

1979 June 1

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

LANITIS BROS. LIMITED,

Applicants.

v.

THE CENTRAL BANK OF CYPRUS,

Respondent.

(Case No. 138/78).

Exchange control—Residence—Determination of, for the purposes of the Exchange Control Law, Cap. 199—Discretion of respondent Bank—Resident Company controlled by non resident Corporation—Directives to resident directors and resident shareholders of Corporation in terms of section 32(1) of the Law requiring them to take all necessary steps to ensure that the Corporation shall comply with certain requirements—Duty of recipients of directive—Corporation renouncing their right to take their proportion of the new shares issued by the Company and acceptance of these shares by resident shareholders—Such renunciation constituting a breach of the said directives with consequential illegality under Part II of the fifth Schedule to the Law—No rights could be derived out of this illegality as the said renunciation and acceptance was an illegal and void transaction—See section 23 of the Contract Law, Cap. 149—Said illegality should not be ignored by respondent Bank when deciding what directions should be given under section 44(2) of the Law regarding residence of the Company.

Statutes—Construction—Words “doing anything” in paragraph (v) of section 32(1) of the Exchange Control Law, Cap. 199 to be read in conjunction with the words “which affect its rights or powers in relation”—Ejusdem generis rule, which is not absolute, not applicable.

The applicant Company, a public Company limited by shares, was incorporated in Cyprus in 1944 under the provisions of the

Companies Law. In the year 1963 the "Food Products Corporation Ltd.;" (hereinafter referred to as "the Corporation") was incorporated in the Bahamas Islands. During that year the majority shareholders in the applicant Company, representing
 5 93.595% of its issued capital, exchanged their shares for the shares in the Corporation and as a result the Corporation became the major shareholder of the applicant Company.

By the coming into force in July, 1972, of the Exchange Control (Amendment) Law, 1972 (Law 53/1972) the Scheduled Territories, which included Bahamas Islands, were abolished and the transfer of funds from Cyprus to any country of the world, including former scheduled territory countries, required permission from the Central Bank of Cyprus.
 10

On October 23, 1973 the respondent Bank informed the Bankers of the applicant Company that, for exchange control purposes, the latter was considered as a resident Company controlled by non-residents and that pursuant to the provisions of section 32(3) of the Exchange Control Law, Cap. 199 (hereinafter referred to as "the Law") the granting of banking facilities to the applicant Company in the form of loans would require the approval of the respondent Bank.
 15
 20

On November 3, 1973 the respondent Company addressed a directive* to Mr. Vladimir Lanitis, as the major shareholder in the Corporation, by means of which he was informed that the Corporation being a "foreign Company" was required to comply with certain requirements and he (Mr. Lanitis), as the major shareholder, was required to "take all necessary steps to ensure that the said foreign company shall comply with these requirements, namely
 25

- (i)
- (ii)
- 30 (iii) refrain from selling, transferring or doing anything which affects the rights or powers of Food Products Corporation Ltd. in relation to quoted securities other than from selling at or above current market rates and doing anything incidental to such sale; and
- 35 (iv) refrain from selling, transferring or doing anything

* See the whole text of this directive at p. 185-86 *post*.

which affects the rights or powers of Food Products Corporation Ltd. in relation to unquoted securities without the prior approval of this Bank".

Mr. Vladimir Lanitis was a resident of Cyprus for exchange control purposes and was holding about 64% of the share capital of the Corporation. A similar directive was sent to Mr. Nicos C. Lanitis, who was considered by the respondent Bank as a director, shareholder and/or trustee of the members of the Corporation; and on November 30, 1973, a similar directive* was sent to all the shareholders of the Corporation. A comparison of the directives and section 32(1)** of the Law showed that, in effect, they reproduced the wording of this section.

On the 9th July, 1974, at an extraordinary general meeting of its shareholders, the applicant Company decided to increase its nominal share capital to 900,000 shares by the issue of additional 400,000 ordinary "A" shares of one pound each; and at a meeting of its board of directors, held on the 11th July, 1976, it was decided to allot to all existing shareholders "A" ordinary shares of one pound each at a ratio of 1.1 to one held but partly paid up to 5%, that is 50 mils each. The Corporation was offered the "A" ordinary shares to which it was entitled, but its board of directors by a resolution dated the 11th February, 1976, irrevocably resolved to renounce the right of the Corporation to take up any proportion of the issue of "A" ordinary shares.

On the 24th May, 1976, the respondent Bank was informed by letter of the increase of the share capital, the refusal of the Corporation to accept these new shares offered to it and the decision of the Board of directors of the applicant Company to offer 303,647 "A" ordinary shares, to which the Corporation was entitled, to the existing shareholders of the Corporation. On the 30th June, 1976 another letter was addressed to the respondent Bank explaining that the reason the applicant Company increased its issued share capital was to revert the control of the Company to residents of Cyprus and that after the new shares were issued to the resident shareholders, the applicant Company was no longer controlled by non-residents and the granting of

* See the text of this directive at pp. 187-88 *post*.

