16,1982

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 7 of 1981

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN:

F. PLAN LIMITED — Appellants (Defendants)

- and -

TIFFANY GLASS LIMITED — Respondents (Plaintiffs)

CASE FOR THE APPELLANTS

Record

1. This is an appeal from a judgment dated 21st June 1979 of the Court of Appeal of Trinidad and Tobago (Hyatali C.J., and Corbin and Kelsick JJA) :- — p. 81 l.1 - p. 82 l.16

(a) Allowing an appeal by the Respondents herein from, and setting aside, a judgment dated 5th May 1978 of the Honourable Mr. Justice MacMillan dismissing an application by the Respondents for an Order that they might be at leave to sign final judgment in the action against the Respondents for possession of premises at Lot No. 7 Diamond Vale Industrial Estate, Diamond Vale, in the Ward of Diego Martin, Trinidad; for $36,000 arrears of rent; for mesne profits at the rate of $1500 per month from 15th September 1975; and for costs; and — p. 28; pp. 29-40

(b) Ordering that the Appellants herein shall deliver up possession of the said premises; and should pay to the Respondents $36,000 arrears of rent, mesne profits at the rate of $1500 per month from 15th September 1977 until delivery up of possession; interest at the rate of 4% per annum on the arrears of rent and the mesne profits from 15th September 1975 to 21st June 1979; and the taxed costs of the Appeal and in the Court below; and — p. 52 ll.10 - 14

(c) Dismissing the cross-appeal by the Appellants by which they sought leave to defend the said action and to counterclaim, with no order as to costs of the cross-appeal; and

(d) staying execution of the order for possession until 15th July 1979; but refusing a stay of the order for payment — p. 52 ll.15 - 24

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of arrears of rent and mesne profits, and refusing an order for the refund of option fees paid.

p. 53 11.36 - 41

2. The issue in this appeal is whether the Respondents herein should have been given summary judgment on their claim in the action, as was the effect of the orders made by the Court of Appeal; or whether the Appellants herein, as they contend, were entitled to have leave to defend the said action and to counterclaim therein, either unconditionally, or at least pending the hearing of an earlier and still subsisting action No. 2603 of 1975 between the same parties and relating to the same premises wherein also the Respondents were claiming against the Appellants for possession of the said premises, and the Respondents were counterclaiming damages and declarations inter alia that the Appellants held the said premises under and by virtue of oral agreements for a lease and option to purchase, hereinafter more particularly referred to.

p. 56 11.1 - 7
p. 69 11.22 - 27

3. The said issue involves the questions whether an option to purchase the Respondents' interest in the said premises granted by them during or about September 1974 to the Appellants as and in terms set out in paragraph 4 hereof, was still subsisting and could be and was validly exercised by the Appellants on 13th and 14th June 1977, so as to entitle the Appellants to call upon the Respondents to give effect to the said option and to convey the Respondents' interest in the said premises to the Appellants; and whether thereby the Appellants were entitled to remain in possession of the said premises by virtue of the said option agreement after the term of their lease of the said premises from the Respondents, hereinafter referred to, had expired on 15th September 1977.

p. 2 11.19 - 28; p. 29 88 - p. 29 23; p. 69 1.39 - p. 70 1.27 p.6 1.8 - p.7 1.22
p. 8 11.26 - 46; p. 96 1.12 - p. 97 1.16

4. By an oral agreement made during September 1974 and evidenced by writing, the Respondents agreed to grant to the Appellants and the Appellants agreed to take both a sub-lease of business premises comprising a factory at Lot No. 7, Diamond Vale Industrial Estate, aforesaid, which premises were then held by the Respondents on a lease from the Industrial Development Corporation of Trinidad and Tobago, the term of the said sub-lease being for three years certain from 15th September 1974 at a rent of $1500 (Fifteen hundred dollars) per month payable in advance on the 15th day of each month; together with an option expressly stated to be supplemental to the said agreement for lease, in consideration of payment by the Appellants of $36,000 (Thirty six thousand dollars) payable by thirty-six equal monthly instalments of $1000 (One thousand dollars) simultaneously with the said payments of rent, to purchase (subject to the consent of the Industrial Development Corporation) the Respondents' leasehold interest in the said premises at a price of $375,000 (Three hundred and seventy five thousand dollars) less credit in respect of all payments made on account of the said consideration of $36,000 (Thirty six thousand dollars), the said option to be exercisable in writing on or before the 15th day of June 1977, and the said price to be paid on or before the 15th day of September 1977, upon which exercise of the option the Respondents were to provide a good marketable title to the said premises, free of encumbrance.

