16,1982

IN THE PRIVY COUNCIL No. 7 of 1981

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN :

F. PLAN LIMITED (Defendants) Appellants

- and -

TIFFANY GLASS LIMITED (Plaintiff) Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal from the judgment of the Court of Appeal of Trinidad and Tobago (Sir Isaac Hyatali C.J. and Corbin and Kelsick JJ.A.) dated 21st June, 1979 allowing with costs the Respondent's appeal and dismissing the Appellant's cross-appeal from a judgment of McMillan J in the High Court of Trinidad and Tobago dated 10th May, 1978.

2. By his said judgment McMillan J. dismissed with costs the Respondent's application for summary judgment under Order 14 of the Rules of the Supreme Court of Trinidad and Tobago for possession of premises situate at and known as Lot No. 7, Diamond Vale Industrial Estate, Diamond Yale in the Ward of Diego Martin (hereinafter referred to as "the premises") and for arrears of rent and mesne profits. p.29, p.40, l.10 p.3, l.30

3. By its said order the Court of Appeal allowed the Respondent's said appeal, dismissed the Appellant's cross-appeal, set aside the said judgment of McMillan J. and made an order for the Appellant to deliver up possession of the premises and gave the Respondent judgment for $36,000 arrears of rent, mesne profits at the rate of $1,500 per month from 15th September, 1977 until the Appellant delivers up possession p.81-82

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and interest at 4% per annum on the arrears of rent and mesne profits from 15th September, 1975 to 21st June, 1975. Execution was stayed until 15th July, 1979.

The Questions for Decision

4. The questions for decision are:

(1) Whether the omission from the writ of an indorsement under O.6 r.(1)(c) of the Rules of the Supreme Court as to whether or not the right to possession of the premises was subject to any statutory restriction, was an omission which rendered the writ a nullity, or whether it was a mere irregularity which could be and was waived.

(2) Whether the Statement of Claim showed a full and complete cause of action without the O.6 r.(1)(c) indorsement so as to enable summary judgment to be entered thereon.

(3) Whether the Appellant had validly exercised an option to purchase the premises so as to preclude the Respondent from obtaining leave to enter summary judgment for possession thereof.

Circumstances of the Case

p.29 l.28 5. The Respondent is the Head-Lessee of the premises holding the same on a long lease from the Industrial Development Corporation. By an oral agreement for a lease made between the parties on or about 9th September, 1974 the Respondent agreed to sub-let the premises to the Appellant for a term of 3 years certain from 15th September, 1974 at a monthly rental of $1,500 payable in advance on the 15th day of each month. By a further oral agreement, held by McMillan J to be supplementary to the said oral agreement for a lease, made on or about 9th September, 1974 in consideration of the payment of $36,000 the Respondent granted to the Appellant an option to purchase the leasehold premises for $375,000 (inclusive of the said $36,000). There were terms, inter alia, of the said option agreement that:

p.29 l.35

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(i) the said $36,000 would be paid by 36 monthly instalments of $1,000 each in advance on the 15th day of each and every month commencing on 15th September, 1974;

(ii) the option may be exercised by the Appellant giving to the Respondent on or before 15th June 1977 notice in writing of its intention to exercise the same and by paying on or before 15th September, 1977 to the Respondent the difference between the amount at the time of the exercise of the option paid in respect thereof and $375,000; p.96 l.30

(iii) should the said Agreement for Lease or the Lease granted thereunder be determined for any reason whatsoever the option shall be void and of no effect;

(iv) the option shall be conditional on the Industrial Development Corporation giving its consent to the absolute assignment of the premises to the Appellant.

6. The Appellant entered into possession and paid all rent until the end of the month commencing 15th August, 1975 and all option monies until the end of the month commencing 15th July, 1975. The oral agreements for the lease and the option were reduced to writing but never executed by the Appellant, although the documents were submitted to it for that purpose. p.30 l.19 p.30 l.25 p.30 l.22

7. On 25th June, 1975 the Respondent served on the Appellant a notice to terminate the tenancy and quit the premises on 31st July, 1975. Moneys for the option and rent were paid in respect of the month commencing 15th July, 1975. The Appellant remitted the sum of $2,500 in respect of the month commencing 15th August, 1975 and the Respondent accepted the sum as rent, without prejudice to its Notice to quit dated 25th June, 1975. p.97 l.30

8. No further sums were paid or tendered by the Appellant either by way of rent or option fee. p.30 l.38

9. On 25th August, 1975 the Respondent wrote to the Appellant enclosing the said receipt for $2,500 and called upon the Appellant to vacate p.96 l.20

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p.98 l.20 the premises immediately. On 28th August, 1975 the Appellant wrote to the Respondent holding it liable "for all damage and consequential loss resulting from the determination of the lease" and said:

> "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 relocate and we hope to be able to deliver up the subject premises to you at our earliest possible opportunity".

