

IFIGENIA PATSALIDOU,

*Appellant-Plaintiff,*

v.

ANDREAS COSTA KYRIAKIDES,

*Respondent-Defendant.*

—  
IFIGENIA  
PATSAIDOU  
v.  
ANDREAS  
COSTA  
KYRIAKIDES

(Civil Appeal No. 5522).

*Civil Procedure—Pleadings—Amendment—Statement of claim—  
Claim resting on undue influence—Sought to be amended,  
during the hearing of appeal, so as to rest on fraud—Different  
considerations apply to a claim based on undue influence and  
to one based on fraud—Application refused—Karmiotis v.  
Pastellis, 1964 C.L.R. 447 followed.*

5

On April 8, 1971, the appellant-plaintiff executed a power  
of attorney authorising the respondent-defendant, *inter alia*, to  
transfer into his name the registration of a house belonging to  
her and to withdraw £1,121 standing to her credit in the  
Bank of Cyprus.

10

Her claim in the Court below for the recovery of the above  
property, which was based on undue influence, was partly dis-  
missed. When she appealed against the dismissal of her claim  
she also applied for leave to amend the statement of claim by  
adding at the end thereof a paragraph alleging fraud.

15

*Held*, dismissing the application, that different considera-  
tions apply to a claim based on undue influence and to one  
based on fraud; and that in the circumstances it would be  
wrong to allow the proposed amendment in this Court (*Kar-  
miotis v. Pastellis*, 1964 C.L.R. 447 applied).

20

*Application dismissed.*

Cases referred to:

*Kemal v. Kasti*, 1962 C.L.R. 317;

25

*Karmiotis v. Pastellis*, 1964 C.L.R. 447 at pp. 452, 453;

*Courtis v. Iasonides* (1970) 1 C.L.R. 180;

*Loucaides v. C.D. Hay & Sons, Ltd.* (1971) 1 C.L.R. 134.

1977  
Febr. 18  
—  
IFIGENIA  
PATSAJIDOU  
v.  
ANDREAS  
COSTA  
KYRIAKIDES

### Application.

Application by plaintiff for leave to amend the statement of claim, made in the course of the hearing of an appeal against the judgment of the District Court of Nicosia (Chr. Ioannides, P.D.C. and A. Ioannides, D.J.) dated the 4th December, 1975 (Action No. 5930/71) whereby the defendant was ordered to pay to plaintiff the sum of £1,027.150 mils as money received by defendant by virtue of a power of attorney. 5

*L. Papaphilippou*, for the appellant. 10

*D. Lambides*, for the respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by:-

STAVRINIDES, J.: In this appeal the plaintiff is applying for leave to amend the statement of claim by adding at the end thereof a paragraph alleging fraud. 15

The applicant is the respondent's sister. On April 8, 1971, she executed a power of attorney authorising the respondent, *inter alia*, to transfer into his name the registration of a house belonging to her and to withdraw £1,121 odd standing to her credit in the Bank of Cyprus. 20  
The material part of the statement of claim reads:

"3. The plaintiff executed the above power of attorney while she was seriously ill and after moral and undue influence on the defendant's part. 25

### Particulars

- (a) The defendant persuaded the plaintiff to move to his house suggesting to her that her life was in danger with her husband.
- (b) The plaintiff was so ill that she did not have a free will and thus gave in to the influence of the defendant and moved to his house. 30
- (c) The plaintiff living in the defendant's house became prey to his pressures. The defendant was representing to her that her death was near and in view of this that the plaintiff should execute a general power of attorney to 35

enable the defendant to administer her property”.

1977  
Febr. 18

IFIGENIA  
PATSAIDOU  
v.  
ANDREAS  
COSTA  
KYRIAKIDES

The proposed new paragraph reads:

5 “10. Further and in the alternative the plaintiff alleges that the defendant persuaded the plaintiff to sign the said power of attorney and he acted on the basis thereof fraudulently and/or with intent to defraud and convert to his own use the above-mentioned property of the plaintiff and/or in abuse of confidence.

10  
Particulars

15 (a) The defendant persuaded the plaintiff to execute the said power of attorney saying to her that his intention was that ‘a means should be employed to protect her house from her husband’, whereas his object was and in fact he converted all the property of the plaintiff to his own use.

20 (b) The defendant converted to his own use the above-mentioned property of the plaintiff and refuses to restore it into her name”.