** Quoted at pp. 188-90 *post*.

banking facilities to the Company in the form of loans, overdrafts etc. no longer required the approval of the respondent Bank. There followed other correspondence between the parties (see pp. 192-3 *post*) and by letter* dated the 30th January, 5 1978 counsel for the applicant company were informed by the respondent Bank that "the refusal of Food Products Corporation Inc. to accept the 'A' ordinary shares—on the basis of which the said shares were offered and issued to the shareholders in Food Products Corporation Inc.—was made in contra- 10 vention of the directives given under section 32(1) of which directives Lanitis, Bros. Ltd. was fully aware"; and that in view of the above the respondent Bank considered that Lanitis Bros. Ltd. (the applicant Company) continued "to be a resident company controlled by non-residents and to which section 32(3) of the 15 Law applies".

Hence the present recourse by means of which the applicant Company sought:

20 " (A) Declaration that the decision of respondent contained in its letter dated 30. 1. 1978 that Lanitis Bros. Limited, a company resident in Cyprus, is controlled by non-residents of Cyprus is null and void and of no effect whatsoever.

25 (B) Declaration that the decision of respondent contained in its letter dated 30. 1. 1978 that Lanitis Bros. Limited cannot borrow money from persons resident in Cyprus without respondent's permission is null and void and of no effect whatsoever."

Counsel for the applicant Company mainly contended:

30 (1) That in deciding whether the applicant Company is controlled by residents or non-residents the Court should not go behind the register and should follow in this respect what was decided in the case of *Lanitis Bros Limited (No. 2) v. The Central Bank of Cyprus* (1974) 3 C.L.R. 328.

35 (2) That the renunciation by the Corporation of their option to take up the new "A" ordinary shares, offered to them by the applicant Company, does not amount

* See the letter at pp. 194-95 *post*.

to a breach of the directive given under section 32(3) of Cap. 199.

Counsel argued in this connection that this directive was not clear and that in interpreting the relevant parts of section 32, the Court should use as an aid of construction the mischief rule in the same sense that it could not have been within the contemplation of the legislature to force a Company, such as the applicant company, resident in the Bahamas, to take up a share option in a Cyprus Company.

- (3) That the Eiusdem Generis Rule was applicable in interpreting the words "or doing anything" which followed the words "refrain from selling, transferring" in paragraph (v) of section 32(1) and that the said words do not cover the case of renunciation of a rights issue option.

Held, (after summarizing the legal position under section 32 of the Law—vide pp. 197–98 *post*):

(1) That this directive in effect reproduced the wording of section 32(1) and by requiring a shareholder to take all steps to ensure that the Corporation would comply with the requirements contained therein coupled with the express reference to the provisions of section 32(1) to which the attention of each shareholder was drawn, cast a duty on the recipient thereof to do or refrain from doing any act which would cause the foreign Company to comply with such requirements; and that each shareholder had thereunder and by virtue of the said statutory provision, a duty both positive and a negative one, in the sense of doing or refraining from doing any act which would cause or remove any obstacle or render it in any respect more probable that the Corporation would comply with the directive.

(2) That on the material before this Court none of the resident shareholders served with the directive has done anything or refrained from doing anything in compliance with the statutory duty cast upon them; and that, more so, nothing was done by either Mr. Nicolaos C. Lanitis, a director shareholder and trustee of the members of the Corporation, or Mr. Vladimir Lanitis, the owner of about 64% of the share capital of the Corporation (pp. 198–99 *post*).

(3) That the requirement contained in the directive was that the Corporation refrained from selling, transferring or doing anything which affects its rights or powers in relation to the securities mentioned in the notice; that these securities included its shares in the applicant Company; that the words "doing anything" in the said directive which are a reproduction of the same words to be found in para. (v) of section 32(1) of the Law, should be read in conjunction with the words that follow them namely "which affect its rights or powers in relation" to such securities; and that the Eiusdem Generis Rule, which is not an absolute one, does not apply in the present case as an examination of this section, shows that the general words should be construed generally and in conjunction with the words following them notwithstanding that they follow more specific terms.

(4) That by renouncing the option for the rights issue of the applicant Company, the Corporation was doing something which affected its rights and powers in relation to its shares, that is, its securities in the applicant Company; that, in other words, there was a positive act which affected the rights of the Corporation within the meaning of the directive and the section as by doing so the Corporation lost control of the applicant Company and the dividends to which it would be entitled; that, also, the interest of the Corporation in the net worth of the applicant Company was thereby substantially reduced by such renunciation; and that, moreover, all these resident shareholders who were served with the directive in addition to doing anything for the purpose of causing the Corporation to comply with it, accepted the shares offered to them after the renunciation of the rights issue by the Corporation.

(5) That the objective of the directive was to preserve the situation in the Corporation through its resident in Cyprus shareholders as it was when same was served on them; that by the breach of the directive the rights of the Corporation were affected and also such breach gives rise to criminal responsibility by virtue of Part II of the Fifth Schedule to the Law; and that out of this illegality no rights could be derived as the renunciation by the Corporation and the acceptance by its shareholders of the new shares of the applicant Company was an illegal and void transaction as being an act forbidden by Law within the meaning of section 23 of the Contract Law, Cap. 149.

(6) That once there has been a breach of the directive and illegality resulted therefrom such illegality should not be ignored by the respondent Bank when directions under section 44(2) of the Law, that for all or any of the purposes of the Law a person, and this includes a legal person, is to be treated as resident or not, because the circumstances under which a shareholding is obtained in such a legal person are material factors to be taken into consideration by the respondent Bank; that this is not an instance of merely going behind the corporate veil of the applicant Company, but an instance of exercise of discretion and the taking into account in such exercise of discretion of those factors that can legitimately be taken into consideration; that definitely the outcome of an illegality going to the root of the shareholding in a company limited is a factor that cannot be ignored in giving a direction under section 44(2) of the Law; and that, accordingly, the recourse must fail (*Lanitis Bros Limited (supra) distinguished*)

Application dismissed.

