

1978 January 30

[TRIANTAFYLLIDES, P., STAVRINIDES, L. LOIZOU, JJ.]

COSTAS KYRIAKOU,

*Appellant-Plaintiff,*

v.

C. D. HAY & SONS AND ANOTHER,

*Respondents-Defendants.*

(Civil Appeal No. 5565).

*Civil Procedure—Appeal—Further evidence—Principle on which received—Evidence sought to be adduced could have been obtained with reasonable diligence for use at the trial—Application refused—Order 35, rule 8 of the Civil Procedure Rules and section 25 (3) of the Courts of Justice Law, 1960 (Law 14 of 1960).*

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In the course of the hearing of this appeal counsel for the appellant applied for leave to adduce further evidence by recalling a witness, who was called by the respondents at the trial, so that he could give further testimony and be cross-examined, regarding certain real evidence on which he has based technical calculations made by him. At the trial the testimony of this witness concerning the real evidence in question was not challenged, even though there was ample opportunity to do so.

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*Held, dismissing the application,* for the Court to allow further evidence on appeal it must be shown, *inter alia*, that the evidence could not have been obtained with reasonable diligence for use at the trial. As it has not been shown to the satisfaction of the Court of Appeal that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial, the application has to be refused. (See *Ladd v. Marshall* [1954] 3 All E.R. 745 at p. 748, *Paraskevas v. Mouzoura* (1973) 1 C.L.R. 88 at p. 98 and *Skone v. Skone and Another* [1971] 2 All E.R. 582, at p. 586).

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*Application dismissed.*

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Cases referred to:

*Ladd v. Marshall* [1954] 3 All E.R. 745 at p. 748;

*Paraskevas v. Mouzoura* (1973) 1 C.L.R. 88 at p. 98;

*Skone v. Skone and Another* [1971] 2 All E.R. 582 at p. 586.

## 5 Application.

Application for leave to adduce further evidence by allowing a witness, who was called at the trial, to be recalled in an appeal against the judgment of the District Court of Nicosia (Stavri-nakis, P.D.C. and Orphanides, S.D.J.) dated the 25th February, 10 1976 (Action No. 2633/72) whereby plaintiff's claim for the rescission of a hire purchase agreement between the parties was dismissed.

*Chr. Dermossoniades*, for the appellant.

*E. Ioannidou (Mrs.)*, for the respondents.

15 The following judgment was delivered by:

TRIANTAFYLIDIS P.: At this stage of this appeal counsel for the appellant is applying that, in the exercise of our powers under Order 35, rule 8, of the Civil Procedure Rules, as well as under section 25 (3) of the Courts of Justice Law, 1960 20 (Law 14/60), we should receive further evidence for the purposes of this appeal, by allowing a witness, who was called by the respondents at the trial, namely George Stratis (D.W. 3), to be recalled before us so that he can give further testimony, and be cross-examined, regarding certain real evidence on which he 25 has based technical calculations made by him.

At the trial his testimony concerning the real evidence in question was not challenged, even though there was, of course, ample opportunity to do so.

We have to exercise our relevant discretionary powers on the 30 basis of certain well-settled criteria such as those which have been formulated in, for example, *Ladd v. Marshall*, [1954] 3 All E.R. 745, where Denning L.J.—as he then was—stated the following (at p. 748):—

35 “ In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the

evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.” 5

The above approach has been referred to, with approval, in the decision of our own Supreme Court in *Paraskevas v. Mouzoura*, (1973) 1 C.L.R. 88, 98, and, also, in the decision of the House of Lords in England in *Skone v. Skone and Another*, [1971] 2 All E.R. 582, 586. 10

In applying the aforementioned criteria we find that this application has to be refused because it has not been shown to our satisfaction that the evidence sought to be adduced before us could not have been obtained with reasonable diligence for use at the trial; the witness in question could have been cross-examined about the real evidence concerned and asked to explain further anything relevant thereto. 15

In the circumstances this application is dismissed.

*Application dismissed.* 20