p. 5 11.12 - 16; p. 30 11. 19 - 23; p. 46 11.3 - 5; p. 46 113 - 5; p. 89 11. 28 - 40. p. 30 11.19 - 21

5. In pursuance of the said agreement, lease, and option referred to in paragraph 3 hereof, the Appellants duly enteredinto possession of the said premises during or about September 1974; and there conducted a substantial business of specialist furniture manufacture properly performing the terms of the said agreement, lease and option and making all payments required thereunder until August 1975 as hereinafter set out.

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6. On 25th June 1975 the Respondents served upon the Appellants what purported to be a notice to determine with effect from 31st July 1975 a tenancy of the said premises held by the Appellants allegedly at a rent of $2,500 (Two thousand five hundred dollars) per month. There was in fact no provision in the said agreement for a lease under which the Appellants were in possession of the said premises, nor any other valid ground, for the premature determination by Notice to Quit by the Respondents of the Appellants' interest prior to the expiry of the three years term certain provided by the said agreement. Moreover, the Respondents' said Notice wrongly sought to attribute to rent the whole amount of the combined monthly payments to be and being made by the Appellants, without recognition or acknowledgement that, as was the fact, of such payments that of $1000 p.m. was in consideration of the said option to purchase.

p. 15 ll.30 - 38; p. 30 ll.24 - 28; p. 46 ll.15 - 23. p. 15 ll.23 - 29; p. 15 ll.26 and 44 - 45; p. 30 LL 24 - 37; p. 46 ll.24 - 38; p 74 ll.19 - 26.

7. That the Appellants nevertheless continued to make payment to the Respondents in accordance with the said agreement, lease and option of $1,500 per month by way of rent, plus $1,000 per month in consideration of the said option, until August 1975. On 25th August 1975 the Respondents wrote to the Appellants in the following terms:

p. 30 ll.26 - 36

p. 97 l.18 - p. 98 l. 7

> "Enclosed is our Receipt which as you note is without prejudice to our Notice to quit dated 25th June 1975. We note you have failed to vacate the premises as stated in the said Notice and would appreciate your doing so immediately so as to avoid the necessity of any legal action."

The receipt referred to was in the following terms:

p. 98 ll.1 - 7

> "25th August 1975. Received from F-Plan Limited the sum of ($2,500) Two thousand, five hundred dollars being rent for August 1975 accepted without prejudice to our Notice to quit dated 25th June 1975"

The said receipt again therefore wrongly purported to attribute to rent the amount of $1,000 of the said $2,500 which was in fact paid in consideration of and related to the option to purchase.

8. That on the 28th day of August 1975 your Petitioner replied by letter to the Respondents in the following terms:

p. 98 ll.14 - 40

> "We hereby acknowledge receipt of your letter and receipt for rent dated 25th August 1975. F-Plan Limited holds you and/or Tiffany Glass Limited liable for all damage and consequential loss resulting from the determination of the lease of the subject premises despite the fact we have observed and performed all covenants and stipulations of the said lease.
>
> We have been trying almost on a daily basis to relocate our plant tackle and machinery elsewhere but, so far, we have not been able to get alternative or other accommodation. We are continuing in our efforts to relocatee and we hope to be able to deliver up the subject premises to you at our earliest possible opportunity."