The Appellant did not vacate the premises.

The "1975 action"

p.14-16 10. On 31st October, 1975 the Respondent issued a specially indorsed writ in Action 2603 of 1975 (hereinafter called "the 1975 Action") in which it claimed possession of the p.15 l.38 premises, arrears of rent and mesne profits. Paragraph 4 of the Statement of Claim contained a statement that the premises are excluded from the provisions of the Rent Restriction Ordinance by virtue of the Rent Restriction (Exclusion of Premises Order) 1969 and the ground upon which the order for possession was sought was that the tenancy had been determined on 31st July 1975 by service of the notice to quit on 25th June, 1975.

p.31 l.14 11. On 12th November, 1975 judgment was entered in the 1975 Action in default of p.31 l.16 appearance. That judgment was set aside by consent on 9th December 1975. Judgment was p.31 l.25 again entered on 22nd January 1976 in default of Defence and on 15th June, 1976 Cross J. set aside the second default judgment and gave the Appellant leave to defend and ordered it to serve a defence within three days.

p.89-91 12. By its Defence and Counterclaim in the 1975 Action the Appellant, inter alia:

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(i) admitted that the premises were excluded from the provisions of the Rent Restriction Ordinance Ch.27 No. 18;

(ii) denied that the Respondent had any right to terminate its tenancy of the said premises;

(iii) averred that it had performed and observed all its covenants under the lease;

(iv) averred that it had been forced to seek alternative accommodation and/or other accommodation; and

(v) counterclaimed for

(1) damages for breach of covenant of quiet enjoyment;

(2) a declaration that the monthly rental of the leasehold premises was $1,500;

(3) a declaration that the Respondent refund to the Appellant all money paid under and by virtue of the said option;

(4) a declaration that the Respondent holds the premises under and by virtue of the oral agreement and option;

(5) costs;

(6) further and other relief.

Purported exercise of option

13. Notwithstanding the issue of the 1975 proceedings the Appellant remained in possession but without paying any rent or option fee. On 13th June, 1977 the Appellant wrote to the Respondent purporting to exercise its option to purchase the leasehold premises and asked for full particulars of the Respondents' title. On 14th June, 1977, the Appellant wrote to the Respondent saying it was ready, willing and able to pay $1,500 per month rent and $1,000 per month towards the option fee. On 29th June, 1977 the Respondent replied that the Appellant was not entitled to exercise the option because it had made no payments for more than 12 months.

p.18

p.19 l.20

p.20 l.15

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The "1977 action"

p.33 l.34
p.16 l.30
p. 1

14. The Respondent took no further action in the 1975 Action until 2nd December, 1977 when it issued a summons seeking leave to discontinue against the Appellant. Prior to the issue of this summons the Respondent had issued a specially endorsed writ in this action ("the 1977 Action") on 4th November, 1977.

p.2 l.35
p.2 l.18

15. In the 1977 Action the Respondent claimed possession of the premises and $37,500 arrears of rent and mesne profits at the rate of $1,500 per month from 15th November, 1975 to the date of delivery up of possession. In its Statement of Claim the Respondent averred that the premises had been let to the Appellant by an oral agremeent for a three year term from 15th September, 1974 at a monthly rental of $1,500 that the term had expired by effluxion of time on 14th September, 1977, that the Appellant had failed to give up possession and that it had failed to pay rent from 15th October, 1975. By notice dated the 2nd December, 1977 the Respondent gave the Appellant notice that it intended to seek leave to amend the Statement of Claim, by alleging that rent was in arrears from 16th September, 1975 and claiming $36,000 arrears of rent and mesne profits from September, 1975.

p.33 l.38

Summons for Summary Judgment in the 1977 Action

p.3 l.22
p.4 l.30

16. On 2nd December, 1977 the Respondent issued a summons returnable before the Judge in Chambers seeking leave to sign final judgment for possession, arrears of rent and mesne profits. This summons for summary judgment was supported by an affidavit sworn by George Janoura, a director of the Respondent Company, in which he swore to the matters pleaded in the Statement of Claim.

