

1987 November 24

\(A LOIZOU LORIS STYLIANIDES JJ)

THELMA TRIFONIDES,

*Appellant-Defendant,*

v

1 ALPAN (TAKI BROS) LIMITED,  
2 ALPAN FURNISHINGS LIMITED,

*Respondents - Plaintiffs*

*(Civil Appeal No 6937)*

*Appeal — Fresh evidence, application for — The Courts of Justice Law, 1960 (14/60) section 25(3) and The Civil Procedure Rules, Order 35, Rule 8 — The three conditions that must be fulfilled — Review of the case law*

5 This is an application by the appellants for adducing further evidence before this Court. The facts relied upon in support of the application are sufficiently summarised in the judgment.

10 Held *dismissing the application* (1) The maxim interest republicae ut finis sit litum is well embedded in our system of administration of justice. The evidence which is available or could with reasonable diligence be obtained must be produced before the trial Court. A further principle that is involved is that a successful litigant should not be deprived without good reason of the fruits of his success.

15 Justice, however, requires that evidence which is relevant to the issues before the trial Court and which could not, with reasonable diligence, be traced and produced, be heard by the Court of Appeal. To exclude it would lead to injustice.

20 (2) The Court developed three conditions, which must be satisfied before further evidence can be received by the Court of Appeal. They were set out by Denning, L.J., as he then was, in *Ladd v Marshall* [1954] 3 All E.R. 745 at p. 748 as follows: 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  
25 apparently credible, although it need not be incontrovertible.

**Trifonides v. Alpan (Taki Bros) (1987)**

(3) The expression «for use at the trial» in the first condition means at any stage before delivery of judgment

(4) In this case the first part of the evidence sought to be adduced does not satisfy the first of the said conditions whilst the second part does not satisfy the second condition

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*Application dismissed with costs*

*Cases referred to*

*Simadhiakos v The Police*, 1961 C L R 64,

*Ladd v Marshall* [1954] 3 All E R 745,

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*Braddock v Tillotson's Newspaper Ltd* [1950] 1 K B 47

*Pounkkos (No 2) v Fevzi*, 1962 C L R 283

*HjiSavva and Others v Panayiotou* (1966) 1 C L R 6,

*Ashiotis and 13 Others v Weiner and 4 Others* (1966) 1 C L R 274,

*Felekkus v The Police* (1968) 2 C L R 151,

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*Athanassiou v The Attorney-General of the Republic* (1969) 1 C L R 160,

*Papadopoulos v Kouppis* (1969) 1 C L R 584,

*Paraskevas v Mouzoura* (1973) 1 C L R 88,

*Moumdzis v Michaelidou and Others* (1974) 1 C L R 226,

*Evdokimou v Roushias* (1975) 1 C L R 304,

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*Kynacou v C D Hay & Sons and Another* (1978) 1 C L R 100,

*Pavlidou and Another v Yerole mou and Others* (1982) 1 C L R 912,

*HjiSotenou v Director of Lands and Surveys and Another* (1983) 1 C L R 567,

*Mobil Oil v Ellinas and Others* (1987) 1 C L R 1

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**Application.**

Application by defendant for leave to adduce further evidence.

*P. Mouaimis*, for the appellant.

*K. Michaelides with A. Yiorkadjis*, for the respondents.

*Cur. adv. vult.* 30

A. LOIZOU, J.: The decision of the Court will be delivered by Mr. Justice Stylianides.

STYLIANIDES, J.: This is an application to this Court to hear further evidence.

5 The application is based on s. 25(3) of the Courts of Justice Law, 1960, (14/60) the Civil Procedure Rules, 0.35, r.8 and 0.48 rr. 1, 2 and 3.

The facts relied upon are set out in the affidavit of the appellant. This appeal is directed against the judgment of the Full District  
10 Court of Limassol, whereby it ordered specific performance of a contract of lease of the shop of the appellant.

The evidence sought to be adduced is divided in the affidavit into two parts: that which existed and was within the knowledge of the applicant prior to the pronouncement of judgment by the  
15 District Court; and evidence which came into existence after the delivery of such judgment.

The first part is that the interim order, restraining the appellant from selling, disposing, exchanging, leasing, or parting in any way with the possession of the said shop until the final determination of  
20 the action, ceased to be in force on 28/2/85, because the respondents failed to satisfy the condition of granting, by renewal, of a bank guarantee.