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p. 30 11.38 - 40; p. 70 11.28 - 30; p. 56 1.26

Thereafter, no further correspondence took place between the parties, and in consequence of the incorrect attribution by the Respondents of the Appellants' monthly payments as set out in paragraphs 6 and 7 above, no further payment was made to the Respondents before the matters next hereinafter set out; and the Appellants continued in possession of the said premises

p. 14 1.14 - p. 16. p. 21

9. By a specially endorsed Writ in the High Court of Justice of Trinidad and Tobago, Action No. 2603 of 1975, issued on 31st October 1975, and sent to the Appellants by registered post by way of service on 4th November 1975, the Respondents purported to claim against the Appellants possession of the said premises, together with arrears of rent of $2,500 and mesne profits at the rate of $2,500 per month, on the ground that the Appellants had been granted by the Respondents a tenancy of the said premises commencing on the 13th day of November 1974 at a monthly rent of $2,500 and that that tenancy had been determined by the said purported Notice to Quit dated 25th June 1975. In the circumstances set out above in paragraphs 6 and 7, that claim by the Respondents was entirely misconceived.

p. 34 11.23 - 26; p. 46 11.15 - 23

p. 31 11.13 - 20

10. On the 12th day of November 1975 the Respondents entered judgment in the said action in default of Appearance, which judgment was set aside by consent on the 9th day of December 1975. On the 22nd day of January 1976 the Respondents entered Judgment in the said action in default of Defence. On the 15th day of June 1976 the High Court (Cross J.) set aside the said Judgment in default, and granted the Appellants leave to defend the said action, ordering delivery of their Defence within three days, and delivery of any Reply and Defence to Counterclaim within 14 days. The Appellants duly delivered the Defence and Counterclaim whereby it was denied that the Respondents' purported Notice to Quit was in accordance with the terms of the Appellants' tenancy or effective; asserting the Appellants' compliance with the terms of their tenancy and their entitlement to the said option to purchase; asseting that the Respondents wrongfully had elected to treat the Appellants' lease and option as at an end; and counterclaiming damages and for declarations that the monthly rental of the said premises was $1,500; that the Respondents refund all monies paid in consideration of the said option; and that the Appellants held the said premises under and by virtue of the said oral agreement for their lease and the said option. No Reply or Defence to Counterclaim was delivered by the Respondent.

p. 31 11.20 - 27

p. 21

p. 89 1.10 - p. 92 1.8

p. 33 1.1

11. Thereafter whilst the said action No. 2603 of 1975 remained still pending, the Appellants by writing dated 13th June 1977 to the Respondents exercised the said option to purchase; proposed that the said purchase should be completed at the Chambers of the barrister then acting for the Appellants on 12th September 1977, but in any event not later than the 15th September 1977, and called for full particulars of the Respondents' title to the said premises. By a further letter dated 14th June 1977 to the Respondents, the Appellants referred to various conferences, telephone conversations and correspondence passing between them and the Respondents on the subject-matter, and signified their willingness and ability to pay to the Respondents the monthly rent and instalments of the consideration for the option to purchase. Nevertheless the Respondents by letter dated 29th June 1977 to the Appellants, contended that it had been advised that the Appellants were not entitled to exercise the option by reason that no monies by way of option payments or otherwise had been received from them for over 12 months.

p. 18

p. 19

p. 20

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12. By the specially endorsed Writ herein No. 2892 of 1977 issued on the 4th day of November 1977, the Respondents then started this second action against the Appellants, in which the Respondents again claimed possession of the said premises, together with arrears of rent of $37,500 (Thirty seven thousand five hundred dollars), and mesne profits at the revised rate of $1,500 per month from the 15th November 1975, on the ground that the Appellants had been granted a tenancy of the said premises for a term of three years from 15th September 1974 at a monthly rent of $1500 payable in advance on the 15th day of each month, that that tenancy had expired on the 14th September 1977, and that the Appellants still remained in possession; and also on the ground that the Appellants allegedly had failed to pay the monthly rent for the said premises from 15th October 1975. An appearance to the said Writ was entered on behalf of the Appellants on 24th November 1977. — p. 1 l.12 - p. 3 l.22; p. 33 l.33 - 34