p.7 l.30

17. On 1st February, 1978 Mr. Gordon Farah swore an affidavit on behalf of the Appellant in opposition to the application for summary judgment. In this affidavit Mr. Farah made, inter alia, the following points:

(i) That the 1977 action was frivolous and vexatious and an abuse of the process of the Court and in support if this allegation

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the Appellant relied upon the fact that the Respondent had already issued the 1975 proceedings in which it claimed the same relief as claimed in the 1977 proceedings. He claimed, further, that by his order dated 15th June, in which Cross J. set aside the Respondent's default judgment and gave the Appellant leave to defend, His Honour had already decided the issue which was raised on the present Order 14 Summons. p.8 ll.3-35

(ii) That the Appellant had an equitable interest in the land by virute of the letter of 13th June, 1977 in which it had purported to exercise its option and that because of the Respondent's refusal to answer requisitions on title it had not been able to tender a Deed of Assignment for completion.

(iii) That in the premises it had a good defence to the 1977 action and ought to be given leave to defend and counterclaim. In its draft Counterclaim exhibited to Mr. Farah's Affidavit the Appellant claimed that by virtue of the Respondent's wrongful refusal to sell the leasehold premises it was deprived of the right to purchase for $275,000 premises which were then worth $575,000 and it counterclaimed damages for breach of contract and a declaration that it was entitled to have the premises assigned to it in accordance with the terms of the oral option. p.11

The Hearing before McMillan J.

18. The Respondent's summons for leave to discontinue the 1975 Action and summary judgment in the 1977 Action were heard by McMillan J. and on 10th May, 1978 His Honour gave the Respondent leave to discontinue the 1975 Action and dismissed the Respondent's application for summary judgment in the 1977 Action. The Appellant was awarded costs on both applications. p.29 p.37 l.10

19. When the Respondent asked McMillan J. for leave to amend the Statement of Claim as indicated in its notice to the Appellant, the Appellant took the point that the writ was not validly issued and therefore not properly before the Court as it was not indorsed with a statement showing whether or p.35 l.15 p.35 l.20

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not the Respondent's right to possession of the premises was subject to any statutory restriction, in particular the Rent Restriction Ordinance. The learned Judge held that the failure to indorse the writ in accordance with Order 6 rule 2(1)(c) of the Rules of the Supreme Court was, by virtue of Order 2, rule 2, a mere irregularity and that it was not open to the Appellant to take the point since it had, by filing affidavits in the proceedings, taken a fresh step in the action.

20. On the substantive issues on the Respondent's Order 14 summons the learned Judge held that
p.39 l.15 there was no possible defence based on the purported exercise of the option because of the Appellant's failure to pay the option fee:

> "If", he said, "the (Appellant) wished to keep the option alive it should have
> p.39 l.10 continued making the monthly payments under the option agreement as and when they fell due and that not having done so he has elected to treat it as at an end".

However, His Honour did uphold a submission by Counsel for the Appellant that leave to enter final judgment ought not to be given because the Statement of Claim was defective in that it did not contain the indorsement requirement by Order 6 Rule 2(1)(c), - i.e. with an endorsement showing whether or not the Respondent's right to possession was subject to any statutory restriction. Order 6 r.2(1)(c) of the R.S.C. 1975 provides:

> "Before a writ is issued it must be indorsed . . . (c) where the claim made by the plaintiff is for possession of land with a statement showing whether or not his right to possession is subject to any statutory restriction."

His Honour held that although the omission to state this in the writ was not fatal in the sense of making the writ a nullity, nevertheless the fact that it was not shown in the Statement of Claim that the Rent Restriction Ordinance does not apply meant that the Statement of Claim
p.39 l.20 was "not complete and good in itself" and as it did not comply with the rules summary judgment could not be given. It was, he said, "an essential part of the endorsement to the

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specially endorsed writ for possession of premises" in an area specified in the Schedule to the Rent Restriction Ordinance. Having so held, His Honour was not prepared to grant the Appellant unconditional leave to defend. The Respondent might, he said, cure the defect by amendment and apply again for summary judgment and, in any event, he took the view that it was not right to give unconditional leave to defend p.30 l.3

> "since in none of the affidavits filed by the defendant on the two proceedings or in the defences disclosed has it claimed the protection of the Rent Restriction Ordinance and, save for that issue, there is no arguable defence to the action." p.40 l.4

