16/82

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 — Appellant (Defendant)

- AND -

TIFFANY GLASS LIMITED — Respondent (Plaintiff)

RECORD OF PROCEEDINGS

INGLEDEW, BROWN, BENNISON
& GARRETT
51 Minories
London EC3N 1JQ

Solicitors for the
Appellant

STEPHENSON HARWOOD
Saddlers' Hall
Gutter Lane
London EC2V 6BS

Solicitors for the
Respondent

IN THE PRIVY COUNCIL No. 7 of 1981

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN:

F. PLAN LIMITED — Appellant (Defendant)

- AND -

TIFFANY GLASS LIMITED — Respondent (Plaintiff)

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

IN THE PRIVY COUNCIL No. 7 of 1981

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN:

F. PLAN LIMITED — Appellant (Defendant)

- AND -

TIFFANY GLASS LIMITED — Respondent (Plaintiff)

RECORD OF PROCEEDINGS

In the High Court

No. 1
Writ of Summons
4th November 1977

No. 1

WRIT OF SUMMONS

DATED 4th NOVEMBER 1977

TRINIDAD AND TOBAGO

J.D. Sellier & Co.
Solicitors, Conveyancers
& Notaries Public
(Writ of Summons -
Specially Endorsed)

IN THE HIGH COURT OF JUSTICE

No. 2982 of 1977

BETWEEN

TIFFANY GLASS LTD — Plaintiff

AND

F. PLAN LIMITED — Defendant
"THE STATE OF TRINIDAD AND TOBAGO"

To: F. PLAN LIMITED,
82/84 Henry Street
Port of Spain.

YOU ARE HEREBY COMMANDED that within eight days after the service of this Writ on you, inclusive of the day of service, you do cause an appearance to be entered for you in an action at the suit of

TIFFANY GLASS LTD.

and take notice that in default of your so doing, the Plaintiff may proceed therein, and judgment may be given

in your absence.

WITNESS: The Hon'ble Sir Isaac Hyatali, Kt., Chief Justice of Trinidad and Tobago, the 4th day of November, 1977.

NOTE: This Writ may not be served later than 12 calendar months beginning with the above date unless renewed by Order of the Court.

DIRECTIONS FOR ENTERING APPEARANCE

The defendant may enter an appearance in person or by a solicitor either (1) by handling the appropriate forms, duly completed, at the Red House Port of Spain, or (2) by sending them to that office by post.

NOTE: If the defendant enters an appearance, then unless a summons for judgment is served on it in the meantime, it must also serve a defence on the solicitor for the plaintiff within 14 days after the last day of the time mited for entering an appearance, otherwise judgment may be entered against it without notice.

STATEMENT OF CLAIM

1. By an oral agreement for a lease which was reduced to writing in September, 1974 the Plaintiff let to the defendant the premises situate at and known as Lot No. 7 Diamond Vale Industrial Estate, Diamond Vale in the Ward of Diego Martin for a term of three years from the 15th day of September, 1974 at a monthly rent of $1,500.00 payable in advance on the 15th day of each and every month.

2. The said term expired on the 14th day of September, 1977.

3. The defendant failed to deliver up possession of the said premises on the said 14th day of September, 1977 and still remains in possession.

4. Further the defendant has not paid the monthly rent which fell due on the 15th day of each month from the 15th day of October, 1975 to date or any part thereof.

5. And the plaintiff claims :

   (1) possession of the said premises.

   (2) $37,500.00 arrears of rent.

   (3) Mesne Profits at the rate of $1,500.00 per month from the 15th day of November, 1975 to the date of delivery of possession.

Sgd. J. D. Sellier & Co.
Plaintiff's Solicitors.

And $130.00 (or such sum as may be allowed on taxation) for costs, and also, if the plaintiff obtains an order for substituted service, the further sum of $75.00 (or such sum as may be allowed on taxation). If the amount claimed and costs be paid to the plaintiff, his solicitor or agent within Four days after service hereof, (inclusive of the day of service), further proceedings will be stayed, but if it appears from the indorsement, on the writ that the plaintiff is a non-resident as defined in section 2(1) of the Exchange Control Act 1970, or is acting by order or on behalf of such a person so resident proceedings will only be stayed if the amount claimed and cost is paid into court within the said time and notice of such payment is given to the plaintiff his solicitor or agent.

This writ was issued by Messrs. J.D. Sellier & Co. of No. 13 - 15 St. Vincent Street, Port of Spain, solicitors for the said plaintiff whose address is: 68/70 Henry Street, Port of Spain.

Sgd. J. D. Sellier & Co.
Plaintiff's Solicitors

No. 2

SUMMONS IN CHAMBERS

DATED 2nd DECEMBER 1977

TRINIDAD AND TOBAGO IN THE HIGH COURT OF JUSTICE

No. 2982 of 1977

BETWEEN

TIFFANY GLASS LTD. Plaintiff

AND

F. PLAN LIMITED Defendant

LET all parties concerned or their solicitors attend the Honourable the Sitting Judge in Chambers at the Court House, Red House, Port of Spain on Wednesday 1st day of February 1978 at the hour of Nine (9) o'clock in the forenoon on the hearing of an application on the part of the plaintiff for an Order that it be at liberty to sign final judgment in this action against the defendant for

In the High Court

No. 2
Summons in Chambers

2nd December 1977

(Continued)

(i) Possession of the premises mentioned in the Statement of Claim indorsed in the Writ of Summons herein.

(ii) $36,000.00 arrears of rent.

(iii) Mesne profits at the rate of $1,500.00 per month from the 15th day of September, 1975 to the date of delivery of possession and costs.

DATED this 2nd day of December, 1977.

This Summons is taken out by Messrs. J. D. Sellier & Company of No. 13 St. Vincent Street, Port of Spain, Solicitors for the Plaintiff. 10

Sgd. J. D. Sellier & Co.
Plaintiff's Solicitors.

NOTE: If you do not attend either in person or by solicitors at the time and place above mentioned such order will be made and proceedings taken as to the Judge may seem just and expedient.

TO: The Registrar of the High Court of Justice.

AND TO: Messrs. Wong and Sanguinette, 20
28 St. Vincent Street,
Port of Spain.

Defendant's Solicitors

No. 3
Affidavit of George Janoura

2nd December 1977

No. 3

AFFIDAVIT OF GEORGE JANOURA

DATED 2nd DECEMBER 1977

TRINIDAD AND TOBAGO: IN THE HIGH COURT OF JUSTICE

No. 2982 of 1977

Between

TIFFANY GLASS LIMITED Plaintiff 30

and

F PLAN LIMITED Defendant

I, GEORGE JANOURA of Lot 6 Nutmeg Avenue, Haleland Park, in the Island of Trinidad, Company Director, make oath and say as follows :-

1. I am a Director of the above named Plaintiff Company and the facts herein deposed to are within

my own knowledge true except where otherwise stated.

2. By an oral agreement for a lease which was reduced to writing in September 1974, but never signed, the Plaintiff let to the Defendant the premises situate at and known as Lot No. 7 Diamond Vale Industrial Estate, Diamond Vale, in the Ward of Diego Martin for the term of three (3) years from the 15th day of September 1974 at a monthly rent of $1,500.00 payable in advance on the 15th day of each and every month. There is now produced and shown to me marked "G.J.I" a copy of the said unsigned agreement for a lease.

3. The Defendant entered into possession of the said premises under the terms of the said oral agreement for lease of the aforesaid premises and by effluxion of time the said term expired on the 14th day of September, 1977.

4. The Defendant, notwithstanding the expiration of the aforesaid term, continued and was at the commencement of this action and still is in possession of the said premises and has refused and refuses to give up possession thereof to the Plaintiff.

5. The Defendant was at the commencement of this action, and still is justly and truly indebted to the plaintiff in the sum of $36,000.00 for arrears of rent of the said premises to the 14th day of September, 1977. The figure of $37,500.00 erroneously appears in the Statement of Claim endorsed on the Writ of Summons herein and leave will be sought of this Honourable Court at the hearing of this application to amend the said Statement of Claim.

6. The Plaintiff is entitled to recover from the Defendant mesne profits in respect of the said premises from the 15th day of September, 1977 until judgment in this action calculated at the rate of $1,500.00 per month.

7. I am advised by my Solicitors and verily believe that the Defendant has no defence to this action and has entered an appearance purely for the purpose of delay.

SWORN to at No. 15 St. Vincent Street,
Port of Spain, this 2nd day of
December, 1977

Sgd:
George Janoura

Before me,
Leslie C. Weekes
Commissioner of Affidavits.