Cases referred to:

Lanitis Bros Limited (No. 2) v. The Central Bank of Cyprus
(1974) 3 C.L.R. 328. 20

Recourse.

Recourse against the decision of the respondent whereby it was decided that the applicant company is controlled by non-residents of Cyprus and it cannot borrow money from persons resident in Cyprus without respondent's permission. 25

R. Johnson, Q.C., with G. Polyviou and K. Michaelides for the applicants.

A. Evangelou, Counsel of the Republic, for the respondent.
Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present application the applicant Company seeks: 30

“(A) Declaration that the decision of respondent contained in its letter dated 30. 1. 1978 that Lanitis Bros. Limited, a company resident in Cyprus, is controlled by non-residents of Cyprus is null and void and of no effect whatsoever. 35

(B) Declaration that the decision of respondent contained in its letter dated 30. 1. 1978 that Lanitis Bros. Limited

cannot borrow money from persons resident in Cyprus without Respondent's permission is null and void and of no effect whatsoever."

The relevant facts which are not in dispute are as follows:-

5 The applicant Company is a public Company limited by shares and was incorporated in Cyprus in 1944 under the provisions of the Companies Law, for the purpose of carrying on the business of distillation, production, preparation or purification of essential oils, manufacture of juices, etc., and they are, *inter*
10 *alia*, the bottlers in Cyprus of Coca-Cola, Sprite, Fanta, soft drinks. Its share capital is 500,000 ordinary shares of one pound each, out of which only 294,948 have been issued as fully paid up.

15 In the year 1963 the Food Products Corporation Ltd., (to be referred to hereinafter as "the Corporation") was incorporated in the Bahamas Islands for the purpose of carrying on the business of investors in stocks, shares and *inter alia*, as producers, manufacturers, canners and bottlers of and dealers in citrus, essential oils, fruit juices, etc.

20 During that year the majority shareholders in the applicant Company, representing 93.595% of its issued capital, exchanged their shares for the shares in the Corporation, and as a result the Corporation became the major shareholder of the applicant Company. At that time another company, the "Lanitis Brothers Trading Limited" was registered in Bahamas
25 Islands. It is a subsidiary of the applicant Company which owns its entire share capital.

30 During those years and in fact until the 6th July, 1972, when the Exchange Control (Amendment) Law 1972, (Law No. 53 of 1972) came into force, the Bahamas Islands were within the sterling area called in the Exchange Control Law Cap. 199 (hereinafter to be referred to as "the Law") the Scheduled Territories.

35 Lanitis Brothers Trading Limited acquired substantial funds from the applicant Company which it lent to the Corporation for a very long period and at a rate of interest ranging from one to four per cent. When Law 53/72 came into force the Scheduled Territories—commonly known as the Sterling Area—were

abolished and the transfer of funds from Cyprus to any country of the world, including former scheduled territory countries, required permission from the Central Bank of Cyprus.

As a result of this new exchange control situation, companies which until then were controlled by residents of the ex-scheduled territories, were affected as regards their borrowing from local sources and section 32 subsection 3 of the Law became applicable to them as well. In this way, except with the permission of the Central Bank, no person resident in the Republic could lend any money or securities to any body corporate resident in the Republic, which is by any means controlled (whether directly or indirectly) by persons resident outside the Republic.

In October 1973, the stand of the respondent Bank on various matters was discussed with Mr. N. Lanitis as set out in paragraph 8 of the facts in the notice of opposition. It is as follows:

"I. '*Food Products Corporation Ltd.*' Nassau.

(a) Residential status of the company:

The company is considered as a non-resident company on the grounds that it is established and operating abroad.

The fact that residents of Cyprus have a controlling interest in the company does not affect its residential status. However, such interest renders the company a 'foreign company' under section 32(1) of the Law.

II. '*Lanitis Bros. Ltd.*' Nicosia.

(a) Residential status of the company:

This company registered and operating in Cyprus is considered for exchange control purposes, as a resident company controlled by non-residents.

(b) Borrowing by the company.

Under section 32(3) no person resident in Cyprus can lend any money or securities to the company, without exchange control permission.

(c) Subsidiary of a company registered and operating outside Cyprus."

On the 23rd October, 1973 the bankers of the applicant Company were informed by letter accordingly and advised that pursuant to the provisions of section 32(3) of the Law the granting of banking facilities in the form of loans, overdrafts etc., would require their approval and advised them that an application on the appropriate form for authority to lend money to the applicant Company had to be submitted to them for the purpose.

The legal situation created by the enactment of Law 53 of 1972 was judicially considered by me as a result of a recourse made under Article 146 of the Constitution in *Lanitis Bros. Limited (No. 2) and the Central Bank of Cyprus* (1974) 3 C.L.R. p. 328. I shall refer, however, to this case later in the course of this judgment.

On the 3rd November, 1973, the Governor of the respondent Bank, addressed the following letter, *exhibit 1(C)*, to Mr. Vladimir Lanitis as the major shareholder in the Corporation:

“ Dear Sir,

Food Products Corporation Ltd.,
Nassau—Bahamas.