That as there was no interim order in force, on 15/3/85 by virtue of a contract of lease she let the subject shop to Kyros Chrysanthou  
25 Ltd., who started necessary construction works in the said shop at considerable expenses. This came to the knowledge of the respondents, who were running a shop nearby on the same avenue. A large advertisement with the words «Προσεχώς Κύρος Χρυσάνθου» was placed on the frontage of the shop.  
30 Furthermore certain telexes, were exchanged between the counsel in consequence of this lease.

The second part of the evidence is that on 15/5/85 the respondents in this appeal filed in the District Court of Limassol Action No. 2827/85 against the aforesaid Kyros Chrysanthou Ltd.;  
35 they secured an interim order restraining the latter from entering, using, possessing, or interfering in any way with the subject shop. The said interim order became final on 7/6/85 on condition that the respondents rendered security in the sum of £25,000.- by bank

guarantee; Kyros Chrysanthou appealed against the said order of the Court. The respondents, again, failed to renew the bank guarantee and the interim order issued in Action 2827/85, which is subject to appeal, lapsed on 6/6/86; thereafter Kyros Chrysanthou proceeded with the completion of the works 5 necessary for the carrying out his business in the said shop.

The respondents opposed this application. The notice of opposition is supported by affidavit sworn by the Managing Director of the respondents.

The main point on which the application is opposed is that the 10 further evidence sought to be adduced before the Court of Appeal was within the knowledge of the applicant before the delivery of judgment by the trial Court; and that the second leg of the evidence is irrelevant for the purpose of this appeal.

The matter is governed by s. 25(3) of the Courts of Justice Law, 15 1960 and Civil Procedure Rules, 0.35, r.8.

Sub-section 3 of s. 25 extended widely the powers of the Court of Appeal set out in previous legislation obtaining in this country. Law 14/60 (Republic) was a new law envisaged by the Constitution after the colonial state came to an end and the new 20 Republic was declared.

The provisions of this sub-section were considered by the High Court in *Simadhiakos v. The Police*, 1961 C.L.R. 64. The judicial dichotomy which was introduced by the Zurich Agreement and the Constitution has ceased to apply after the enactment of the 25 Administration of Justice (Miscellaneous Provisions) Law, 1964 (No. 33/64). Even in the early stages of this Republic the provisions of sub s. 3 was not favoured by the High Court and was given narrow interpretation.

Rule 8 of 0.35 of the Civil Procedure Rules continues to be in 30 operation by virtue of 0.3 of the Rules of Court (Transitional Provisions), 1960, that reads as follows:-

«3. Τηρούμενων των διατάξεων του Συντάγματος, πας κατά την αμέσως προηγούμενη της ημέρας ανεξαρτησίας ημέραν ισχύων διαδικαστικός 35 κανονισμός, πίναξ δικαστικών τελών και η εν τοις δικαστηρίοις ακολουθουμένη και νόμω καθοριζομένη πρακτική και δικονομία (practice and procedure) θα

5 εξακολουθούν να ισχύουν μεχρις ου τροποποιηθούν  
 διά μεταβολης, προσθήκης ή καταργήσεως, δυνάμει  
 διαδικαστικού κανονισμού και θα ερμηνεύονται και θα  
 εφαρμόζονται μετα τοιούτων μετατροπών καθ' ο  
 μέτρον είναι τουτο αναγκαίον προς συμμόρφωσιν  
 προς τας διαταξεις του Συντάγματος».

10 («Subject to the provisions of the Constitution, every Rule  
 of Court, table of Court fees and the practice and procedure  
 followed by the Courts and prescribed by law in force on the  
 day immediately before the day of Independence will  
 continue to be in force until amended whether by variation,  
 addition or repeal, by Rules of Court and shall be interpreted  
 and applied with such modifications that are necessary for  
 compliance with the provisions of the Constitution»)

15 No new Rules were made either by the High Court, or by its  
 substitute, the present Supreme Court

The material part of r 8 of O 35, which relates to the admission  
 of further evidence, is almost identical to the provisions of r 9,  
 O 58 of the English Rule of Court (old)

20 The principles governing the admission of further evidence by  
 the Court of Appeal upon question of fact are by now well settled

25 The maxim interest reipublicae ut finis sit litur is well  
 embedded in our system of administration of justice. The evidence  
 which is available or could with reasonable diligence be obtained  
 must be produced before the trial Court. We apply the adversary  
 system in our Courts. The litigants have to adduce the evidence in  
 support of their case before the trial Court. The Court of Appeal  
 will not usurp the powers of the trial Courts in hearing evidence.  
 A further principle that is involved is that a successful litigant  
 30 should not be deprived without good reason of the fruits of his  
 success.