This Affidavit is filed on behalf of the Plaintiff herein.

In the
High Court

No. 3

Exhibit "G.J.1 to Affidavit of George Janoura

2nd December 1977

EXHIBIT "G.J.1"

TO AFFIDAVIT OF GEORGE JANOURA

This is the exhibit marked "G.J.1" referred to in the prefixed affidavit of George Janoura sworn to before me the 2nd day of December, 1977.

Leslie C. Weekes
Commissioner of Affidavits

AGREEMENT FOR LEASE

Between

TIFFANY GLASS LIMITED ("the Lessor")

And

F PLAN LIMITED ("the Lessee")

Subject to the consent of the Industrial Development Corporation the Lessor will grant to the Lessee and the Lessee shall take a sub-lease in respect of Lot No. 7 Diamond Vale Industrial Estate upon the following terms and conditions :-

1. The period of the sub-lease shall be Three Years and shall commence on the 15th September, 1974.

2. The monthly rent payable shall be the sum of $1,500.00 payable in advance on the 15th day of each and every month.

3. The Lessee shall not use the premises for purposes other than such purposes as may be permitted under the Head Lease from the Industrial Development Corporation under which the said premises are held, and shall observe and perform all the covenants and stipulations contained in the Head Lease, save that the Lessor shall pay the rent payable thereunder.

4. The Lessor shall be responsible for the maintenance and upkeep of the main structure and roof of the building on the said premises and the Lessee shall be responsible for all other repairs, maintenance and upkeep of the said building and the grounds.

5. The Lessee shall bear and pay to the Lessor (a) any charges for excess water which may from time to time become payable in respect of the premises, and (b) all amounts by which the annual sums payable for rates, taxes, charges and other assessments in respect of the premises shall exceed those now payable. The Lessor

shall bear and pay the annual sums now payable for such rates, taxes, charges and assessments.

6. The Lessee shall not do or permit to be done anything whereby the existing policy of insurance on the said building against damage by fire and other risks may become void or voidable or whereby the premium thereon may be increased and to repay to the Lessor all sums paid by it by way of increased premium and all expenses incurred by it in or about any renewal of such policy or policies rendered necessary by a breach or non-observance of such covenant.

7. In other respects the said sub-lease shall contain such covenants terms and conditions as are normal and proper in leases of property of the nature of the said premises.

Dated the day of September, 1974.

Signed by)
for and on behalf of the Lessor in)
the presence of :)

Signed by)
for and on behalf of the Lessee in)
the presence of :)

No. 4

AFFIDAVIT OF GORDON FARAH
DATED 1st FEBRUARY 1978

TRINIDAD AND TOBAGO IN THE HIGH COURT OF JUSTICE

1977, NO 2982

BETWEEN

TIFFANY GLASS LIMITED Plaintiff

And

F PLAN LIMITED Defendant

I, GORDON FARAH of 6A Champs Elysees, Maraval in the Island of Trinidad, Company Director, make oath and say as follows:-

1. I am a Director of the above named Defendant Company and the facts deposed to herein are within my personal knowledge.

2. I have read what purports to be a true copy of the

affidavit of George Janoura sworn to and filed herein on 2nd day of December, 1977.

3. I am advised by the Defendant's Solicitors and verily believe the same that the subject action is frivolous and vexatious and an abuse of the process of the Court in that :

(a) The Plaintiff has instituted two separate actions, viz, High Court Action 2603 of 1975 and the subject action 2982 of 1977 claiming in both the same relief, that is to say, possession, arrears of rent and mesne profits.

(b) By High Court Action 2603 of 1975 the Plaintiff can recover everything to which it is entitled and in consequence thereof ought not to have brought this action.

(c) This Honourable Court by order of Mr. Justice Cross dated 15th June, 1976, has already decided the question raised anew in the subject proceedings, that the Defendant has a good defence to the claim for possession contained in the Statement of Claim filed in High Court Action 2603 of 1975 which action is now pending before this Honourable Court.

(d) Pursuant to the said order the Plaintiff duly delivered its defence and counterclaim which was filed on 20th February, 1977.

4. Notwithstanding the above, by an oral option to purchase supplemental to and of even date with and forming part of an oral agreement for a lease, which were contained in two separate written documents, but never executed, it was agreed, inter alia :

(a) that the Plaintiff would let to the Defendant certain Industrial premises known as Lot No. 7 Diamond Vale Industrial Estate for a term of 3 years.

(b) that the monthly rental therefor should be $1,500.00 and the sum of $1,000.00 should be paid towards the said option to purchase the said premises for $375,000.00 such option to be exercised in writing on or before 15th June, 1977, and both sums should be paid monthly in advance;

(c) that the Defendant enter into possession under the terms of the said oral option and the said oral agreement for a lease, which it did;

(d) that should the said Agreement for a lease be determined for any reason whatsoever the said option should be rendered void and of no effect;

Pursuant to the agreements aforesaid the Defendant took possession of the said premises and assembled a modern furniture factory and finishing operation at considerable expense.

5. The Defendant observed and performed all the covenants and conditions contained in the said unsigned agreement and the said option.

6. By letter dated 13th June, 1977, the Defendant exercised its option to purchase in accordance with the provisions of the said option and requisitioned for full particulars of title to the said premises, suggested a time, place and date for completion but the Plaintiff did not answer or conform to the said requisition.

7. By letter dated 14th June, 1977, the Defendant referred to the history of the transaction and pleaded with the Plaintiff to accept payment of monies due for rent and monies towards the said option but the Plaintiff refused to respond.

8. I am advised by the Defendant's Solicitors and verily believe the same that the Plaintiff's refusal to answer requisitions on the said title rendered it impossible to make the necessary searches prior to the preparation of a proper Deed of Assignment and it therefore became impossible to tender such a document to the Plaintiff for completion.

9. In the premises the Defendant has been deprived of its option to purchase the said premises in consequence whereof it has suffered great loss and damages.

10. I am advised and verily believe that I have a good defence to this action and hereby seek leave of this Honourable Court to defend and Counterclaim in this action.

11. A copy of the Defence and Counterclaim in this action is hereto annexed and marked "A".

SWORN to at No. St. Vincent Street in the City of Port-of-Spain in the Island of Trinidad this day of February, 1978.

Before me

DOROTHY JOSEPH

Commissioner of Affidavits

Filed on behalf of the Defendant herein.

In the High Court

No. 4
Exhibit "A"
to Affidavit
of Gordon Farah

1st February
1978

EXHIBIT "A" to

AFFIDAVIT OF GORDON FARAH

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

1975, NO. 2603

BETWEEN

TIFFANY GLASS LIMITED Plaintiff

And

F. PLAN LIMITED Defendant

DEFENCE AND COUNTERCLAIM

D E F E N C E

1. The Defendant admits so much of paragraph 1 of the Statement of Claim as alleges and/or implies the existence of a lease of Lot 7, Diamond Vale Industrial Estate and no more.

2. The Defendant admits so much of paragraph 3 of the Statement of Claim as alleges and/or implies that it remains in possession of the said premises but says it retains such possession until its rights in this matter are settled.

3. The Defendant does not admit paragraphs 2 and 4 of the Statement of Claim.

4. The Defendant says that by virtue of an oral option to purchase supplemental to and induced by an oral agreement for a lease and forming part thereof and of even date therewith the Plaintiff granted to the Defendant an option to purchase the said leasehold premises for the price of $375,000.00 such option to be exercisable by notice in writing on or before 15th June, 1977.

5. The Defendant says that it has performed and observed all the covenants conditions and stipulations contained in the said lease and the said oral option.

6. Further, the Defendant says that by letter dated 13th June, 1977 it exercised its option to purchase the said premises in accordance with the provisions of the said option and requisitioned for full particulars of title to the said premises, suggested a time, a place and a date for completion but the Plaintiff did not answer or conform to the said requisitions.

7. By letter dated 14th June, 1977, the Defendant referred to the history of the transaction and called upon the Plaintiff to accept payment of monies due for rent and monies due on the said option but the Plaintiff refused and still refuses to conform.

8. The Defendant says that the Plaintiff's refusal to answer requisitions on the said title rendered it impossible to carry out the necessary searches of the said title prior to the preparation of a proper assurance and it therefore became impossible to tender such document to the Plaintiff for completion.

9. Save and except as herein above expressly admitted the Defendant denies each and every allegation and/or implication of fact in the Statement of Claim contained as if the same were set forth herein seriatim and specifically traversed.