13. On the 2nd December 1977 the Respondents issued a Summons in the first action 2603 of 1975 applying for leave to discontinue the Respondents' action against the Appellants. On the same day the Respondents issued a Summons in this second Action No. 2892 of 1977, supported by an Affidavit of one George Janoura sworn on 2nd December 1977, applying for an Order that the Respondents might be at liberty to sign summary final judgment for the relief claimed by their Writ and Statement of Claim against the Appellants; and also issued a Notice in this action of the Respondents' intention to apply for leave to amend the Statement of Claim in the terms of the draft annexed to the said Notice. — p. 33 l.34 - p. 34 l.4; p. 16 l.30 - p. 31 l.21; p. 3 l.26 - p. 4 l.22; P. 4 l.25 - p. 5 l.46; p. 22 l1.1 - 28; p. 23 l.29 - p. 24 l.33

14. In answer to the Summons and Affidavit for final judgment in this action, there was filed on the Appellants' behalf an Affidavit of one Gordon Farah sworn on the 1st day of February 1978, wherein he deposed that for the reasons therein set out he contended that this action by the Respondents was frivolous and vexatious, that the Appellants were being deprived of the benefit of the said option to purchase, and that he was advised and verily believed that the Appellants had a good defence to this action; and he sought leave for the Appellants to defend and Counterclaim in this action in the terms of a draft Defence and Counterclaim annexed to the said Affidavit, whereby it was contended that the Appellants had performed or offered to perform their obligations under the said agreement, lease and option to purchase; that they were entitled to exercise and properly had exercised the said option to purchase and thereby were entitled to the benefits and effects thereof; that they were entitled to remain in possession of the said premises; and that by reason of the Respondents' wrongful refusal to perform their obligations under the said option to purchase, the Appellants were deprived of the benefits and effects thereof, and thereby had suffered damage. By the said Counterclaim the Appellants sought damages for such loss and a declaration that it was entitled to have the said leasehold interest in the said premises assigned to it in accordance with the terms of the said option to purchase. The said Janoura replied by a further Affidavit sworn on 17th February 1978. — p. 7 l.24 - p. 9 l.44; p. 10 61 - p. 12 l.12; pp. 12 - 13

15. On the 26th day of April 1978 the High Court of Justice by MacMillan J. heard both the Respondents said Summonses and their said Notice at the same time, and after hearing Counsel for both parties decided the application to — pp. 25 - 28

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discontinue Action No. 2603 of 1975 and the application to amend and adjourned the hearing of the application for liberty to sign final judgment until 5th May 1978, when he gave a reserved judgment, whereby:

p. 28
pp. 29 - 40 1.14
p. 25 11.6 - 13

(i) He gave leave to the Respondents to discontinue its claim in Action No. 2603 of 1975, holding that the Appellants would not be in practice prejudiced as to their Counterclaim therein or their Defence and Counterclaim herein by the consequent loss of opportunity of obtaining in that action a judgment against the Respondents on their claim therein, or of setting up any estoppel which might have derived from such judgment.

p. 34 1.5 - p. 35 1.13

p. 35 11.14 - 54

(ii) He gave leave to amend the Statement of Claim in Action No. 2982 of 1977, holding that, although the Writ and Statement of Claim were irregular in that they did not comply with Order 6, Rule 2 (1)(c) of the Rules of the Supreme Court by stating whether or not the Respondents right to possession was subject to any statutory restriction, in particular the provisions of the Rent Restriction Ordinance, nevertheless objection on the ground of that irregularity was no longer open to the Appellants by reason that they had taken since a fresh step in the action by filing Affidavits in the proceedings.

p. 39 11.16 - 48

(iii) He dismissed the Respondents' application for leave to enter summary final judgment herein against the Appellants, holding that the irregularity in the Writ and Statement of Claim in failing to comply with Order 6, Rule 2(1)(c) precluded leave being properly given for entry of a summary final judgment on such Writ and Statement of Claim which did not comply with the said rule; but nevertheless

p. 40 11.3 - 9

(iv) He refused to grant to the Appellants unconditional leave to defend the Respondents' claim, holding that as the Appellants had not paid rent due, and that as by not paying the monthly instalments in consideration of the option to purchase the Appellants as he found, had elected to treat the said option as at an end, there was no arguable defence to the Respondents' claims.

p. 39 11.7 - 16

p. 40 1.18 - p. 42 1.11

16. By Notice of appeal dated 20th November 1978 the Respondents with leave to appeal out of time did so appeal against that part of the judgment of MacMillan J. on 5th May 1978 whereby he had refused them unconditional leave to defend the Respondents' claim, and sought that the said judgment might be varied so as to allow them to defend and counterclaim in this action in the terms of their said draft Defence and Counterclaim or in such other form as might be appropriate.