25 Counsel for the applicant relies on Order 35, r. 8, and Order 25, r. 1 et seq., of the Civil Procedure Rules and three Cyprus cases, viz. *Kemal v. Kasti*, 1962 C.L.R. 317; *Karmiottis v. Pastellis*, 1964 C.L.R. 447; and *Courtis v. Iasonides*, (1970) 1 C.L.R. 180. In the first and third of these cases the application for amendment was made to the District Court, so that they are of no assistance in the instant case. In the second case, where it was made to this court, it was refused, and the relevant part of the judgment reads (pp. 452, 453):

35 “At the opening of the appeal before us, Mr. Tornaritis applied for amendment of the pleadings which, as pointed out in the judgment of the trial court, would be required to connect plaintiff’s claim with the evidence adduced. His client’s claim is twofold, learned counsel said. She claimed the right of passage over a public pathway; but if the evidence failed to establish a public path, then plaintiff, as owner and

1977  
Febr. 18  
—  
IFIGENIA  
PATSAIDOU  
v.  
ANDREAS  
COSTA  
KYRIAKIDES

occupier of plot 173 claimed a right of way to her plot over 194, now belonging to the defendant 2, and plot 174 belonging to a third person, not a party in this action.

We indicated at that stage that we would deal with the application for amendment, if necessary, after hearing appellant's counsel on the merits. And having done so, we do not think that this litigation should be allowed to go on further. We refuse the application for amendment, and we find it unnecessary to call on the respondent on the merits. 5 10

As we have pointed out during the hearing of the appeal, the right to use a public pathway, or a public road as such, is, legally, of a different nature to the right of owner or occupier of immovable property to pass over property belonging to another person, for certain purposes connected with the enjoyment of the dominant property. The matter is so obvious that it requires no further elaboration. The claim to the exercise of a right of way over the servient property is inconsistent with the allegation for the existence of a public pathway thereon. The evidence to establish a right of way attached to the enjoyment of property would, normally, disprove the existence of a public path there. 15 20 25

By her present action the plaintiff claimed judicial remedies against interference by the defendant with her (plaintiff's) use of an alleged public pathway. The existence of such a pathway having been denied by the defendants, the plaintiff set out to prove it. But at the conclusion of the trial it was submitted on her behalf that plaintiff had established a private right of way; a right which did not form part of the claim in the action. We are, therefore, of the opinion that plaintiff's action was rightly dismissed. And this appeal must fail. 30 35

On the other hand let it be made quite clear that this litigation cannot, and does not purport to, adjudicate upon the existence of any right of way not forming part of the claim herein; nor can it determine the existence, or otherwise, of a public path, as far as 40

the public authorities are concerned, or other members of the general public”.

1977  
Febr. 18

—  
IFIGENIA  
PATSAIDOU  
v.  
ANDREAS  
COSTA  
KYRIAKIDES

5 In our view the second case presents a cogent analogy to the present one. Just as, in that case, in the District Court the plaintiff rested his claim on a public right of way and on appeal sought to rely on a private right of way, so the plaintiff here, having relied in the District Court on undue influence, now seeks to rely on fraud; and just as different considerations apply to a claim based on a public right of way and to one based on a private right of way, so here different considerations apply to a claim based on undue influence and to one based on fraud. In the circumstances it would be wrong to allow the proposed amendment in this court.

15 For these reasons the application must be dismissed.

Reference may also be made to *Loucaides v. C.D. Hay & Sons, Ltd.*, (1971) 1 C.L.R. 134, where Hadjianastassiou, J., giving the judgment of the court, referred to the test to be applied in determining an application for amendment of pleadings in a passage at pp. 143, 144 which reads:

25 “On the particular facts of this case having regard to what took place at the trial, I came to the conclusion that an injustice would be done to the other side by allowing the amendment and I would, therefore, not accept the submission of the counsel for the respondent on this point”.

30 We think it appropriate to conclude by paraphrasing in a shortened form the last paragraph of the passage we have cited from the judgment in the *Karmiotis* case: On the other hand let us make it quite clear that this litigation cannot, and does not purport to, adjudicate upon the existence of any right to a remedy in respect of the registration of the house in the respondent’s name which may be based on fraud.

35 Application dismissed with costs. The appeal to be fixed by the registrar for hearing.

*Application dismissed with costs.*