AND BY WAY OF COUNTERCLAIM

10. The Defendant repeats paragraphs 1 to 9 inclusive of its defence herein and says that in the premises the Plaintiff has wrongfully refused to sell the said premises to the Defendant particularly having regard to the matters and facts set out in paragraphs 4, 5 and 6 above in consequence whereof the Defendant was deprived and is being deprived of a very valuable option to purchase the said premises at the price of $375,000.00 and has suffered loss and damage.

PARTICULARS OF SPECIAL DAMAGE

1.	Estimated value of the said premises at present day prices	$575,000.00
2.	Agreed price under the said option	$375,000.00
	Estimated loss:	$200,000.00

AND the Defendant counterclaims :

1. Damages for breach of contract.

2. A declaration that the Defendant is entitled to have the said premises assigned to it in accordance with the terms of the said oral option.

In the High Court

No. 4
Exhibit "A" to Affidavit of Gordon Farah

1st February 1978

(Continued)

3. Costs.

4. Such further or other relief as may be just.

OF COUNSEL

DELIVERED this day of FEBRUARY, 1978 by Messrs. Wong & Sanguinette, of No. 28 St. Vincent Street, Port-of-Spain, Solicitors for the Defendant.

DEFENDANT'S SOLICITORS.

TO: MESSRS. J. D. SELLIER & CO.,
Solicitors & Conveyancers,
13 St Vincent Street,
Port of Spain.

Plaintiff's Solicitors.

No. 5
Affidavit of George Janoura

17th February 1978

No. 5

AFFIDAVIT OF GEORGE JANOURA

DATED 17th FEBRUARY 1978

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. 2982 of 1977.

BETWEEN

TIFFANY GLASS LIMITED Plaintiff

And

F PLAN LIMITED Defendant

I, GEORGE JANOURA, of No. 6 Nutmeg Avenue, Haleland Park, Maraval, in the Ward of Diego Martin, in the Island of Trinidad, Company Director make oath and say as follows :

1. I refer to my affidavit sworn to and filed herein on the 2nd December, 1977.

2. I have read what purports to be a true copy of the affidavit of Gordon Farah sworn to and filed herein on the 1st day of February, 1978 (hereinafter called "the Affidavit in Opposition").

3. There is now produced and shown to me and hereto

annexed and marked "GJ1" a true copy of the Statement of Claim in High Court Action No. 2603 of 1975. By a Summons in Chambers filed on the 2nd December, 1977 the Plaintiff is seeking leave to discontinue High Court Action No. 2603 of 1975. There is now produced and shown to me and hereto annexed and marked "GJ2" a true copy of the said Summons.

4. There are now produced and shown to me and marked "GJ3" and GJ4" respectively true copies of the letters dated 13th June, 1977 and 14th June, 1977 referred to in paragraphs 6 and 7 of the Affidavit in Opposition but neither exhibited nor annexed thereto. The Plaintiff by its solicitors, by a letter dated 29th June, 1977 replied to the said letter of 13th June, 1977, and also dealt with the purported exercise of the option. There is now produced and shown to me and hereto annexed and marked "GJ5" a true copy of the said letter dated the 29th day of June, 1977.

5. By his Order dated the 15th June, 1976 referred to in paragraph 3c of the Affidavit in Opposition the Honourable Mr. Justice Cross set aside the Judgment obtained in default of Defence by the Plaintiff in High Court Action No. 2603 of 1975 and granted the Defendant leave to defend. There is now produced and shown to me and hereto annexed and marked "GJ6" a true copy of the said Order of the Honourable Mr. Justice Cross.

6. The Defendant has not paid or tendered any rent whatsoever for the premises since 15th August, 1975 and since I swore to my Affidavit in Support the Defendant has continued to occupy the Plaintiff's premises without payment of any money therefor.

SWORN TO at No. 30a St. Vincent Street, Port of Spain, this 17th day of February, 1978.) GEORGE JANOURA

Before me

Cecil C. Reece

Commissioner of Affidavits.

In the
High Court

No. 5
Exhibit "GJ1"
to Affidavit of
George Janoura

17th February
1978

EXHIBIT "G.J.1"

TO AFFIDAVIT OF GEORGE JANOURA

"GJ1"

This is the Statement of Claim marked "GJ1" referred to in the Affidavit of George Janoura sworn to the 17th day of February, 1978.

Cecil C. Reece

Commissioner of Affidavits.

J. D. Sellier & Co.,
Solicitors,
Conveyancers, &
Notaries Public

(Writ of Summons - Specially Indorsed)

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. 2603 of 1975

BETWEEN

TIFFANY GLASS LTD. Plaintiff

AND

F. PLAN LIMITED Defendant

ELIZABETH THE SECOND, by the Grace of God Queen of Trinidad & Tobago and of Her Other Realms and Territories, Head of the Commonwealth.

TO: F. Plan Limited,
68/70 Henry Street,
Port of Spain.

WE command you, that within eight days after the service of this Writ on you inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of

TIFFANY GLASS LTD.,

and take notice that in default of your so doing, the Plaintiff may proceed therein, and judgment may be given in your absence.

WITNESS: The Honourable Sir Isaac Hyatali, Kt., Chief Justice of our said Court at Port of Spain, in the said Island of Trinidad, this 31st day of October, 1975.

N.B. - This Writ is to be served within Twelve Calendar months from the date thereof or, if renewed, within Six Calendar months from the date of the last renewal, including the day of such date and not afterwards.

The Defendant may appear hereto by entering an appearance either personally or by Solicitor at the Registrar's Office at the Court House, in the City of Port of Spain.

If the defendant enters an appearance it must also deliver a defence within fourteen days from the last day of the time limited for appearance unless such time is extended by the Court or a Judge, otherwise judgment may be entered against it without notice, unless it has in the meantime been served with a summons for judgment.

STATEMENT OF CLAIM

1. The plaintiff and the defendant are both companies duly incorporated in this Territory under the Companies Ordinance with limited liability and their respective registered offices are at 58 Queen Street and 68/70 Henry Street, Port of Spain.

2. On or about the 15th day of November, 1974 the plaintiff let to the defendant leasehold premises situate at Lot 7 Diamond Vale Industrial Estate, Diamond Vale at the monthly rental of $2,500.00 commencing on the 13th day of November, 1974 and continuing payable on the 15th day of each and every month thereafter.

3. By Notice to quit dated the 25th day of June, 1975 and served on the defendant on the said 25th day of June, 1975 the plaintiff terminated the tenancy above referred to with effect from the 31st day of July, 1975, but the defendant has refused to deliver vacant possession of the aforesaid premises to the plaintiff and remains in occupation thereof as a trespasser.

4. The said premises are excluded from the provisions of the Rent Restriction Ordinance Ch. 27 No. 18 by virtue of the Rent Restriction (Exclusion of Premises) Order 1969.

And the Plaintiff claims :-

(a) Possession of the said premises.

(b) $2,500.00 as arrears of rent up to the 31st day of October, 1975.

(c) Mesne profits for rent at the rate of

In the High Court

No. 5
Exhibit "GJ1" to Affidavit of George Janoura

17th February 1978

(Continued)

$2,500.00 per month from the 1st day of November, 1975 to the date of delivery of possession by the defendant to the plaintiff.

Sgd: J.D. Sellier & Co.
Plaintiff's Solicitors.

And the sum of $75.60 (or such sum as may be allowed on taxation) for costs; and also, in case the Plaintiff obtain an order for substituted service, the further sum of $55.28 (or such sum as may be allowed on taxation). If the amount claimed is paid to the Plaintiff or its Solicitors or Agents within four days from the service hereof, further proceedings will be stayed.

This Writ was issued by Messrs. J.D. Sellier & Co. of No. 13 - 15 St. Vincent Street, Port of Spain, whose address for service is the same.

Solicitors for the said Plaintiff whose registered office is situate at 58 Queen Street, Port of Spain.

Sgd: J.D. Sellier & Co.
Plaintiff's Solicitors

Exhibit "GJ2" to Affidavit of George Janoura

17th February 1978

EXHIBIT "GJ2"

to AFFIDAVIT OF GEORGE JANOURA

This is the Summons marked "GJ2" referred to in the Affidavit of George Janoura sworn to the 17th day of February, 1978.

Cecil C. Reece
Commissioner of Affidavits

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. 2603 of 1975

Between

TIFFANY GLASS LIMITED — Plaintiff

And

F PLAN LIMITED — Defendant

L E T all parties concerned or their solicitors

attend the Honourable The Sitting Judge in Chambers at the Court House, Red House, Port of Spain on Wednesday the 25th day of January, 1978 at the hour of Nine (9) o'clock in the forenoon on the hearing of an application on the part of the Plaintiff for an Order that leave be granted to the Plaintiff to discontinue this action and that the costs of this action be provided for.