pp. 45 - 80
p. 81 1.1 - p. 82 1.16

17. The Court of Appeal (Hyatali G.J. and Corbin J.A. and Kelsick J.A.) heard the said appeal and cross-appeal and by reserved judgments delivered on the 21st June 1979 allowed the Respondents' appeal, dismissed the Appellants' cross-appeal, and made orders to the effect summarised in paragraph 1 hereof.

p. 52 11.10 - 24

Further, the Appellants' application for a stay of execution of the order for the payment of the arrears of rent and mesne profits thereon was refused; as was also its' application for a refund of option fees paid to the Respondent, as not being relevant to these proceedings.

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18. That in so ordering, the Court of Appeal held, in summary, that:

(i) Failure to comply with Order 6, Rule 2(1)(c) was an irregularity of form, not substance, which was waived when the Appellants entered an unconditional appearance; the pleadings and Affidavits in the earlier action 2603 of 1975, which had been admitted by consent, constituted evidence on which MacMillan J. had been entitled to be satisfied that a possession order, if made, would not be rendered a nullity by Section 14 of the Rent Restriction Ordinance; the Statement of Claim otherwise disclosed a good and complete cause of action; and in the circumstances, the non-compliance with Order 6, Rule 2(1)(c) did not, contrary to the finding of MacMillan J, of itself preclude leave being given for entry of a summary final judgment, subject to the Appellants otherwise being able to show a triable issue.

p. 49 11.32 - 45; p.51 11.17 - 30; p.54 11.22 - 40; p.55 11.12 - 49; p.64 11.16 - 27; p.66 1.28 - p.68 1.24

p.68 11.10 - 16

(ii) (a) Whilst the Appellants had given the notice prescribed under the option agreement, nevertheless they had not complied with two other conditions subject to which the option to purchase was exercisable, namely firstly, the payment each month after August 1975 of the instalments of the option fee, and secondly, the payment on or before the exercise of the option of the balance of the purchase price; and/or

p. 57 11.21 - 42; p.72 1.40 - p.73 1.2

(b) the Respondents by their conduct in June-August 1975 unequivocally had repudiated the agreements for the lease and the option; but the effect of their letter of 28th August 1975 and their Defence and Counterclaim in Action No. 2603 of 1975 in which no properly formulated claim for specific performance had been included, was to constitute an election by the Appellants to accept that repudiation and to claim damages. Even though it may have been that the agreement for the lease was impliedly revived by consent by the Respondents' claim in this action based on the original oral agreement for the lease as having subsisted for its full three year term, and by agreement by the Appellants by their Defence, nevertheless the agreement for the option to purchase was separate and distinct from that for the lease; there had been no such revival also of the agreement for the option; in the foregoing circumstances the option agreement had become determined in 1975; and in June 1977 it was thereby no longer subsisting or capable of performance by the Appellants, and/or in any event had not been performed in fact; and/or

p.46 1.39 - p. 47 1.21; p.56 11.19 - 36; p.77 11.6 - 10. p.47 11.12 - 21; p.76 11.6 - 30.

p.49 11.16 - 31; p.72 11.5 - 39.

(c) in either case, the exercise in June by the Appellants of the option to purchase, the subject of the original agreement, was in fact abortive, and not a proper or effective exercise in law of any suction option;

p.49 11.24 - 26; p.76 11.31 - 41; p.79 1.46 - p.80 1.6; p.80 11.19 - 22.

(iii) The grant of Cross J. to the Appellants in the earlier Action No. 2603 of 1975 of leave to defend created no estoppel or res judicata;

p.75 11.7 - 49;

(iv) The counterclaim by the Appellants in Action No. 2603 of 1975 for a declaration that the Appellants held the said premises under and by virtue of the said agreement for a lease and an option to purchase, and in this action for a declaration that the Appellants were entitled to have the said premises

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p.47 11.12 - 21; p.76 11.22 - 30. p.76 11.42 - 48.

assigned to them, did not equate claims for specific performance; and in any event the Appellants would not have been entitled to an order in this action for specific performance or assignment, since at the date of the Writ herein, they had not been in compliance with the conditions for the exercise by them of the option to purchase, so as to be entitled to an assignment in pursuance thereof;

p.49 11.26 - 21; p.57 11.16 - 25; p.58 11.3-7; p.79 1.40 - p.80 1.6; p.80 11.19 - 22.