Justice, however, requires that evidence which is relevant to the  
 issue before the trial Court and which could not, with reasonable  
 diligence, be traced and produced, be heard by the Court of  
 35 Appeal. To exclude it would lead to injustice.

Having regard to the aforesaid general principles, the Courts  
 have developed three conditions which must be satisfied before  
 further evidence can be received by the Court of Appeal. They

were lucidly set out by Denning, L.J., as he then was, in *Ladd v. Marshall* [1954] 3 All E.R. 745 at p. 748 as follows:-

«... 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.»

The aforesaid conditions were adopted and applied by the Supreme Court in this country.

Before *Ladd* case Tucker, L.J. in *Braddock v. Tillotson's Newspaper Ltd.* [1950] 1 K.B., 47, at p. 50 said:-

«It has been the invariable practice of the Court of Appeal in this country to confine the admission of fresh evidence, in circumstances such as this to evidence which could not reasonably have been discovered before the trial, and to evidence which, if believed, either would be conclusive or, as has been said by some judges, to evidence which would lead to the reasonable probability that the verdict would have been different.»

The Supreme Court dealt with the question of admission of further evidence in a number of cases since 1960. (See, inter alia, *Yiannakis Kyriacou Pourikkos (No. 2) v. Mehmed Fevzi*, 1962 C.L.R. 283; *HjiSavva and Others v. Panayiotou* (1966) 1 C.L.R. 6; *Ashiotis and 13 Others v. Weiner and 4 Others* (1966) 1 C.L.R. 274; *Felekkis v. The Police* (1968) 2 C.L.R. 151; *Savvas Athanassiou v. The Attorney-General of The Republic* (1969) 1 C.L.R. 160; *Papadopoulos v. Kouppis* (1969) 1 C.L.R. 584; *Paraskevas v. Mouzoura* (1973) 1 C.L.R. 88; *Moumdjis v. Michælidou and Others* (1974) 1 C.L.R. 226; *Evdokimou v. Roushias* (1975) 1 C.L.R. 304; *Kyriacou v. C.D. Hay & Sons and Another* (1978) 1 C.L.R. 100; *Pavlidou and Another v. Yerolemou and Others* (1982) 1 C.L.R. 912; *HjiSoteriou v. Director of Lands and Surveys and Another* (1983) 1 C.L.R. 567; *Mobil Oil v. Ellinas and Others* (1987) 1 C.L.R. 1.)

In the present application the first part of the evidence was not only obtainable with reasonable diligence, but in fact was within the knowledge of the plaintiff prior to the pronouncement of judgment.

- 5 The expression in the conditions «for use at the trial» includes in our opinion any stage before judgment is delivered by the trial Court. The armory of the rules provides for machinery for application to re-open the case and adduce such evidence, which was obtained, or was created after judgment was reserved.
- 10 Therefore the first part of the evidence does not satisfy the first condition.

The second part of evidence satisfies the first condition. Does it satisfy the second?

In the *Annual Practice 1958*, vol. 1, at p. 1679 we read:-

- 15 «As regards the second condition, ..... Hanworth, M.R., in *R. v. Copestake*, [1927] 1 K.B. 468, at p. 474, thought 'the evidence must be of such a character that not merely is it relevant but of such importance that it would have affected the judgment of the tribunal if it had been before them at the original hearing of the case.' Scrutton, L.J., at p. 477, thought 'it must be of such weight
- 20 as, if believed, would probably have an important influence on the result' (and see per Birkett, L.J., in *Corbett v. Corbett*, [1953] P. 205 at p. 215). The Privy Council in *Hip Foong Hong v. Neotia & Co.*, [1918] AC. 888 at p. 894, thought that the evidence must be
- 25 'of such a character that it would, so far as can be foreseen, have formed a determining factor in the result' (words adopted by Lord Maugham in *Rowell v. Pratt*, [1937] A.C. at p. 116, by Evershed, M.R., in *Corbett v. Corbett*, supra, at p. 215, and again by the Privy Council in *Andrew v. Andrew*, [1953] 1 W.L.R. 1454).»

- 30 We are of the view that the evidence which came into existence after the delivery of the judgment by the trial Court falls short of satisfying the second condition.

- In the light of the aforesaid the application is dismissed with costs in favour of the respondents in this appeal to be paid at the
- 35 final determination of this appeal.

*Application dismissed  
with costs.*