Dated this 2nd day of December, 1977.

This Summons is taken out by MESSRS. J. D. SELLIER & CO., of No. 13 St. Vincent Street, Port of Spain, solicitors for the plaintiff.

Sgd. J. D. Sellier & Co.
Solicitors for the Plaintiff.

TO: The Registrar of the High Court of Justice

AND
TO: Messrs. Wong & Sanguinette, of No. 28 St. Vincent Street, Port of Spain, Defendant's Solicitors.

NOTE: In default of your attendance either in person or by your Solicitors at the time and place above mentioned such order will be made and proceedings taken as to the Judge may seem just and expedient.

EXHIBIT "GJ3"

TO AFFIDAVIT OF GEORGE JANOURA

F PLAN (FURNITURE) LTD.

P.O. Box 516 Port of Spain,
Trinidad, W.I.
Cable Address GAFFM Telephone:
62-35774; 62-31787

"GJ3"

This is the letter dated June 13, 1977 marked "GJ3" referred to in the Affidavit of George Janoura sworn to the 17th day of February, 1978.

Cecil C. Reece
Commissioner of Affidavits.

June 13th. 1977.

In the High Court

No. 5
Exhibit "GJ3" to Affidavit of George Janoura

17th February 1978

(Continued)

The Secretary,
Tiffany Glass Ltd.,
58, Queen Street,
PORT OF SPAIN,

Dear Sirs,

Re: Option to Purchase Lot No. 7
Diamond Vale Industrial Estate
Diamond Vale, Diego Martin

The Company hereby exercises its option to purchase the subject premises in accordance with the provisions referential to the said option to purchase as set out in the affidavit of George Janoura exhibit "GJ2" referred to in High Court Action 2603 of 1975.

Would you be good enough to supply Mr. Clive W. R. Phelps of Phelps of 31 Abercromby Street, Port-of-Spain (Telephone 34091) with full particulars of your title to the said premises, so that, he may prepare the necessary legal documents.

We have instructed Mr. Clive W.R. Phelps to prepare and engross a deed of assignment of the said premises for presentation to your Lawyers for perusal and approval. Kindly let us know who will act for your Company in this matter so as to expedite this transaction.

We are suggesting that the transaction be completed at the Chambers of Mr. Clive W.R. Phelps at 31 Abercromby Street, Port-of-Spain, at 2.00 p.m. on Monday 12th September, 1977, but in any event not later than 15th September, 1977.

Yours faithfully,
F. Plan Limited

(Sgd) Richard A. Farah

Managing Director

c.c. Mr. B. Des Vignes
Mr. C. J. Sanguinette
Mr. Clive W.R. Phelps

DIRECTORS: CLIVE W.R. PHELPS (CHAIRMAN, RICHARD A FARAH (MANAGING DIRECTOR), GORDON E. FARAH, RAWLE C. JEFFREY, ROMEO M. BELFONTE.

In the High Court

No. 5
Exhibit "GJ4" to Affidavit of George Janoura

17th February 1978

EXHIBIT "G.J.4"

TO AFFIDAVIT OF GEORGE JANOURA

F PLAN (FURNITURE) LTD.

P.O. Box 516, Port of Spain,
Trinidad, W.I.

Cable Address GAFFM
Telephone: 62-35774, 62-31787

"GJ4"
This is the letter dated the 14th June, 1977 marked "GJ4" referred to in the Affidavit of George Janoura sworn to the 17th day of February, 1978.

Cecil C. Reece
Commissioner of Affidavits

June 14th, 1977

The Secretary,
Tiffany Glass Ltd.,
58, Queen Street,
PORT OF SPAIN.

Dear Sirs,

Re: High Court Action No.2603 of 1975
Tiffany Glass Ltd. & F. Plan Ltd.

We refer finally to the various conferences, telephone conversations and correspondence passing between us on the subject matter.

We repeat herein that we are not only ready and willing but also able to pay you sums of $1,500 per month as rent and $1,000 per month towards our option to purchase.

We regret your persistent refusal to accommodate us in this matter and we wish to hear from you by return, concerning acceptance of our repeated proposal set out above.

Yours faithfully,

F. PLAN LIMITED

Sgd. RICHARD FARAH

Managing Director

DIRECTORS: CLIVE W.R. PHELPS (Chairman), RICHARD A. FARAH (Managing Director), GORDON E. FARAH, RAWLE C. JEFFREY, ROMEO M. BELFONTE

In the
High Court

No. 5
Exhibit "GJ5"
to Affidavit of
George Janoura

17th February
1978

EXHIBIT "G.J.5"

TO AFFIDAVIT OF GEORGE JANOURA

This is the letter dated June 29, 1977 marked "GJ5" referred to in the Affidavit of George Janoura, sworn to the 17th day of February, 1978.

Cecil C. Reece
Commissioner of Affidavits.

BdesV:sds

June 29, 1977.

F. Plan (Furniture) Ltd.,
P.O. Box 516.
Port of Spain

Attention: Mr Richard Farah

Dear Sirs,

Re: Option to Purchase Lot No. 7
Diamond Vale Industrial Estate
Diamond Vale, Diego Martin

On behalf of our client Tiffany Glass Ltd., we acknowledge receipt of your letter of 13th instant, purporting to exercise an Option to Purchase our client's premises at Diamond Vale Industrial Estate.

Counsel has advised that you are not entitled to exercise this option for the reason that no monies have been received from yourselves, whether by way of option payments or otherwise, for more than 12 months.

Yours faithfully,

Sgd: J.D. Sellier & Co.

In the
High Court

No. 5
Exhibit "GJ6"
to Affidavit of
George Janoura

17th February
1978

EXHIBIT "G.J.6"

TO AFFIDAVIT OF GEORGE JANOURA

This is the Order marked "GJ6" referred to in the Affidavit of George Janoura sworn to the 17th day of February, 1978.

Cecil C. Reece
Commissioner of Affidavits

TRINIDAD

IN THE HIGH COURT OF JUSTICE

No. 2603 of 1975

BETWEEN

TIFFANY GLASS LIMITED Plaintiff

AND

F PLAN LIMITED Defendant

Dated the 15th day of June, 1976
Entered the 15th day of June, 1976
Before the Honourable Mr. Justice Cross

UPON reading the Summons in Chambers dated the 23rd day of January, 1976 the Affidavit of Gordon Farah sworn to the 20th day of February, 1976 with the exhibits attached thereto, and the Affidavit of George Janoura sworn to the 20th day of May, 1976 with the exhibits attached thereto, all filed herein.

AND UPON HEARING Counsel for the Plaintiff and Counsel for the defendant

IT IS ORDERED that the Judgment entered herein on the 22nd day of January, 1976 be set aside and that the defendant be granted leave to defend this matter

AND IT IS FURTHER ORDERED that the defendant deliver its defence within three days

and that the plaintiff company deliver if necessary its Reply to Defence and Counterclaim within 14 days

costs be costs in the cause.

Judge

In the High Court

No. 6
Notice of Intention to apply for leave to amend Statement of Claim

2nd December 1977

No. 6

NOTICE OF INTENTION TO APPLY FOR LEAVE TO AMEND STATEMENT OF CLAIM

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. 2982 of 1977

BETWEEN

TIFFANY GLASS LTD. Plaintiff

AND

F. PLAN LIMITED Defendant

TAKE NOTICE that an application will be made by the Plaintiff at the hearing of the Summons in Chambers issued herein the 22nd day of December, 1977 for an Order that leave be granted to the Plaintiff to amend the Statement of Claim endorsed on the Writ of Summons herein in terms of the draft Amended Writ of Summons hereto annexed.

Dated the 2nd day of December, 1977.

Sgd: J. D. Sellier & Co.
Plaintiff's Solicitors

To: The Registrar of the Supreme Court
Red House
Port of Spain.

And
To: Messrs. Wong & Sanguinette
28 St. Vincent Street
Port of Spain

Defendant's Solicitors

TRINIDAD AND TOBAGO

J.D. Sellier & Co.,
Solicitors, Conveyancers
& Notaries Public
(Writ of Summons -
Specially Endorsed)

IN THE HIGH COURT OF JUSTICE

No. 2982 of 1977

BETWEEN

TIFFANY GLASS LTD. Plaintiff

AND

F. PLAN LIMITED Defendant
(THE STATE OF TRINIDAD AND TOBAGO)

TO: F. PLAN LIMITED
82/84 Henry Street
Port of Spain.