I have been informed that you are the major shareholder in the above mentioned foreign company holding about 63.7 % i.e. 426,853 shares of its share capital.

As you are a resident of Cyprus, I wish to draw your attention to the provisions of section 32(1) of the Exchange Control Law, Cap. 199 and to give you notice that Food Products Corporation Ltd., being a ‘foreign company’ within the meaning of the above section, is required to comply with the requirements mentioned below and you, as the major shareholder are required to take all necessary steps to ensure that the said foreign company shall comply with these requirements, namely:—

(i) furnish to this Bank the following information:—

(a) a copy of the Memorandum and Articles of Association of Food Products Corporation Ltd incorporated under the Law of Bahama Islands with registered office at Sandringham House, Nassau, Bahamas.

(b) a copy of each of the Annual Report and Accounts

of Food Products Corporation Ltd for the years ended 31st December, 1971 and 31st December, 1972.

- (c) a list of directors and of the shareholders of the Food Products Corporation Ltd showing their addresses and the respective number of shares held by each at the end of the years 1971 and 1972 and at 30th September, 1973. 5
- (d) a copy of the Memorandum and Articles of Food Products Corporation (Cayman) Ltd registered in the Cayman Islands, along with a list of its directors and shareholders, indicating the number of shares held by each as at 30th September, 1973 and a recent statement—preferably as at 30th September, 1973—of assets and liabilities of the said company. 10 15
- (ii) furnish to this Bank a list of all securities, as defined in the Law, held by or beneficially for Food Products Corporation Ltd.
- (iii) refrain from selling, transferring or doing anything which affects the rights or powers of Food Products Corporation Ltd in relation to quoted securities other than from selling at or above current market rates and doing anything incidental to such sale; and 20
- (iv) refrain from selling, transferring or doing anything which affects the rights or powers of Food Products Corporation Ltd in relation to unquoted securities without the prior approval of this Bank. 25

Finally, I wish to draw your attention to the provisions of section 11(2) and 31 of the Law. 30

This letter is being forwarded to you in original form at the addresses indicated below.

- | | | |
|---|---|----|
| 1. c/o Lanitis Bros Ltd.,
P.O.Box 2000,
Nicosia. | 2. c/o Food Products Corporation Ltd.
Sandringham House,
Nassau, Bahamas. | 35 |
| 3. Duke University,
Durham,
North Carolina,
U.S.A. | 4. 2, Aeschylus Street,
Politia—Kifissia,
Athens,
Greece.” | 40 |

Mr. Vladimir Lanitis is a resident of Cyprus for exchange control purposes and was holding about 64 % of the share capital of the Corporation. A similar directive was sent to Mr. Nicos C. Lanitis, *exhibit 1(B)*, who was considered by the respondent Bank as a director, shareholder and or trustee for the members of the Corporation.

A similar directive was sent to all shareholders of the Corporation on the 30th November, 1973, copy of which has been produced as *exhibit 5* with list of such shareholders attached thereto and which reads as follows:

"Food Products Corporation Ltd Nassau—Bahamas.

We have been informed that you are a shareholder in the above-mentioned foreign company holding about—shares of its share capital apparently as a result of an exchange of shares in Lanitis Bros Ltd, a company incorporated and operating in Cyprus.

In connection with the above foreign company which continues to control Lanitis Bros Ltd., we wish to inform you the following:—

On the 21st August, 1972 we approved the transfer of the dividend declared by Lanitis Bros Ltd for the year ended 31st December, 1971, and due to Food Products Corporation Ltd of Nassau—Bahamas on the understanding that this Bank would be supplied with information on the foreign company involved.

Unfortunately this information had not been provided and on submission of an application for the transfer of dividend due by Lanitis Bros Ltd to Food Products Corporation Ltd for the financial year 1972 the Bank directed that the amount due should be placed to a blocked account, pending receipt of that information.

In the meantime a number of meetings have taken place with representatives of both Food Products Corporation Ltd and Lanitis Bros Ltd, at one of which it was revealed that the group was contemplating certain steps, including the voluntary winding-up of two of the companies established abroad, namely Food Products Corporation Ltd and Lanitis Brothers Trading Ltd.

By this letter, we wish to draw the attention of shareholders of Food Products Corporation Ltd to section 11(2) of the Exchange Control Law, Cap. 199 which provides that except with the permission of this Bank, a security not registered in Cyprus shall not be transferred outside Cyprus if either the transferor or the transferee, or the person, if any, from whom the transferor or transferee is or is to be a nominee, is resident in Cyprus and to the provisions of section 31 of the Law regarding settlements. 5

We also wish to draw your attention to the provisions of section 32(1) of the Law and to give you notice that Food Products Corporation Ltd being a 'foreign company' within the meaning of the above section has been required to comply with certain requirements and you, as a shareholder, are required to take all necessary steps to ensure that the said foreign company shall comply with these requirements which were mentioned in our letter dated 5th November, 1973 addressed to the company and in particular to:- 10 15

- (a) refrain from selling, transferring or doing anything which affects its rights or powers in relation to quoted securities other than from selling at or above current market rates and doing anything incidental to such sale; and 20
- (b) refrain from selling, transferring or doing anything which affects its rights or powers in relation to unquoted securities without the prior approval of this Bank." 25

It may be appropriate to set out hereinafter section 32 of the Law for the purpose of easier reference to it on account of the arguments advanced by both sides in relation to its relevant provisions. 30

" 32.(1) Where there is served on any person resident in the Republic a notice in writing that the Central Bank wishes any such requirements as are hereinafter mentioned to be complied with by any such body corporate as is specified in the Second Schedule (hereafter in this subsection referred to as a 'foreign company'), and that person can, by doing or refraining from doing any act.- 35

- (a) cause the foreign company to comply with any of the requirements; or
- (b) remove any obstacle to the foreign company complying with any of the requirements; or
- 5 (c) render it in any respect more probable that the foreign company will comply with any of the requirements,

then, except so far as permission to the contrary may be given by the Central Bank, that person shall do, or, as the
10 case may be, refrain from doing, that act.

