants for the period February 25, 1963 — December 23, 1963, both inclusive, in implementation of an agreement reached between Applicants and Respondents on the matter as stated in the facts herein below, is *null* and *void* and of no effect whatsoever;

(b) declaration that the decision of the Respondents contained in *exhibits 1* to *3* attached hereto to the effect that the price of 51 mils per oke of flour (or £2.550 mils per sack of 50 okes of flour) affords adequate margin of profit is *null* and *void* and of no effect whatsoever;

(c) declaration that the omission of the Respondents to decide promptly the matters in prayers *(a)* and *(b)* herein above ought not to have been made and whatever has been omitted should have been performed;

(d) declaration that the decision of the Respondents contained in *exhibit 3* attached hereto, not to communicate to Applicants the report prepared by the committee of inquiry on the cost of flour-milling is *null* and *void* and of no effect whatsoever".

It is opposed on the following grounds of law:

"*(a)* no decision as alleged in prayers *(a)*, *(b)* and *(d)* is contained in *exhibits 1 & 3* and in any event the information contained therein does not amount to a decision as contemplated in Art. 146, para. 1, of the Constitution;

(b) even if we concede that there exists a decision such decision was not given by an organ, authority or person in the exercise of any *executive* or *administrative authority* and no recourse under Art. 146 can lie on such a decision;

(c) for the same reasons the omission alleged in prayer *(d)* (a slip for '*(c)*') does not constitute an 'omission within the meaning of Art. 146, para. 1, of the Constitution and no recourse can lie in respect thereof;

(d) the Applicants have not got any existing—ἐνεστὼς—legitimate interest adversely affected by the alleged decisions inasmuch as they have ceased operating their flour-mill and selling flour to the public since December 23, 1963, and they cannot proceed through a recourse under Art. 146 of the Constitution;

(e) any act or decision of the Respondents in the matter was *bona fide* done or taken for the purposes of good administration and in the public interest and was fully supported by the facts and the circumstances and no right guaranteed under Arts. 25, 28 or 29 of the Constitution belonging to the Applicants has in any way been infringed or contravened;

(f) the subject matter of this recourse cannot be entertained and the only remedy of the Applicants, if any, would be by a civil action".

The prayer for relief in the application, and the statement of the grounds of law relied upon in the opposition, in the other case are on the same lines, with this one difference between each pair of documents: in the other case the end of the period in para. *(a)* of the prayer, corresponding to para. *(a)* of the prayer above set out is *January 8*, 1966; and the grounds of law do not include the words "inasmuch as ..... of the Constitution", which occur in para. *(d)* of the grounds of law above set out.

On April 23, 1966, Triantafyllides, J., set both cases down "for hearing on the preliminary legal issues arising out of paras. *(a) (b) (c) (d)* and *(f)* of the grounds of law in the opposition..... on September 26, 1966"; and on the latter day they came on before me for that purpose.

In the course of his address counsel for the Applicants emphasised that his clients "deny the accuracy of *exhibit 4* in so far as it conflicts with the facts as stated" by him. That *exhibit* had been put in by counsel for the other side as being a copy of a decision of the Council of Ministers dated February 23, 1963, which runs

"The Council decided—

(a) to authorise the Minister of Commerce and Industry to inform the millers that Government has accepted their proposal for a reduction, with effect from February 25, 1963, of the present price of flour from £2.650 mils to £2.550 mils per sack of 50 okes, on condition that an expert is appointed by Government to inquire into the real costs of milling....."

Counsel for the Applicants did not particularise, but it would appear that what he had in mind was the indirect statement that the proposal for a reduction in the price of flour originated with the millers.

Clearly para. *(f)* of the grounds of law in each opposition is but a conclusion based on the preceding paragraphs of those grounds, so it raises no additional issue. In so far as para. *(a)* states that "no 'decision' as alleged in the prayers *(a)*, *(b)* and *(d)* is contained in *exhibits 1* and *3*" it is wrong; for as appears from the foregoing, *exhibit 1* expressly states that "payment to the flour-millers of more than 51/- per bag is not warranted", which, in the context of the agreed facts, amounts to a decision not to make any payment to the Applicants in connexion with the agreement; in *exhibit 3* it is stated that "the contents (of the committee's report) unfortunately cannot be communicated to you" and that "the Government having studied the report of the committee ..... reached the conclusion that the prices at which the products of the flour milling industry are disposed afford adequate margins of profit....."; and in the same context those statements amount respectively to a decision not to disclose to the Applicants any of the contents of the committee's report and to a reaffirmation of the previous decision to make no payment to them in connexion with the agreement. Accordingly (treating the original decision to make no such payment and its reaffirmation as one decision) "the preliminary legal issues arising out of paras. *(a)*, *(b)*, *(c)* and *(d)* of the grounds of law in each opposition" are the following: (1) whether the decision not to make any payment to the Applicants in connexion with the agreement (hereafter "the decision against payment") is one "of any organ, authority or person exercising any executive or administrative function" within Art. 146, para. 1, of the Constitution; (2) whether the decision not to disclose to the Applicants any

of the contents of the committee's report (hereafter "the decision against disclosure") is one within that provision; (3) whether any "omission to decide promptly the matters in prayers *(a)* and *(b)*" is one within the same provision; (4) whether the Applicants have an "existing legitimate interest adversely affected" by those decisions or any such omission.