YOU ARE HEREBY COMMANDED that within eight days after the service of this Writ on you, inclusive of the day of service, you do cause an appearance to be entered for you in an action at the suit of

TIFFANY GLASS LTD.,

and take notice that in default of your so doing, the Plaintiff may proceed therein, and judgment may be given in your absence.

WITNESS: The Hon'ble Sir Isaac Hyatali, Kt., Chief Justice of Trinidad and Tobago, the 4th day of November, 1977.

NOTE: This Writ may not be served later than 12 calendar months beginning with the above date unless renewed by Order of the Court.

DIRECTIONS FOR ENTERING APPEARANCE

The defendant may enter an appearance in person or by a solicitor either (1) by handling the appropriate forms, duly completed, at the Red House Port of Spain, or (2) by sending them to that office by post.

NOTE: If the defendant enters an appearance, then unless a summons for judgment is served on it in the meantime, it must also serve a defence on the solicitor for the plaintiff within 14 days after the last day of the time mited for entering an appearance, otherwise judgment may be entered against it without notice.

AMENDED STATEMENT OF CLAIM

1. By an oral agreement for a lease which was reduced to writing in September, 1974 the Plaintiff let to the Defendant the premises situate at and known as Lot No. 7 Diamond Vale Industrial Estate, Diamond Vale in the Ward of Diego Martin for a term of three years from the 15th day of September, 1974 at a monthly rent of $1,500.00 payable in advance on the 15th day of each and every month.

2. The said term expired on the 14th day of September, 1977.

3. The defendant failed to deliver up possession of the said premises on the said 14th day of September, 1977 and still remains in possession.

4. Further the defendant has not paid the monthly rent

which fell due on the 15th day of each month from the 15th day of ~~September~~ October, 1975 to date or any part thereof.

5. And the plaintiff claims :

(1) possession of the said premises.

(2) ~~$37,500.00~~ $36,000.00 arrears of rent.

(3) Mesne Profits at the rate of $1,500.00 per month from the 15th day of ~~November~~ September 7, 1978 to the date of delivery of possession

Sgd: J. D. Sellier & Co.
Plaintiff's Solicitors.

And $130.00 (or such sum as may be allowed on taxation) for costs, and also, if the plaintiff obtains an order for substituted service, the further sum of $75.00 (or such sum as may be allowed on taxation). If the amount claimed and costs be paid to the plaintiff, his solicitor or agent within Four days after service hereof, (inclusive of the day of service), further proceedings will be stayed, but if it appears from the indorsement, on the writ that the plaintiff is a non-resident as defined in section 2 (1) of the Exchange Control Act 1970, or is acting by order or on behalf of such a person so resident proceedings will only be stayed if the amount claimed and cost is paid into court within the said time and notice of such payment is given to the plaintiff his solicitor or agent.

This writ was issued by Messrs. J. D. Sellier & Co of No. 13-15 St. Vincent Street, Port of Spain, solicitors for the said plaintiff whose registered office is situate at 68/70 Henry Street, Port of Spain

Sgd: J. D. Sellier & Co.
Plaintiff's Solicitors

No. 7

JUDGE'S NOTES OF SUBMISSIONS

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. 2982 of 1977

BETWEEN

TIFFANY GLASS LIMITED — Plaintiff

AND

F. PLAN LIMITED — Defendant

Before the Honourable Mr. Justice Kester McMillan

M. de la Bastide, Q.C. and M. Daly for the plaintiff
F. Ramsahoye Q.C. and C. Phelps for the defendant.

S U B M I S S I O N S

de la Bastide: Seeking first to have writ amended. Notice given only 2 years - rent due at $1,500 per month as per Janoura's affidavit of December 2, 1977. Rent not paid from 15th September, 1975 and tenancy expired on 14th September, 1977.

Ramsahoye: Object. Writ not validly issued and not properly before the Court. Order 6, rule 2(1)(c) not complied with. Not shown premises outside the Rent Restriction Ordinance.

de la Bastide: (1) Rule merely states "showing" not "stating". Sufficient funds shown in writ. Premises on Industrial Estate and rent $1,500 per month.

(2) Order 2, rule 1 mere irregularity but by rule 2 not open to the defendants to take point since they have filed affidavit in these proceedings and given notice accordingly.

Objection over-ruled - not open to defendants to take point.

Amendment allowed in terms of Notice dated 2nd December, 1977.

Ramsahoye: Raising same argument with respect to

amended writ. Defendants have not taken any steps with regard to it.

Over-ruled. It is still the same writ and Order 2 applicable.

de la Bastide: Summons claims possession. Arrears of rent and mesne profits.

(Ramsahoye admits arrears of rent)

Farah's affidavit: Para. 3 not correct. Action 2603/75 based on notice to quit. Para. 4 Option agreement not exhibited but filed in 2603/75. (leave granted).

Note (a) Not true to say $1,000 was payable towards option - it was.

(b) Option gave no right to possession. Possession arose under lease.

Para. 5 untrue - rent not paid for 2 years. Same with payments under option agreement. Paras. 6 and 7 - documents referred to exhibited in Janoura's affidavit in reply. Letter of 13th June, 1977 is what defendants rely on as having exercised option. On that date defendants in default of terms of option agreement and had not made any attempt to remedy default. No mention of arrears of rent or option fee.

Letter of 14th June, 1977: No offer to pay arrears even after purported exercise of option. Para. 8: clearly shows lack of bona fides. Leasehold land held of I.D.C. - what requisitions.

Note: No admission of rent owing until today by Counsel.

Leave granted to refer to Janoura's affidavit filed on the 24th May, 1975 in 2603/75.

Note: Para.10: Compare and contrast Farah's affidavit of 1st February 1978.

Para. 7: Rent not paid - no tender of rent, not even by letter of June 13, 1977. Defendant seeking leave to defend on basis of option. Fact is at time they purported to exercise option they had not paid option fee for about 21 months.

Option, is privilege which can only be exercised if strict compliance of terms on which given. If non-compliance of any condition precedent this cannot be exercised. Option fee most fundamental

obligation to be fulfilled before exercise of option.

Vol. 23 Hals. (3rd) para. 1091.

Vol. 34 Hals. - para 345.

Hare v Nicoll 1966, 1 A.E.R. 285

West County Cleaners (Falmouth) Ltd. v Saly 1966, 3 A.E.R. 210.

Australian Hardwoods Property Ltd. v Commissioner for Railways, 1961 1 A.E.R. 737

On admitted facts no triable issue raised. No dispute about the law. Submit for order in terms. Even if defendants feel they can succeed on claim for specific performance at liberty to do so, but possession should be given now to plaintiff who is entitled to it. Lease expired. If defendants are given leave it should be on the following terms -

(1) Payment of arrears of rent of $36,000.00 within 7 days;

(2) Payment into Court within 7 days of arrears of option fee;

(3) Payment into Court on the 15th day of each and every month of the sum of $1,500;

(4) Payment into Court of mesne profits at the rate of $1,500.00 per month from the 15th September, 1977 to commencement of payment under (3).

All payments under (2), (3) and (4) to be applied towards purchase price if defendant succeeds.

Ramsahoye: Note option headed supplemental to agreement for lease and two reasons -

(1) To allow defendants occupation for 3 years with (2) right to become purchasers in accordance with option.

In June, 1975 the plaintiff gives notice of determination. Writ issued 30th October, 1975 claims arrears of rent of $2,500. Plaintiff in breach of option agreement as it treats defendant as paying only rent. Dispute arises. Defendant counterclaimed for declaration it was holding under option. Because defendant purported to terminate lease and treat payments of $2,500 solely as rent defendants forced to litigate issue. They repudiated option by purporting to terminate lease and until defendant obtained declaration that option still valid

defendant acted quite properly in not paying or tendering rent or option moneys and once defendants exercised option they become equitable owners entitled to remain in occupation.

Defendant not in breach of fundamental obligation and should have unconditional leave to defend.

AP 1976 P. 149 14th July, 1973,

Note - Still no endorsement re Rent Restriction Ordinance and no amendment sought.

de la Bastide : Defendants seek to explain failure to pay option fee on basis of plaintiffs' breach. Assuming plaintiffs in breach, defendants could accept repudiation or refuse to accept and insist on compliance of agreement. If he elects to treat contract as on foot he must perform all obligations imposed on him by contract. If he does not he has elected to accept repudiation and his only remedy is in damages.