The requirements with respect to which such a notice may be given are as follows, that is to say, that the foreign company shall –

- 15 (i) furnish to the Central Bank such particulars as to its assets and business as may be mentioned in the notice;
- (ii) sell or procure the sale to an authorized dealer of any gold or specified currency mentioned in the notice, being gold or specified currency which it
20 is entitled to sell or for which it is entitled to procure the sale;
- (iii) declare and pay such dividend as may be mentioned in the notice;
- (iv) realize any of its assets mentioned in the notice in
25 such manner as may be so mentioned;
- (v) refrain from selling, transferring, or doing anything which affects its rights or powers in relation to, any such securities as may be mentioned in the notice.

30 (2) Except with the permission of the Central Bank, no person resident in the Republic shall do any act whereby a body corporate which is by any means controlled (whether directly or indirectly) by persons resident in the Republic ceases to be controlled by persons resident in the Republic:

35 Provided that this subsection shall not prohibit any

person from selling any securities authorized to be dealt in on any recognized stock exchange in the Republic if the sale takes place in pursuance of an agreement entered into in the ordinary course of business on that exchange.

No person resident in the scheduled territories shall in the Republic do any act which involves, is in association with or is preparatory to any such transaction outside the Republic as is referred to in this subsection. 5

(3) Except with the permission of the Central Bank no person resident in the Republic shall lend any money or securities to any body corporate resident in the scheduled territories which is by any means controlled (whether directly or indirectly) by persons resident outside the scheduled territories: 10

Provided that this subsection shall not apply where the lender after making such inquiries as are reasonable in the circumstances of the case does not know and has no reason to suspect that the body corporate is controlled as aforesaid. 15

No person resident in the scheduled territories shall in the Republic do any act which involves, is in association with or is preparatory to any such transaction outside the Republic as is referred to in this subsection. 20

(4) For the purposes of this section and of the Second Schedule, persons resident in the Republic or outside the scheduled territories shall be deemed to control a body corporate notwithstanding that other persons are associated with them in the control thereof if they can together override those other persons. 25

(5) In this section the expression 'security' includes a secondary security." 30

A comparison of the directives in *exhibit 5*, hereinabove set out and section 32(1)(v) shows that they are identical with the exception of the words "any such securities" which are specified in the notice as being quoted securities under paragraph (a) and unquoted securities under paragraph (b) of the directive. 35

The applicant company on account, as set out in its appli-

5 cation, of certain difficulties it faced, because of the situation in which it found itself after 1972, and in order to overcome them and safeguard its future internal borrowing facilities, at an extraordinary general meeting of its shareholders that took place on the 9th July, 1974, increased its nominal share capital to 900,000 shares by the issue of additional 400,000 ordinary "A" shares of one pound each. The dividend rights attaching to the two classes of shares of the applicant Company were determined by it by way of special resolution to be the following:

10 " (i) The holders of 'A' Ordinary Shares shall be entitled out of those profits of the Company which the Company may in the course of any particular year determine to distribute by way of dividend a non-cumulative preferential dividend for such year at a rate not exceeding 100 % per
15 annum on the amount paid-up or deemed to have been paid-up on such shares as at the end of the financial year to which the payment of dividend refers that the dividend payable hereunder shall not be such as to amount to more than 10 % of the nominal value of such shares.

20 (ii) Whenever the profits of the Company which the Company shall determine to distribute by way of dividend shall be more than sufficient to pay the preferential dividend aforesaid the holders of the 'A' Ordinary Shares shall be
25 entitled to participate in the surplus pari-passu with the holders of the Ordinary Shares."

At a meeting of its board of directors, held on the 11th July 1976, it was decided to allot to all existing shareholders "A" ordinary shares of one pound each at a ratio of 1.1 to one held but partly paid up to 5 %, that is 50 mils each. The Corporation was offered the "A" ordinary shares to which it was entitled,
30 but its board of directors by resolution dated 11th February, 1976 irrevocably resolved to renounce the right of the Corporation to take up any proportion of the issue of "A" ordinary shares. The board, it is stated in the notice of opposition, took
35 this step in order to pass control of the applicant Company into the hands of residents of Cyprus in order to safeguard its future internal borrowing facilities.