Appeal to the Court of Appeal

21. Both the Respondent and the Appellant appealed and cross-appealed against the decision of McMillan J. The Respondent sought an order for final judgment and the Appellant asked for leave to defend and counterclaim. p.40 p.42

22. On 21st June, 1979, the Court of Appeal (Sir Isaac Hytali C.J. Corbin and Kelsick A.JJ.) allowed the Respondent's appeal, set aside the judgment of McMillan J. gave the Respondent summary judgment for possession of the premises, dismissed the Appellant's cross-appeal and gave the Respondent the costs of the appeal and cross-appeal. Execution was stayed until 15th July, 1979. p.81

The Judgment of Sir Isaac Hyatali C.J.

Agreement on facts

23. In reviewing the facts the learned Chief Justice observed that the points raised on the claim for recovery of possession in the second action have a direct bearing on the circumstances attending the first action and vice versa and that the facts which were contained in the affidavits filed in the first action furnish the background to the contest between the parties and were admitted by consent at the hearing of the Respondent's application for summary judgment in the second action. p.45 l.27

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Determination of agreements for lease and option

24. His Honour found that the Respondent had unequivocally repudiated the oral agreements for the lease and the option but that the appellant on its part had clearly elected to accept the repudiation in its letter of 28th August, 1975 by ceasing to tender any rent or option fee after September, 1975 and by counterclaiming for damages for breach of the agreement for the lease and for a refund of all moneys paid under the oral agreement for the option:

p.46 l.38

p.46 l.46

> p.47 l.23 "In my judgment it is an inescapable conclusion from these facts that the oral agreements for the lease and the option had ceased to exist between the parties from 28th August 1975 and that the only outstanding questions between them from that date related to damages and the refund of the option moneys paid under the latter agreement".

25. The option having ceased to exist on 28th August, 1975 it was a "futile exercise", His Honour concluded, for the Appellant to purport to exercise on 15th June, 1977 the option reserved under the oral agreement.

26. His Honour observed that on the evidence before the court the oral agreement for the lease which had ceased to exist since 28th August, 1975 was revived by the parties and ultimately expired by effluxion of time on 14th September 1977. However, the oral agreement for the option was separate from the agreement for the lease and was not revived. In these circumstances, His Honour held, the Appellant could not rely on the exercise of the option to obtain leave to defend in the second action nor to counterclaim for a declaration that it is entitled to have the premises assigned to it in accordance with the option.

p.48 l.45
p.49 l.10

Omission to state on Writ that premises not subject to Statutory Restriction

27. His Honour said that McMillan J. had "quite rightly" ruled that the fresh steps taken in the second action by the Appellant

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with knowledge of the irregularity disqualified it from objecting to the validity of the writ and adopted the reasoning of Corbin and Kelsick JJ.A on this point. However, His Honour disagreed with McMillan J. on the effect of the omission to state in the Statement of Claim that the Respondent's right to possession was not subject to statutory restriction as required by O.6 r.2(1)(c). His Honour said that the real question for decision was whether the Statement of Claim failed to disclose a good and complete cause of action. His Honour said that before giving judgment the Court had to have an assurance that the premises were not subject to statutory restriction, but that such an assurance was required as a matter of evidence and not of pleading. In fact, the proceedings in the first action furnished the assurance needed for the purpose of O.6 r.(1)(c) to the Court and that in the circumstances leave to enter final judgment ought to have been granted.

p.49 l.40

p.51 l.10

p.51 l.20

The Judgment of Corbin J.A.

Omission to include O.6 r.2(1)(c) indorsement

28. His Honour first held that the omission did not go to render the writ a nullity, but was a mere irregularity which had been waived. He further held that the statement was not essential in the Statement of Claim to show a good cause of action. There was, he said, clear evidence from the proceedings filed in the first action and put in by consent in the second action to show that the premises were not protected and that there was therefore nothing to prevent the judge from giving leave to sign final judgment.

p.54 l.22

p.55 l.40

Exercise of oral option

29. The Appellant had admitted that there was a lease which had come to an end by effluxion of time and therefore the only basis upon which it could claim to be entitled to remain in possession was by virtue of a valid exercise of the oral option. His Honour held, however, that the Appellant could not base a defence on this ground because since it had failed to pay the monthly instalments due it had lost its rights under the option.

p.57 l.25

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The Judgment of Kelsick J.A.