No dispute as to what monthly payments should be. Only dispute that could arise was as to the character of the payment. Even now no tender. But their own defence and counterclaim in 2603/75 clearly shows they accepted repudiation - See para. 10 and prayer for relief.

Adjourned to 5.5.78.

5th May, 1978 - Decision read.

The application is dismissed with costs, fit for Counsel.

No. 8

REASONS FOR DECISION OF McMILLAN J.

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. 2982 of 1977

BETWEEN

TIFFANY GLASS LTD. Plaintiff

AND

F. PLAN LIMITED Defendant

Before the Honourable
Mr. Justice K. McMillan

M. de la Bastide S.C. and M. Daly for Plaintiff

R. Ramsahoye S.C. and C. Phelps for Defendant

REASONS FOR DECISION

The application before me is for summary judgment for possession of the premises the subject matter of this action, $36,000 arrears of rent, and mesne profits at the rate of $1,500 from September 15, 1977 to the date of delivery of possession and costs. The application is resisted. Before dealing with the merits of the substantive application it is, I think, necessary to refer to the events which have given rise to the present application and which are disclosed in the affidavits filed in these proceedings and in action No. 2603/1975 between the same parties all of which have with leave been referred to.

By an oral agreement entered into between the parties on or about 9th September, 1974 the plaintiff agreed to sublet to the defendant the premises situate at and known as Lot No. 7, Diamond Vale Industrial Estate, Diamond Vale, Diego Martin for 3 years certain from September 15, 1974 at a monthly rental of $1,500 payable in advance on the 15th day of each month. By a supplementary oral agreement of the same date and in consideration of the sum of $36,000 to be paid by the defendant by 36 equal monthly payments of $1,000 each on the 15th day of each month commencing September 15, 1974, the plaintiff granted to the defendant an option to purchase the said premises on September 15, 1977 for

$365,000 (inclusive of the option fee for $36,000) provided the defendants exercised the option by notice in writing given to the plaintiff on or before June 15, 1977 and paid, on or before September 15, 1977 the difference between the full purchase price and any moneys already paid in respect of the option on the date of the exercise of the same. It was also provided by the option agreement that nothing therein should relieve the defendant of its liability to pay the rent payable under the agreement for lease and concluded -

> "Should the Agreement for lease in the lease granted there-under be determined for any reason whatever the option hereby granted shall be void and of no effect."

The option agreement was subject to the Industrial Development Corporation giving its consent to the absolute assignment of the premises to the defendant. Defendant duly entered into possession and paid all rent due under the oral agreements for the lease and option which were reduced into writing but never executed by the defendant, although the documents were submitted to it for the purpose.

On June 25, 1975 the plaintiff served on the defendant a notice of that date purporting to terminate the tenancy on July 31, 1975. It appears that moneys for the option and rent were paid in respect of the month commencing July 15, 1975. In respect of the month commencing 15th August, 1975 the defendant remitted $2,500 to the plaintiff who issued a receipt dated August 25, 1975 in these terms :

> "Received from F Plan Limited the sum of ($2,500.00) two thousand, five hundred dollars being rent for August, 1975 accepted without prejudice to our Notice to Quit dated 25th June, 1975.
>
> Signed (George Janoura)"

Thereafter no moneys have been paid or tendered by the defendant either by way of rent or option fee.

On October 31, 1975 the plaintiffs issued a specially endorsed writ (Action 2603 of 1975) against the defendants claiming possession for the said premises, arrears of rent at $2,500 from October 31, 1975 and mesne profits at $2,500 per month from November 1st, 1975. The allegations in the Statement of Claim are, inter alia -

(a) that on or about November 15, 1974 the plaintiff let to the defendant the said premises at a monthly rental of $2,500

commencing on November 15, 1974 payable on the 15th day of each month :

(b) that by notice to quit dated, and served on the defendant, on June 25, 1975 the tenancy was terminated on July 31, 1975 but that the defendant has refused to deliver up possession there-of and remain in occupation thereof as a trespasser;

(c) that the premises are excluded from the provisions of the Rent Restriction Ordinance, by virtue of the Rent Restriction (Exclusion of premises Order) 1969.

The writ was sent by registered post to the defendant Company on November 4, 1975 and on November 12, 1975 judgment was entered in terms of the Statement of Claim in default of appearance. That judgment was on December 9, 1975 set aside, it is agreed, by consent although the order as entered does not reflect that it was by consent, and the defendant given 7 days to enter appearance. Appearance was entered on December 9, 1975 but on January 22, 1976 judgment was again entered in terms of the Statement of Claim on the defendant's failure to deliver its defence. That judgment was itself set aside on June 15, 1976 on the defendant's application filed on January 23, 1976 and the defendant given three days to deliver its defence.

The affidavit of Gordon Farah, a Director of the defendant Company dated 20th February, 1976 filed in support of the application to set aside the judgment referred to the oral agreements and averred that (para. 5)

> "the defendant has also observed and performed all the covenants and conditions contained in the said unsigned agreement and the said option but the plaintiff in breach thereof has wrongfully issued the writ for possession herein."

and alleged that the notice served on it did not effectively determine its tenancy. In its defence exhibited to the affidavit, the defendant pleaded, inter alia, as follows :-

> "7. In further pursuance of the said option the defendant paid $1,000.00 each and every month commencing on the 15th day of September, 1974, up to and including the 15th day of October, 1975, but the said sum was purportedly treated as rent by the plaintiff after the said notice to quit was served on the defendant and contrary to the terms of the said lease and the said option.

The defendant will refer at the trial of this matter to the unsigned Option to Purchase containing all the terms of the said oral option for its true meaning and effect.

8. The defendant says that it has performed and observed all the covenants conditions and stipulations contained in the said lease and the said oral option and in breach thereof the plaintiff wrongfully issued a writ which was filed on the 31st October, 1975, entered judgment in default of appearance and threatened to take process to enforce physical possession and has continued so to threaten and has told the defendant's trading partners of its intention to put the defendant out of the said leasehold premises in consequence whereof the defendant has been forced to seek alternative and/or other accommodation.

9. .....

10. The defendant repeats paragraphs 1 to 9 inclusive of its defence herein and says that in the premises the plaintiff wrongfully elected to treat the said lease and the said option as at an end in consequence whereof the defendant has had to make arrangements for alternative and/or other accommodation for the removal of its business elsewhere particularly having regard to the matters and facts set out in paragraph 8 above and has had to make arrangements to dismantle containerise and remove its furniture factory and finishing operations and as a result has lost profits thereby and has incurred expenditure loss and damage and is continuing to lose profits, incur expenses, loss and damage."

and counterclaimed for -

1. Damages for breach of covenant for quiet enjoyment;
2. (a) A decl.
   (b) A declaration that the plaintiff refund to the defendant all money paid under and by virtue of the said oral agreement and the said option;
   (c) A decl.
3. Costs;
4. Such further or other relief as may be just.

That defence was duly delivered but no Reply was made thereto.

It is in these circumstances the plaintiff on November 4, 1977 issued its specially endorsed writ in this action. The Statement of Claim is in the following form :

Statement of Claim

1. By an oral agreement for a lease which was reduced to writing in September, 1974 the Plaintiff let to the defendant the premises situate at and known as Lot No. 7, Diamond Vale Industrial Estate, Diamond Vale in the Ward of Diego Martin for a term of three years from the 15th day of September, 1974 at a monthly rental of $1,500.00 payable in advance on the 15th day of each and every month.

2. The said term expired on the 14th day of September, 1977.

3. The defendant failed to deliver up possession of the said premises on the said 14th day of September, 1977 and still remains in possession.

4. Further the defendant has not paid the monthly rent which fell due on the 15th day of each month from the 15th day of October, 1975 to date or any part thereof.

5. And the plaintiff claims :

   (1) possession of the said premises.

   (2) $37,500.00 arrears of rent.

   (3) Mesne Profits at the rate of $1,500.00 per month from the 15th day of November, 1975 to the date of delivery of possession.

Appearance to this writ was entered on November 24, 1977 and on December 2, 1977, the plaintiff issued two summons, one in each action. In action 2603/75 the summons sought leave to discontinue the plaintiff's action against the defendant. In the present action the summons is for leave to sign final judgment. By a notice of even date the plaintiffs also gave notice of its intention to seek leave to amend their Statement of Claim in this action by substituting -

   (a) in para 4 "September" for "October";

   (b) in para 5

      (1) "$36,000" for "$37,000.

(11) "September 1977" for "November, 1977";

in order to bring its claim properly within the terms of the oral agreement for lease.