On the 24th May, 1976, the respondent Bank, (*exhibit 1. F*) was informed by letter of the increase of the share capital and the

refusal of the Corporation to accept these new shares offered to it and that the board of directors of the applicant Company decided to offer 303,647 "A" ordinary shares to which the Corporation was entitled to the existing shareholders of the Corporation and further requested approval for the issue of this new shares to some non resident shareholders. 5

On the 30th June, 1976, another letter was addressed to the respondent Bank explaining that the reason the applicant Company increased its issued share capital was to revert the control of the Company to residents of Cyprus and that after the new shares were issued to the resident shareholders, the applicant Company was no longer controlled by non residents, and the granting of banking facilities to the Company in the form of loans, overdrafts, etc., no longer required the approval of the respondent Bank which should inform the applicant Company's bankers accordingly. 10 15

The views of the respondent Bank on the subject are contained in their letter of the 29th December, 1976, (*exhibit 1. I*) which reads:

"Lanitis Bros Ltd. 20

We refer to your today's meeting with our Mr. Ioannou during which you confirmed your letter of 30th June, 1976 and asked the Central Bank to inform the bankers of the above company that it is no longer controlled by non-residents. 25

We understand that the basis on which the above request is made lies on the refusal of Food Products Corporation Ltd to accept the shares in the above company—carrying special rights particularly as to dividend—offered to them which shares were, thereupon, distributed to the shareholders of the said Food Products Corporation Ltd. The main shareholders in Food Products Corporation Ltd since 3rd November, 1973 had been directed under section 32(1) of the Exchange Control Law, Cap. 199 to take all necessary steps so that the said company would not affect any of its rights or powers in relation to any securities held by it except with permission. Therefore, the said company should not have refused and its shareholders should not have accepted the new shares without previously seeking Central Bank permission. 30 35 40

As explained to you, within the spirit of good will announced, we are prepared to consider the scheme pursued by the Company, on its merits; provided that full details thereof are submitted to the Central Bank at the earliest.

5 In the meantime and irrespective of the question of whether the Company ceased to be controlled by non-residents, a question which, in the light of the foregoing, we are not as a matter of principle prepared to examine at this stage, we have informed Barclays Bank that we raise no objection
10 to their request to grant to the above company an overdraft facility of £ 200,000.- required until the end of summer, 1977”.

15 To this letter counsel replied by letter dated 17th January, 1977 (*exhibit 1J*) in which the stand of the applicant Company is reiterated. There followed some further correspondence to be found in the bundle of *exhibit 1* and the other *exhibits* produced in this case.

20 On the 7th June, 1977, Barclays Bank International Ltd., referred to the letter of the applicant Company dated 17th January, 1977, (*exhibit 1J*) in which it was alleged that the applicant Company was controlled locally and that any facilities extended to it by their bankers were not subject to the respondent Bank’s approval. The respondent Bank answered by its letter of the 28th June, 1977, (*exhibit 1N*) reiterating that the applicant
25 Company continued to be regarded as resident controlled by non residents, and any facilities extended to it were still subject to the Bank’s approval.

30 Banking facilities were, however, approved by the respondent Bank in the meantime. There followed a meeting with the Attorney-General of the Republic, with a view to discussing and resolving outstanding matters. The respondent Bank further approved an application submitted by the Chartered Bank Nicosia, for banking facilities for the applicant Company up to the 30th June, 1978, in the form of, an overdraft of £ 200,000.-,
35 letters of credit £ 75,000.- and letters of guarantee £ 20,000.

 On the 20th January, 1978, the respondent Bank renewed the facility for £ 40,000.- from Barclays Bank until the 31st December, 1978, and on the 30th January, 1978, it addressed the

letter to counsel acting for the applicant Company, which has given rise to the present recourse and which reads as follows:—

“ Lanitis Bros Limited

We received your letter of 20th December, 1977, in which you request us to take the view that the above company is no longer controlled by non-residents and to inform its bankers that they may lend money to it without prior permission under section 32(3) of the Exchange Control Law. 5

In this connection, we have to remark the following:—

- (a) We do not have evidence as to the extent to which present shareholding is beneficially owned by residents. 10
- (b) Irrespective of (a) above, the refusal of Food Products Corporation Inc. to accept the ‘A’ ordinary shares—on the basis of which the said shares were offered and issued to the shareholders in Food Products Corporation Inc.—was made in contravention of the directives given under section 32(1), of which directives Lanitis Bros. Ltd. was fully aware. Among others, our letter to them dated 20. 11. 73 refers. 15 20
- (c) The circumstances under which the scheme was put through, do not lend themselves to the conclusion that transactions between Food Products Corporation Inc. and Lanitis Bros. Ltd. are at arms length and that the latter is no longer controlled by the former. 25

In view of the above, we are unable to accede to your request and we consider that Lanitis Bros. Ltd. continues to be a resident company controlled by non-residents and to which section 32(3) of the Law applies. 30

On this occasion, we wish to point out that if you wish the local credit facility of £ 200,000 approved by us for the Company until 30th June, 1978, to be extended, you are required to give us the reasons for such extension, and, in any case, to explain the following:— 35

- (a) Under what circumstances the Board of Lanitis

5 Bros. Ltd. considered that the amount of about £ 370,000.— was 'not immediately required' (see Memorandum of Association of the Company Clause 3(g) and, therefore, could be invested in shares of Lanitis Brothers Trading Ltd., a company established in Bahamas, being a subsidiary of Lanitis Bros. Ltd.?

10 (b) Under what circumstances Lanitis Brothers Trading Ltd., so being a subsidiary, lent the whole capital paid in by Lanitis Bros. Ltd. (i.e. about £ 370,000) to Food Products Corporation Inc., in terms of Cyprus pounds, for a period ranging from 70 to 125 years at the nominal rate of interest of 1 % p.a. with the exception of about £ 50,000.— which were lent for a similar period at 3-4 % p.a.?