Issues 1 and 2 may be considered together. In Greece only ἐκτελεσταὶ πράξεις may be made the subject of an application to the Council of State for annulment; and Tsatsos in his work on Τὸ Ἔνδικον Μέσον τῆς Αἰτήσεως Ἀκυρώσεως ἐνώπιον τοῦ Συμβουλίου τῆς Ἐπικρατείας (2nd Edn.) states in para. 67, pp. 101, 102:

> «Ἕνεκα τοῦ λόγου τούτου (ὑπάρξεως παραλλήλου προσφυγῆς)—ἢ τῆς ἐλλείψεως ἐκτελεστότητος—ἐκφεύγουσι τοῦ ἀκυρωτικοῦ ἐλέγχου τοῦ Συμβουλίου τῆς Ἐπικρατείας, τοῦ ἄλλως ἐκ τοῦ Συντάγματος ἁρμοδίου νὰ κρίνῃ περὶ τοῦ κύρους πάσης πράξεως διοικητικῆς ἀρχῆς, τὰ ζητήματα τὰ ἐκ συμβάσεων γεννώμενα, αἱ πράξεις διαχειρίσεως αἱ ὑπὸ τῆς διοικήσεως ἢ τῶν ἀσκούντων διοίκησιν νομικῶν προσώπων ἐνεργούμεναι καὶ γενικῶς αἱ πράξεις ἰδιωτικοῦ δικαίου».

The requirement of ἐκτελεστότης is nowhere expressly laid down in our Constitution, nor in any of our Laws or other legislation. But it has been expressly recognised, as to both "acts" and "decisions", by this court, both in the exercise of its original jurisdiction and on appeal: see *Kolokassides* v. *Republic*, (1965) 3 C.L.R. 549; affirmed on appeal, (1965) 3 C.L.R. 542; *Kythreotis* v. *Republic*, (1965) 3 C.L.R. 437; *Mavromatis* (No. 2) v. *Republic*, (1966) 3 C.L.R. 431; *Pitsillos* v. *Republic*, (1966) 3 C.L.R. 589 and 884, affirmed on appeal, (1967) 3 C.L.R. 236. In *Kolokassides's* case Triantafyllides, J., delivering judgment in the first instance, said at p. 551:

> "An administrative act (and decision also) is only amenable within a competence, such as of this Court under Art. 146, if it is executory (ἐκτελεστή)..."

Is either of the decisions complained of ἐκτελεστή? The judgment goes on to cite a passage from Πορίσματα Νομολογίας τοῦ Συμβουλίου τῆς Ἐπικρατείας, at p. 237, which describes ἐκτελεσταὶ πράξεις as those

> «δι' ὧν δηλοῦται βούλησις διοικητικοῦ ὀργάνου, ἀπο-

σκοποῦσα εἰς τὴν παραγωγὴν ἐννόμου ἀποτελέσματος ἔναντι τῶν διοικουμένων καὶ συνεπαγομένη τὴν ἄμεσον ἐκτέλεσιν αὐτῆς διὰ τῆς διοικητικῆς ὁδοῦ».

The book goes on

«Τὸ κύριον στοιχεῖον τῆς ἐννοίας τῆς ἐκτελεστῆς πράξεως εἶναι ἡ ἄμεσος παραγωγὴ ἐννόμου ἀποτελέσματος συνισταμένου εἰς τὴν δημιουργίαν, τροποποίησιν ἢ κατάλυσιν νομικῆς καταστάσεως, ἤτοι δικαιωμάτων καὶ ὑποχρεώσεων διοικητικοῦ χαρακτῆρος παρὰ τοῖς διοικουμένοις».

Clearly neither of the decisions in question is ἐκτελεστή.

Faced with the fact that the decisions complained of arose out of the agreement, counsel for the Applicants invoked the so-called θεωρία τῆς ἀποσπάσεως τῶν πράξεων. As to this Stasinopoulos in his work on Δίκαιον τῶν Διοικητικῶν Διαφορῶν (4th Edn.) says at p. 184:

«Τὸ γαλλικὸν Συμβούλιον τῆς Ἐπικρατείας ἐδημιούργησεν ἐν προκειμένῳ τὴν λεγομένην 'θεωρίαν τῆς ἀποσπάσεως τῶν πράξεων', κατ' ἐφαρμογὴν τῆς ὁποίας ὑποβάλλει ὑπὸ τὸν ἔλεγχόν του τὰς πράξεις ταύτας, ἐξεταζομένας μεμονωμένως, χωρὶς νὰ ἐλέγχῃ αὐτὴν ταύτην τὴν σύμβασιν.