On the summonses coming on before me, the summons for leave to discontinue the first action was, after some discussion, dealt with first by agreement and the defendant's Counsel submitted that leave should not be granted the plaintiffs to discontinue that action as on the facts as narrated and on the pleadings he was sure to obtain judgment on the plaintiff's claim, and that the effect of that judgment would create an estoppel in his favour which would support him in his counterclaim and in the present action. He submitted that the plaintiff's action should be dismissed with costs and referred to Vol. 15 Atkins Court Forms and Precedents 2nd Ed. p. 9 and to the cases referred to therein:

Stahl Schmidt v. Walford 1879, 4QB. D. 217 and

Fox v. Newspaper Co. 1898, 1Q.B. at 639

In these two cases there were adverse findings of fact against the plaintiffs when they sought to discontinue their actions. In action 2603/75 while it appeared that the plaintiff would not have succeed, there is no finding of fact against him and the defendant can still pursue its counterclaim. It is sure to get a declaration that the monthly rental applicable to his tenancy was $1,500 per month, and the withdrawal of the plaintiff's claim cannot prejudice him in the prosectuion of the rest of counterclaim. On the plaintiff's claim all that would have been decided in his favour is that the plaintiffs did not effectively determine the tenancy and that, it is entitled still to pursue by its counterclaim under which it appears the defendant elected to treat the tenancy as being wrongfully determined and to sue for damages for breach of covenant for quiet enjoyment. What also will be determined under the counterclaim is whether at the date of expiration of the notice the defendant was still entitled to remain in occupation, a question which, apart from any damages suffered as alleged in paragraph 10 of the Defence (and, indeed, by a letter of August 28, 1975 a copy of which is annexed to an affidavit of George Janoura filed in action 2603/75 on behalf of the plaintiff) as a result of electing to treat the contract as at an end, will be purely academic since the agreement for lease has been determined by effluxion of time. The question whether the right to exercise the option was still vested in the defendant on that date might still be in issue but would also be academic, because even to the date

of delivery of its defence and counterclaim in January, 1976 it had not purported to exercise it. It was only by letter dated June 13, 1977 that the defendant purported so to do. The question whether on that date it was entitled so to do only arises in the present action, 2982/77. For these reasons I was of the view that the defendant would in no way be prejudiced by the withdrawal of the plaintiff's claim in action 2603/75 and give the plaintiff leave to discontinue its claim against the defendant and awarded the defendant the costs of and occasioned by the claim and the application for leave to discontinue, fit for counsel.

Before argument could proceed on the summons for final judgment in action 2982/77 Senior Counsel for the plaintiff sought leave to amend the Statement of Claim as indicated earlier. Dr. Ramsahoye, S.C. for the defendant took the objection that the writ was not validly issued and therefore not properly before the Court since it was not endorsed with a statement showing whether or not the plaintiff's right to possession of the premises was subject to any statutory restriction, in particular the Rent Restriction Ordinance. On behalf of the plaintiff it was submitted that all that was required was for the plaintiff to indicate sufficient facts which "showed" that the premises were without the protection of the Ordinance, and the fact that the Statement of Claim showed it was situated in an Industrial Estate owned by the Industrial Development Corporation and the rent was $1,500 per month, that was sufficient. I think not. Those facts do not in any way show whether the premises are protected or not or more particularly whether the defendant's tenancy is. What must be shown is, I think, why the premises are excluded from the provisions of the Ordinance, as shown in the first writ where the Statement of Claim alleged that it is so excluded by virtue of the Rent Restriction (Exclusion of Premises) Order, 1969. The objection therefore, seemed to me to have been well taken, but counsel for plaintiff also relied on Order 2 and submitted that the failure to endorse the writ in accordance with Order 6 rule 2 (1) (c) was a mere irregularity and it was not open to the defendant to take the point since the defendant had, by filing affidavits in the proceedings, taken a fresh step in the action. That submission seemed to me to adequately dispose of the objection and I did not sustain it and argument was heard on the substantive application for leave to enter final judgment. The same objection was then taken to the writ in its amended form. I ruled however that it was still the same writ and that Order 2, rule 2 was still applicable.

On the substantive application for leave to enter

final judgment Senior Counsel for the defendant sought to obtain leave to defend on the basis of an affidavit sworn to and filed herein on February 1, 1978 annexing "a copy of a defence and counterclaim in this action" which does not appear to have been as yet delivered. The affidavit is as follows:-

I, Gordon Farah of 6A Champs Elysees, Maraval in the Island of Trinidad, Company Director, make oath and say as follows :-

1. I am a Director of the above named Defendant Company and the facts deposed to herein are within my personal knowledge.

2. I have read what purports to be a true copy of the affidavit of George Janoura sworn to and filed herein on 2nd day of December, 1977.

3. I am advised by the Defendant's Solicitors and verily believe the same that the subject action is frivolous and vexatious and an abuse of the process of the Court in that :

(a) The Plaintiff has instituted two separate actions, viz, High Court Action 2603 of 1975 and the subject action 2982 of 1977 claiming in both the same relief, that is to say, possession, arrears of rent and mesne profits.

(b) By High Court Action 2603 of 1975 the Plaintiff can recover everything to which it is entitled and in consequence thereof ought not to have brought this action.

(c) This Honourable Court by order of Mr. Justice Cross dated 15th June, 1976, has already decided the question raised anew in the subject proceedings, that the Defendant has a good defence to the claim for possession contained in the Statement of Claim filed in High Court Action 2603 of 1975 which action is now pending before this Honourable Court.

(d) Pursuant to the said order the Plaintiff duly delivered its defence and counter-claim which was filed on 20th February, 1976.

4. Notwithstanding the above, by an oral option to purchase supplemental to and of even date with and forming part of an oral agreement for a leave, which were contained in two separate written

documents, but never executed, it was agreed, inter alia :

(a) that the Plaintiff would let to the Defendant certain Industrial premises known as Lot No. 7 Diamond Vale Industrial Estate for a term of 3 years.

(b) that the monthly rental therefor should be $1,500.00 and the sum of $1,000.00 should be paid towards the said option to purchase the said premises for $375,000.00 such option to be exercised in writing on or before 15th June, 1977 and both sums should be paid monthly in advance;

(c) that the Defendant enter into possession under the terms of the said oral option and the said oral agreement for a lease, which it did;

(d) that should the said Agreement for a lease be determined for any reason whatsoever the said option should be rendered void and of no effect: Pursuant to the agreements aforesaid the Defendant took possession of the said premises and assembled a modern furniture factory and finishing operation at considerable expense.

5. The Defendant observed and performed all the covenants and conditions contained in the said unsigned agreement and the said option.

6. By letter dated 13th June, 1977, the Defendant exercised its option to purchase in accordance with the provisions of the said option and requisitioned for full particulars of title to the said premises, suggested a time, place and date for completion but the Plaintiff did not answer or conform to the said requisition.

7. By letter dated 14th June, 1977, the Defendant referred to the history of the transaction and pleaded with Plaintiff to accept payment of monies due for rent and monies towards the said option but the Plaintiff refused to respond.

8. I am advised by the Defendant's Solicitors and verily believe the same that the Plaintiff's refusal to answer requisitions on the said title rendered it impossible to make the necessary searches prior to the preparation of a proper Deed of Assignment and it therefore became impossible to tender such a document to the Plaintiff for completion.

9. In the premises the Defendant has been deprived of its option to purchase the said premises in

In the High Court

No. 8
Reasons for Decision of McMillan J.

10th May 1978

(Continued)

consequences whereof it has suffered great loss and damages.

10. I am advised and verily believe that I have a good defence to this action and hereby seek leave of this Honourable Court to defend and Counterclaim in this action.

11. A copy of the Defence and Counterclaim in this action is hereto annexed and marked "A".

It is sufficient to state that paragraph 3 (c) is not true since action 2603/75 was based on notice to quit where as the present action is based on determination of the tenancy by effluxion of time. Paragraph 5 is also not true since the Defendant's Counsel admitted that rent has not been paid for the two years of the three year term amounting to $36,000, nor has any money in respect of the option been paid for the same period or tendered.

The ground on which the defendant ultimately sought to defend was on the basis of a purported exercise of the option by letter of June 13, 1977. However, Counsel for the plaintiff submitted that it was a mere privilege which could only be exercised if there was strict compliance of the terms on which it was granted and that the defendant's failure to pay the instalments due on the option fee since September, 1975 deprived them of the right to exercise it. He referred to the following authorities which confirmed that proposition :

Vol. 23 Halsbury Laws 3rd Ed. para. 1091.
Vol. 34 Halsbury Laws 3rd Ed. para. 345.
Hare v Nichol 1966 1 All E. R. 285
West County Gleaners (Falmouth) Ltd. v. Saly 1966 3 All E. R. 210
Australian Hardwood Ltd. v. Commissioner for Railways, 1961
1 All E.R. 737.