15 (c) Irrespective of above, why Food Products Corporation Inc. which still has an interest in the capital and undistributed profits of Lanitis Bros. Ltd. to the extent of 88.5 % should not be called upon to contribute to the finances of Lanitis Bros. Ltd. at terms similar to those at which Lanitis Bros. Ltd. lent, through its subsidiary, money to Food Products Corporation Inc.?"

25 It is not in dispute that a breach of a directive given under section 32 constitutes a criminal offence. Part II of the Fifth Schedule to the law contains the general provisions as to offences. Under section 1(1) thereof, any person in or resident in the Republic who contravenes any restriction or requirement imposed by or under this Law, and any such person who
30 conspires or attempts, or aids, abets, counsels or procures any other person, to contravene any such restriction or requirement as aforesaid, shall be guilty of an offence punishable under this Part of the Schedule.

Sections 2 and 3 of this Part of the Schedule read as follows:—

35 “(2) Where an offence punishable under this Part of this Schedule has been committed by a body corporate, any person who at the time of the commission of the offence was a director, general manager, secretary or other similar officer of the body corporate, or was purporting to

act in any such capacity, shall be deemed to be guilty of that offence, unless he proves that the contravention was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances. 5

(3) Any person who commits an offence punishable under this Part of this Schedule shall be liable –

(a) on summary conviction, to imprisonment for not more than three months or to a fine or to both; 10

(b) on conviction on information, to imprisonment for not more than two years or to a fine or to both, and where the offence is concerned with any currency, any security, any gold, any goods or any other property, the Court may, if they think fit so to do, order the currency, security, gold, goods or property to be forfeited”. 15

Moreover, by section 36(1) of the Law, the provisions of the Fifth Schedule are given effect for the purpose of its enforcement.

It is the case for the applicant Company that the Court in deciding whether the applicant Company is controlled by residents or non residents should not go behind its register and the Court should follow in this respect what was decided in the case of *Lanitis Bros., Limited* (No. 2) (*supra*). Furthermore, that the renunciation by the Corporation of their option to take up the new 'A' ordinary shares offered to them by the applicant Company, does not amount to a breach of the directive given under section 32 of the Law and that even if it did amount to such breach, same was not material to the determination of the question of control of the applicant Company covered by section 32(3) of the Law. It was urged that this directive was not clear and that in interpreting the relevant parts of section 32, the Court should use as an aid of construction the mischief rule in the same sense that it could not have been within the contemplation of the legislature to force a Company, such as the applicant Company, resident in the Bahamas, to take up a share option in a Cyprus Company; the intention of the Exchange Control Law being to prevent the taking out of the country capital and not to compel a foreign resident to bring capital into the country. 20
25
30
35

It was further argued that the *Ejusdem Generis* Rule was applicable in interpreting the words "or doing anything" which followed the words "refrain from selling, transferring" in para. (v) of sub-section 1 of section 32 and that the said words do not cover the case of renunciation of a rights issue option; also that the words "in relation to" to be found in the said para. (v) refer to existing assets and matters or rights arising out of the shareholding of the Corporation and nothing was done by the Corporation in respect of such assets and rights and do not refer to potential new assets as the rights issue were.

I have tried to condense the very elaborate and lucid arguments advanced on behalf of the applicant Company and I hope I shall be forgiven for any injustice I may be doing to Mr. Johnson who argued the case for them if I have omitted to refer expressly to any of the various legal points raised by him or that by such condensation I have deprived the various legal points raised of their force. I shall endeavour, however, to answer every material point raised in the discharge of my duty to adjudicate upon the rights of the parties in the present recourse.

Before proceeding any further I would like to summarize the legal position under section 32 of the law. By virtue of it, the respondent Bank has power to serve on any resident of the Republic notice that it wishes certain requirements to be complied with by a foreign Company. If, therefore, a person served with such a notice can by doing or refraining from doing any act cause the foreign Company to comply with any of the requirements, or remove any obstacle to the foreign Company complying with any of the requirements, or render it in any respect more probable that the foreign Company will comply with any of the requirements, such person, must, except so far as permission to the contrary may be given by the respondent Bank, do that act or as the case may be refrain from doing it.

It should be observed that the duty so cast upon a person served with a notice includes the case where the doing or refraining from doing any act will merely render it in any respect more probable that the foreign Company will comply with any of the requirements contained in such notice. The success in the ultimate achievement of the carrying out of such a duty need not be certain.