Omission to indorse writ with 0.6 r.2(1)(c) indorsement

p.61 l.130

30. His Honour agreed with the conclusion of the learned Judge at first instance that the omission did not render the writ a nullity but disagreed with his ruling that the "0.6 indorsement" was an essential part of the statement of claim without which it did not disclose a complete and good cause of action.

p.62 l.1

His Honour held that 0.6 r.2(1)(c) refers and relates only to the writ and not to the Statement of Claim and, furthermore, said that the 0.6 indorsement is a matter of form and not substance, the omission of which can be waived. It was necessary for the Court to be satisfied on the evidence that the premises were not subject to statutory protection, but there was evidence before the learned judge in the form of the first action from which this fact was established.

The option agreement

p.72 l.36

31. His Honour held, relying upon the judgment of the English Court of Appeal in Griffith v. Pelton (1957) 3 All E.R. 75, that the option agreement was a contract separate and distinct from the lease agreement, but as the Appellant did not comply with two important conditions subject to which the option was made exercisable, there had been no valid exercise of the option. The two conditions were the payment each month of the instalments of the option fee and the payment of the balance of the purchase price on the exercise of the option. In any event, His Honour held that the Appellant had elected to accept the repudiation of both the oral agreement for a lease and the option agreement.

p.77 l.8

Other arguments: Res Judicata and entitlement to specific performance:

p.75 l.10

32. His Honour rejected the arguments put under both these heads. He held that Cross J.'s order giving leave to defend and counterclaim in the first action did not oblige McMillan J. to grant leave to defend in the second action. The issues, he said, were different in each action:

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"The issue in the first action was whether the notice to quit was bad in law because the defendant was lawfully in possession under an extant term in the lease agreement, no step then having been taken by the defendant to exercise his option. On the other hand the question in the present action is whether the lease agreement having expired, the defendant's possession is unassailable for the reason that he had under the option agreement validly exercised his option to buy the premises". p.75 l.34

33. His Honour also held that the Appellant was not entitled to specific performance of the option agreement or to a declaration that it was entitled to have the premises assigned to it in accordance with the terms of the option agreement. The time for complying with the terms of the option had expired, there was no plea for specific performance and, in any event, the Appellant was in breach of his obligations under the option to pay the fee and to tender the balance of the purchase price. p.76 l.30

34. On 13th July, 1979 the Court of Appeal of Trinidad and Tobago granted conditional leave to appeal to the Judicial Committee of the Privy Council. On 19th December, 1979 the Right Honourable the Lords of the Judicial Committee of the Privy Council dismissed the Appellants petition for special leave to appeal against the said order for conditional leave. By an order dated 25th January 1980 (or amended by the order of Hassanali J.A. dated 3rd July, 1980) Cross J. granted final leave to appeal the Lords of the Judicial Committee against the said judgment of the Court of Appeal dated 21st June, 1979. p.83

35. The Respondent submits that this appeal should be dismissed with costs for the following among other

R E A S O N S

(1) The omission from the writ of an indorsement under O.6 r.2(1)(c) of the Rules of the Supreme Court was an irregularity which could be and was waived by the Appellant. In any event, the Appellant did not cross-appeal to the Court of Appeal against the decision of McMillan J. on this point.

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(2) It is not necessary to include in the Statement of Claim an indorsement under O.6 r.2(1)(c) of the Rules of the Supreme Court in order to show a good and complete cause of action. There was evidence before the Court that the premises were not subject to any statutory restriction and the Court of Appeal was therefore right to make an order for possession.

(3) After the premature purported determination of the agreement for the lease the said agreement was revived and subsequently, having run its full term, expired by effluxion of time on 14th September, 1977. Thereafter the Appellant had no right to remain on the premises. The agreement for the option was separate from the agreement for the lease and was determined by the Appellant's acceptance of the Respondent's repudiation thereof.

(4) As the Appellant had not paid the monthly payments under the option agreement as and when they fell due it lost the right to exercise the option and acquired no rights by the purported exercise thereof on 13th June, 1975, which exercise was, in any event, not accompanied by payment or tender of the purchase price.

BRIAN COLES

No. 7 of 1981

IN THE PRIVY COUNCIL

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FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN :

F. PLAN LIMITED (Defendants) Appellants

- and -

TIFFANY GLASS LIMITED (Plaintiff) Respondent

CASE FOR THE RESPONDENT

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