'Η θεωρία αὕτη εἶναι ὀρθή, διότι πράγματι, καθ' ἣν στιγμὴν ἐκδίδονται αἱ πράξεις αὗται, δὲν ὑπάρχει ἀκόμη συμβατικὴ δέσμευσις, καὶ συνεπῶς αἱ πράξεις αὗται εἶναι μονομερεῖς καὶ δημιουργοῦσι διοικητικὰς διαφορὰς ἀκυρώσεως.

Τὴν αὐτὴν θεωρίαν ἐφαρμόζει καὶ τὸ παρ' ἡμῖν Συμβούλιον τῆς Ἐπικρατείας, δεχόμενον ὅτι δύναται νὰ ἀσκηθῇ αἴτησις ἀκυρώσεως κατὰ τῶν μονομερῶν διοικητικῶν πράξεων, αἱ ὁποῖαι σχετίζονται πρὸς τὴν σύναψιν τῆς συμβάσεως καὶ ἐκδίδονται πρὸ τῆς καταρτίσεως αὐτῆς, οὐχὶ ὅμως καὶ κατ' ἐκείνων, αἱ ὁποῖαι σχετίζονται πρὸς τὴν ἐκτέλεσιν αὐτῆς καὶ ἐκδίδονται μετὰ τὴν κατάρτισιν αὐτῆς».

As this passage shows, the doctrine applies only to acts which both are ἐκτελεσταί and preceded the agreement. But here both decisions as well as not being ἐκτελεσταί came after the conclusion of the agreement. It follows that the doctrine does not avail the Applicants.

The foregoing disposes of prayers *(a)*, *(b)* and *(d)*. Coming now to issue 3, "omission" in Art. 146 must mean what in Greece is called παράλειψις ὀφειλομένης νομίμου ἐνεργείας as to which Kyriakopoulos in his Διοικητικὸν Ἑλληνικὸν Δίκαιον (4th Edn.), Vol. 3, p. 104, para. 9 says:

> «... ἵνα συναχθῇ ὅτι συντρέχει παράλειψις νομίμου ἐνεργείας, καθιστῶσα βάσιμον τὴν σχετικὴν αἴτησιν ἀκυρώσεως, δέον νὰ ἐπιβάλληται, ὑπὸ ρητῆς διατάξεως νόμου, ἡ ρύθμισις συγκεκριμένης σχέσεως δι' ἐκτελεστῆς πράξεως, ἥτις ἐκδιδομένη, θὰ ὑπέκειτο εἰς τὸν ἔλεγχον τοῦ Συμβουλίου Ἐπικρατείας συμφώνως πρὸς τὸ ἄρθρον 46 τοῦ κωδικοποιητικοῦ νόμου 3713, κατὰ τὰ ἀνωτέρω ἀναπτυχθέντα. Ἐφ' ὅσον, ἑπομένως, ὁ νόμος δὲν ἐπιβάλλει ἐνέργειάν τινα, ἡ ἐκ τῆς σιωπῆς τεκμαιρομένη ἄρνησις δὲν συνιστᾷ ἐκτελεστὴν πρᾶξιν. Ἡ παράλειψις δύναται νὰ συνίσταται εἴτε εἰς ρητῶς ἐκδηλουμένην ἄρνησιν τῆς διοικήσεως, ὅπως προβῇ εἰς τὴν ἐνέργειαν ταύτην, διὰ τῆς ἐκδόσεως ἀπορριπτικῆς πράξεως· εἴτε εἰς τεκμαιρομένην τοιαύτην ἄρνησιν ἐκ τῆς ἀπράκτου παρελεύσεως ἢ τῆς τεθειμένης ὑπὸ τοῦ νόμου ἰδίας ἢ τῆς τριμήνου προθεσμίας : σιωπηρὰ ἀπόρριψις».

As the decisions on "the matters" to which each of the alleged omissions relates cannot be made the subject of a recourse it follows that the omissions themselves cannot either. Therefore prayer *(c)* also fails.

For these reasons both applications must be dismissed, and accordingly as to issue 4 I need do no more than merely record my view that the termination of the operation of the flour-mill of the Applicants in case No. 256/65 had no bearing on the existence of a legitimate interest in those Applicants and that each Applicant still possesses such interest in the setting aside of the decisions complained of, if not also in a declaration in respect of the alleged omission.

It remains to consider costs. It is not necessary to express any opinion in these proceedings on the legal basis of the decision against disclosure. Nay, since that decision, along with the other matters complained of in these applications, may be made the subject of proceedings in the District Court, it would be wrong to do so. But for the purposes of costs the question whether the Minister, regardless of the existence or otherwise of a legal duty in that behalf, should have dis-

closed to the Applicants the contents of the committee's report, or any part thereof that might be sufficient to enable them to defend their interests under the agreement, is relevant, and my view on that question being that he should have done so, I award no costs.

For the reasons given both applications are dismissed without costs.

Applications dismissed without costs.