The requirements with respect to which such a notice may be

given are to be found in the second paragraph of section 32(1) of the law which has been earlier set out in full in this judgment and which I need not quote once more here. In the present case, however, under the directive given every person served therewith was as a shareholder required to take all necessary steps to ensure that the Corporation would comply with the requirements which were mentioned in the letter addressed to the Corporation and in particular to refrain from selling, transferring or doing anything which affected its rights or powers in relation to quoted and unquoted securities without the prior approval of the respondent Bank. 5 10

This directive in effect reproduced the wording of section 32(1) and by requiring a shareholder to take all steps to ensure that the Corporation would comply with the requirements contained therein coupled with the express reference to the provisions of section 32(1) to which the attention of each shareholder was drawn, cast a duty on the recipient thereof to do or refrain from doing any act which would cause the foreign Company to comply with such requirements. Each shareholder had thereunder and by virtue of the said statutory provision, a duty both positive and a negative one, in the sense of doing or refraining from doing any act which would cause or remove any obstacle or render it in any respect more probable that the Corporation would comply with the directive. 15 20

In our case and on the material before me, none of the resident shareholders served with the aforesaid directive has done anything or refrained from doing anything in compliance with the statutory duty cast upon them. More so nothing was done by either Mr. Nicolaos C. Lanitis, who is a director shareholder and trustee of the members of the Corporation (see *exhibit 4*), nor Mr. Vladimir Lanitis who is the owner of about 64 % of the share capital of the Corporation. I have mentioned these two persons as in so far as the former is concerned, he being a director might be taken to have participated in the decision of the renunciation, though aware of and bound by the directive did nothing to make it probable that the Corporation would comply with its requirements. The latter had by himself and not necessarily jointly with any other shareholder or shareholders, the power to take some steps for the purpose of ensuring that the requirements of the directive were complied. Under a special resolution of the Corporation passed on the 25th day of Februa- 25 30 35 40

ry, 1972 (*exhibit 3*) he could cause the office of directors to be vacated by requesting them in writing to resign. Under para. 70(B)(v) thereof "The office of a director shall be vacated if he be requested in writing by a member or members together holding a majority in value of the issued and paid up share capital to resign". Nothing was done in the present case to that effect. The position being so I need only say that none of the other shareholders has done anything to that direction.

The requirement contained in the directive in the instant case was that the Corporation refrained from selling, transferring or doing anything which affects its rights or powers in relation to the securities mentioned in the notice. These securities included its shares in the applicant Company. The words "doing anything" in the said directive which are a reproduction of the same words to be found in para. (v) of section 32(1) of the Law, should be read in conjunction with the words that follow them namely "which affect its rights or powers in relation" to such securities.

The Ejusdem Generis Rule which is not an absolute one, does not apply in the present case as an examination of this section, shows that the general words should be construed generally and in conjunction with the words following them notwithstanding that they follow more specific terms.

By renouncing the option for the rights issue of the applicant Company, the Corporation was doing something which affected its rights and powers in relation to its shares, that is, its securities in the applicant Company. In other words, there was a positive act which affected the rights of the Corporation within the meaning of the directive and the section as by doing so the Corporation lost control of the applicant Company and the dividends to which it would be entitled. Also the interest of the Corporation in the net worth of the applicant Company was thereby substantially reduced by such renunciation.

Moreover all these resident shareholders who were served with the directive in addition to doing anything for the purpose of causing the Corporation to comply with it, accepted the shares offered to them after the renunciation of the rights issue by the Corporation.

The objective of the directive was to preserve the situation in

the Corporation through its resident in Cyprus shareholders as it was when same was served on them. By the breach of the directive the rights of the Corporation were affected and also such breach gives rise to criminal responsibility by virtue of Part II of the Fifth Schedule to the Law. Out of this illegality no rights could be derived as the renunciation by the Corporation and the acceptance by its shareholders of the new shares of the applicant Company was an illegal and void transaction as being an act forbidden by Law within the meaning of section 23 of our Contract Law, Cap. 149.

In deciding whether in giving directions under section 44(2) of the Law, that for all or any of the purposes of the Law a person, and this in my view includes a legal person, is to be treated as resident or not, the circumstances under which a shareholding is obtained in such a legal person are material factors to be taken into consideration by the respondent Bank. This is not an instance of merely going behind the corporate veil of the applicant Company, but an instance of exercise of discretion and the taking into account in such exercise of discretion of those factors that can legitimately be taken into consideration. Definitely in my view the outcome of an illegality going to the root of the shareholding in a company limited is a factor that cannot be ignored in giving a direction under section 44(2) of the Law. This is the ground upon which the *Lanitis case (supra)* is distinguishable from the present one, as in that case no question of illegality existed. It turned on the interpretation of the meaning of the word "persons" in section 32(3) of the Law and as to whether same included corporate bodies or not and also on the meaning of the words "controlled (whether directly or indirectly)" in the case of a resident Company. In the present case the question for determination has been that once it has been found that there has been a breach of the directive and illegality results therefrom, should such illegality be ignored by the respondent bank when determining what directions should be given under section 44(2) of the Law? This question has already been answered in the negative.

It has been further argued that this was an instance as parabolically put by learned counsel for the applicant Company where the hens were brought back into the hen-coop and therefore a situation that cannot be considered as constituting the sort of mischief intended to be remedied by this Law. The

Mischief Rule, in my opinion, does not come into play, particularly so in view of my conclusions regarding the breach of the directives and the legal consequences arising therefrom.

- 5 I have explained what the objective of the directives were and why the directives and of course the Law, had to be complied with. If my approach on the subject is correct, then the result intended to be achieved—the bringing back of the hens into the hen-coop—could have been brought about if under section 32(1) of the Law the permission of the respondent Bank was sought.
- 10 In such a case the respondent Bank, in the exercise of its administrative discretion as to whether it should grant or not a permission, should undoubtedly take into consideration all relevant factors and such exercise of a discretion could be the subject of judicial control under Article 146 of the Constitution.
- 15 For all the above reasons this recourse is dismissed but in the circumstances I make no order as to costs.

Application dismissed. No order as to costs.