(v) (v) There was therefore left in this action to the Appellants no claim by virtue of the said option to purchase either to an assignment of the said premises, or to damages for loss by reason of refusal by the Respondent to assign pursuant to the said option to purchase; nor any triable issue by way of defence or counterclaim.

19. The Appellants do not seek to appeal against the finding of the Court of Appeal summarised in paragraph 18(i) above; but they respectfully submit that both MacMillan J. and the Court of Appeal of Trinidad and Tobago erred in holding that both no triable issue had been raised in this action, and also that there should be leave to the Respondents to sign a final summary judgment in this action without a full hearing of the case, and in particular when the Action No. 2603 of 1975 ("the first action") was still pending.

20. The Appellants accept and indeed contend that it was correct and necessary that the issues in this action should be considered in the context of the existence and circumstances giving rise to the first action; but they respectfully submit that despite having recognised this, the Courts below thereafter erred in their conclusions both as to the effect of the subsistence of, and of the issues in, the first action on the position of the Appellants in the second, and further in consequence and/or in any event as to the issues in the instant action.

21. Thus the Appellants respectfully submit that the Courts below should not have regarded the prayer of the Appellants by their Defence and Counterclaim, in what was a wholly misconceived claim by the Respondents in the first action, for a declaration that the Appellants held the said premises under and by virtue of the said lease and option agreements, merely as providing a formula for the quantification of damages, for which purpose such a declaration would have been otiose; but should have recognised that that prayer was more properly to be regarded as an alternative to a claim for damages and, as submitted by the Appellants, tantamount to a claim for specific performance, in that it was more consistent with the provision of a basis for a subsequent express prayer for specific performance (which remedy it had not then yet become appropriate to seek in terms, since the Appellants were still in possession of the said premises, and the period within which the option to purchase could be exercised was still running, and in any event the Respondents subsequently discontinued their claim in that action), than with the unnecessary provision of a formula for quantification. The Courts below should further have recognised that if an express prayer for specific performance were to become appropriate or necessary, or be found to be requisite as a matter of formulation, then it remained still open for the Appellants, since their Counterclaim in the first action was still subsisting, to seek leave to include such an express prayer by amendment. It is significant that the Respondents had never served in the first action any Reply and Defence to the Appellants' Defence

and Counterclaim, so that the Appellants' claim for this declaration stood unchallenged.

22. Had the above view been taken of the Appellants' counterclaim in the first action for relief by the said declaration, then there would have arisen in that action an issue as to whether or not the Appellants irrevocably had elected to treat the Respondents' conduct in wrongfully seeking possession as a repudiation of the lease and option agreements. It is respectfully submitted that the finding by the Courts below in the instant action that the Appellants had accepted the Respondents' conduct as such repudiation should not have been made. Firstly, the Respondents themselves had not averred by their pleadings any such case that there had been in 1975 a repudiation by them, acceptance by the Appellants, and consequent determination of the agreements, nor had they founded their claim for possession in this action on any such case; on the contrary, they had expressly approbated by their Statement of Claim, the lease agreement. Secondly and in any event, such finding was premature, in that when there was still subsisting an earlier action in which the Appellants had been granted leave to defend and counterclaim, it was inappropriate that determination of a live issue on complete evidence in a full trial in that action should be pre-empted by a finding made on limited evidence in summary procedure in a later action, as is its' effect in fact; and moreover, by reason that the Courts below in any event failed to recognise or to give sufficient weight to factors which militated against there having been in fact any such irrevocable acceptance by the Appellants of repudiation by the Respondents, including inter alia the fact that the Appellants continued to pay rent and option fee instalments after the purported notice to quit, and ceased only after the Respondents' wrongful attribution of the whole of the payments to rent alone; that notwithstanding their letter of 28th August 1977 they had continued in possession, had included in their counterclaim in the first action the prayer for the declaration referred to in paragraph 21 above, had sought to exercise the option to purchase, and in their counterclaim in the instant action had sought a further declaration of their entitlement to have the premises assigned to them in accordance with the option agreement; and that the Respondents' discontinuance of their claim in the first action together with their approbation of the lease agreement in the instant action (admitted by the Appellants, which of itself was again inconsistent with any acceptance by them of repudiation by the Respondents) consistuted in effect a recognition and acceptance by the Respondents that the lease agreement, and thereby the option agreement also, subsisted and had not been in fact determined (as further referred to in paragraph 26 hereof), and hence that the Appellants had made no such irrevocable election to accept the Respondents' conduct as a repudiation of those agreements.

23. In the premises advanced in paragraphs 21 and 22 hereof, it is submitted that the Courts below could and should have found, or that at the least there was a triable issue, that the lease and option agreements were still subsisting and capable of exercise by the Appellants, in June 1977. It is further submitted that the Courts below erred further in finding that the exercise by the Appellants of that option in

June 1977 was ineffective for non-compliance with conditions of the option; and that they should instead have found that in the context of the Respondents' wrongful notice to quit and misconceived claim for possession, and their misattribution of the August 1975 option fee instalment, it was reasonable for payment of rent and option fee instalments to have been suspended for the time being whilst the first action, and the determination therein of the parties' conflicting claims and respective rights, was still pending; and that it would be inequitable for the Respondents to rely, and/or they were estopped from relying, to their own advantage upon suspension of payments following upon their own wrongful conduct, as constituting breaches of conditions of the exercise of the option to purchase so as to defeat the entitlement of the Appellants in the second instance, which the Respondents wrongfully had sought to abrogate in the first instance; had the contentions of the Appellants in the first action been accepted, it would always have been possible for provision to have been made for the suspended instalments first to have been paid up-to-date on determination of the parties' rights, if the option to purchase were to be exercised, whereby the Respondents' interests could fairly have been protected. In any event, the Appellants by their letter of 14th June 1977 had indicated that they were ready, willing and able to pay rent and option fee instalments.

24. Furthermore, the Courts below should not have found that there was any non-compliance by the Appellants with a condition of the option by reason of any failure by them to pay or to tender the balance of the option price; the option agreement did not stipulate for such payment on or by the time for the giving of notice to exercise the option, but only by 15th September 1977; and before that due date was reached, the Respondents already had evinced by their letter of 29th June 1977 an intention not to implement the option in accordance with the Appellants' notice, so that payment or tender by the Appellants was pre-empted and frustrated by the Respondents' own wrongful conduct. Again, it would be inequitable for the Respondents to rely, and/or they are estopped from relying, to their own advantage, on non-payment or absence of tender caused or induced by their own conduct, as a non-compliance with condition by the Appellants such as to disentitle the Appellants to their interest under the option; and in particular so, when it appeared from the Appellants' letter of 14th June 1977 that there had been conferences, telephone conversations and correspondence between the parties which were not in evidence in the summary procedure, but which would have required and received investigation on full trial, and could have been significant to the positions of the parties. In fact the Respondents themselves did not rely on any failure to pay or tender the balance of the option price, but only upon the non-payment of rent and option fee instalments prior to June 1977.

25. It is also respectfully submitted that the Court of Appeal erred in its' further finding that although (contrary to the Appellants' foregoing contentions) it had become determined in 1975, yet the Respondents' approbation and the Appellants' admission of the original lease agreement in their respective pleadings in the instant action nevertheless constituted a revival of that lease agreement sufficient to found the Respondents' claim in this action, but not likewise of the option agreement so as to found entitlement in the Appellants to possession. Again, no such case was ever averred by their pleadings by the Respondents themselves, nor relied on by them to found the claim for possession herein. In any event, it should rather have been found that even if indeed the lease

agreement once had become determined at all in 1975, it would have been incapable of any such retrospective revival by pleadings after the term of the tenancy already had expired; that the true effect of the Respondents' approbation of the lease agreement by their Statement of Claim, and their discontinuance of their claim in the first action, could be no more than an acknowledgement that the original agreement had continued to subsist throughout; and that the Appellants' admission by their Defence and Counterclaim could not relate or constitute a consent to such a concept of retrospective revival which had never been raised or averred by the Respondents, but related only to the original lease agreement relied on by the Respondents (and with it the option agreement also), and in effect admitted and asserted only the continued subsistence of those original agreements, as the Respondents' pleading had implied, and as Carbin J. appears to have found (Record, p.57 ll 15 - 20). It should have followed from this that if the lease agreement had been determined at all in 1975, it had remained so since and at the time of the commencement of this action, so that the Respondents' claim herein was wrongly founded and judgment thereon in their favour should not have been given.

26. Alternatively, even if the Court of Appeal's finding were correct, that there had been a determination of the lease agreement in 1975 followed by a revival by the pleadings in the instant action, it should have then found that thereby the option agreement also, being expressed to be supplemental to, and dependent upon the subsistence of, the lease agreement, equally became revived with it; and that it would be inequitable for the Respondents to be able to on the one hand derive the benefit of reliance upon the original lease agreement as a foundation for their claim and judgment in this action, in which otherwise they would necessarily fail in limine, yet to avoid the corresponding burden on them and benefit to the Appellants of the supplemental option agreement, which was an inherent element in the overall transaction between the parties, and should not have been treated in the circumstances as separate and severable, as it was by the Court of Appeal.

27. The Appellants next respectfully submit that, as in the case of their counterclaim for a declaration in the first action, so their counterclaim for a declaration in the second action was both an approbation and an assertion of their entitlement under the original lease and option agreements, and also a foundation for a subsequent prayer for specific performance should such in terms have become appropriate, or found to be required, on or in the course of the determination of the respective rights of the parties in this action. Application for leave to add by amendment a claim for specific performance expressly following upon the declaration, could have been sought in the action and would have caused no injustice to the Respondents; and it is submitted that the Court of Appeal should not have been influenced adversely to the Appellants' case, as it appeared to be, by reason that an express prayer for specific performance had not yet been included in the Appellants' counterclaim.

28. By order dated 25th January 1980 of the Honourable Mr. Justice Cross, as amended by order dated 3rd July 1980 of the Honourable Mr. Justice Massanali J.A., the Appellants were granted final leave to appeal to the Lords of the Judicial

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Committee of the Privy Council against the said judgment of the Court of Appeal of Trinidad and Tobago dated 21st June 1979,
p. 82 l.18 conditional leave having been earlier granted by the Court of
p. 84 l.30 Appeal by Order dated 13th July 1979.

29. The Appellants respectfully submit that the judgment of the Court of Appeal was wrong and ought to be reversed, that this appeal ought to be allowed with costs to the Appellants here and in both Courts below, and that the Appellants should have judgment, alternatively unconditional leave to defend and counterclaim in this action, for the following (amongst other). 10

R E A S O N S

(1) BECAUSE the Appellants' defence and counterclaim in this action was liable to be affected by a prior determination of their defence and counterclaim in the first action No. 2603 of 1975, and conversely the Appellants' defence and counterclaim in the first action was liable to be prejudiced by a prior summary determination in the instant action; and that therefore there should have been no determination in this action, in particular in summary procedure, until after the first action had been heard and concluded. 20

(2) BECAUSE in any event in the premises hereinbefore set out the Appellants were entitled to exercise the said option to purchase, as they did, and to performance of the same by the Respondents accordingly; and to remain in possession of the premises upon the wrongful refusal of, and pending, such performance by the Respondents.

(3) BECAUSE further and in any event in the premises hereinbefore set out a sufficient prima facie or arguable defence and counterclaim in the Appellants had been manifested, and/or sufficient triable issues arose, in this action for the Appellants to be entitled to have leave to defend and counterclaim herein. 30

FENTON RAMSAHOYE
DAVID PREBBLE

No. 7 of 1981

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN:

F. PLAN LIMITED — Appellants (Defendants)

- and -

TIFFANY GLASS LIMITED — Respondents (Plaintiffs)

CASE FOR THE APPELLANTS

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