I accept that as a settled proposition of Law. Counsel for the defendant however submitted that the effect of the two agreements was to allow the defendant to occupy the premises for 3 years with the right to become purchasers in accordance with the option the plaintiffs improper notice of June 25, 1975 and that their receipt of August, 1975 which purported to treat the global sum of $2,500 paid by only as rent, and their subsequent issue of the Writ in action 2603/75 for possession and arrears of rent at $2,500 per month had the effect of repudiating the option and that until the defendant obtains a declaration that is still valid, the defendant acted quite properly in not paying the monthly instalments due on the option.

I have already indicated that in action 2603/75 the declaration sought could only relate to the defendant's rights as at 31st July, 1975, the date on which the plaintiff purported to determine the tenancy. In the instant action what is in issue is the validity of the purported exercise of the option by the letter of June 13, 1977. In my view Counsel for the plaintiff was correct when he submitted that if the defendant wished to keep the option alive it should have 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. In the circumstances not having paid either the rent due or the option instalments there can be no possible defence based on the purported exercise of the option on July 31, 1975. Senior Counsel for defendant took a last stand and submitted that the writ is still defective in that it does not contain the endorsement required by Order 6 Rule 2 (1)(c). I think that submission is fatal to the present application as the object of the rule is to enable the plaintiff who is claiming possession of premises which are situate in an area described in the Schedule to the Rent Restriction Ordinance but who can nevertheless show that the Ordinance does not apply to the premises or that the defendant is not entitled to the protection of the Ordinance to apply for summary judgment. See the rubric "Claim for possession of land" to the corresponding rule in the Annual Practice 1973, p. 40, note 6/2/7F. In order to obtain leave, the statement of claim must be complete and good in itself and must, therefore, comply with the rule. Further the affidavit in support must verify the facts (Order 14 Rule 2) and this has not been done in relation to the endorsement required by Order 6 Rule 2 (1)(c). In my view it is an essential part of the endorsement to the specially endorsed writ for possession of premises which, as is apparent from the writ itself, is situated in the Ward of Diego Martin, an area specified in the Schedule to the Rent Restriction Ordinance.

The question remains whether I should dismiss the application or give leave to defend. I think I ought to dismiss the application since it may be open to the plaintiff to amend his Statement of Claim with leave if necessary, and apply again for summary judgment. See Gummey vs. Small 1891, 2 Q.B. 584, Wills J. at p. 587. I think I should not enter judgment for the liquidated sum claimed as arrears of rent and give leave to defend as to the rest of the claim since, if the premises are subject to the Rent Restriction Ordinance the question as to the standard rent applicable to the premises would be in issue and the plaintiff may not be entitled to recover the sum

In the High Court

No. 8
Reasons for Decision of McMillan J.

10th May 1978

(Continued)

claimed or mesne profits. In any event the defendant may be entitled to remain in occupation as a statutory tenant. I do not think it right to give leave unconditional leave to defend 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.

The application is dismissed with costs, fit for Counsel. 10

Dated this 10th day of May, 1978.

(Signed) K C McMillan
Judge

In the Court of Appeal

No. 9
Notice of Appeal

20th November 1978

No. 9

NOTICE OF APPEAL

DATED 20th NOVEMBER 1978

TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 85 of 1978 20

High Court Action No. 2982 of 1977

BETWEEN

TIFFANY GLASS LTD. Appellant/Plaintiff

And

F PLAN LTD Respondent/Defendant

TAKE NOTICE that the Appellant being dissatisfied with the decision, more particularly stated in paragraph 2 hereof, of the High Court, sitting in Chambers in Port of Spain, contained in a judgment of the Honourable Mr. Justice McMillan, 30 dated the 5th day of May, 1978, does appeal to the Court of Appeal on the grounds set out in paragraph 3 hereof and will at the hearing of the appeal seek the relief set out in paragraph 4 hereof.

AND the Appellant further states that the names and addresses, including its own, of the parties directly affected by this Appeal are set out in paragraph 5 hereof.

2. The Appellant complains of the judgment of the Honourable Mr. Justice McMillan dated the 5th day of May 1978, namely the dismissal with costs certified fit for two Counsel of its application dated the 2nd day of December 1977 and made under O 14 of the Rules of the Supreme Court 1975 for liberty to sign final judgment in H.C.A. No. 2982 of 1977 for :-

(i) Possession of the premises mentioned in the Statement of Claim endorsed on the Writ of Summons therein.

(ii) $36,000.00 arrears of rent.

(iii) Mesne profits at the rate of $1,500.00 per month from the 15th day of September 1975 to the date of delivery of possession and costs.

3. GROUNDS OF APPEAL:

The learned judge erred in law in holding that :

(a) The Statement of Claim specially endorsed on the Writ was defective for non-compliance with O 6 r 2 (1) (c) of the Rules of the Supreme Court 1975; and/or

(b) The affidavit filed in support of the said summons did not verify sufficiently or at all the facts on which the Plaintiff's claim for possession and/or rent and/or mesne profits was based; and/or

(c) If the Statement of Claim was defective as aforesaid, such defect did not constitute an irregularity which irregularity was effectively waived by the Respondent.

The Appellant will seek leave to amend and/or add to the above grounds of appeal when the reasons of the learned judge are available.

4. The relief sought is that :

(i) The learned judge's order be set aside;

(ii) The Appellant be granted an order in the terms sought by the said summons.

(iii) The Court make such other orders as to the Court may seem fit.

5. PARTIES DIRECTLY AFFECTED BY this Appeal :

F Plan Limited., 68-70 Henry Street, PORT OF SPAIN

In the Court of Appeal

No. 9
Notice of Appeal

20th November 1978

(Continued)

TIFFANY GLASS LIMITED., 58 Queen Street, PORT OF SPAIN.

DATED this 20th day of November, 1978.

Sgd. J.D. Sellier & Co.
Solicitors for the
Plaintiff/Appellant

Messrs. Wong & Sanguinette
28 St. Vincent Street
PORT OF SPAIN

Defendant/Respondent's Solicitors.

No. 10
Notice of Cross-Appeal

1st December 1978

No. 10

NOTICE OF CROSS-APPEAL

DATED 1st DECEMBER 1978

TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 85 of 1978

High Court Action No. 2982 of 1977.

BETWEEN

TIFFANY GLASS LTD — Appellant/Plaintiff

And

F PLAN LTD — Respondent/Defendant

TAKE NOTICE that upon the hearing of the above Appeal the Respondent herein intends to contend that the decision of the High Court (McMillan J.) dated the 5th May 1978 be varied in any event as follows:-

That the Respondent be allowed to defend and counterclaim in the action No. 2982 of 1977 in terms of the draft defence and counterclaim placed before the Court on the hearing of the application for Summary Judgment or in such other form as may be appropriate.

AND TAKE NOTICE that the grounds on which the Respondent intends to rely are as follows :-

1. The decision of Mr. Justice Cross in respect of the claim for possession of the premises in action No. 2603 of 1975 that the Respondent had a good defence to the claim and setting aside a judgment with a grant of leave to defend caused that issue to become res judicata as between the Appellant

and the Respondent. Further the Respondent in action 2603 of 1975 claimed a declaration that it held under the option and was entitled to seek further relief by way of counterclaim in action 2982 of 1977 and to seek specific performance or a declaration that it was entitled to have the lease assigned in accordance with the option in the events which took place between the institution of action 2603 of 1975 and the expiry of the period ending with 15th June 1977 when the time for the exercise of the option expired.

2. The learned Judge ought to have dismissed the application for Summary Judgment upon grounds additional to what he gave and in particular the dismissal ought to have been on the further ground that the Respondent had raised by his affidavit in answer to the application an issue of the breach of the terms of the lease and option agreement which had to be tried and in relation to which the question whether there was such an issue was res judicata as between the Appellant and the Respondent by the order of Cross J. Further, the mere discontinuance of one action for possession i.e. action 2603 of 1975 and the institution of the action herein claiming the same or substantially the same relief could not affect the principle of res judicata as it applied to the question whether the breach of the terms of the lease and option agreement was a triable issue as between the parties.

3. The High Court ought to have exercised its discretion pursuant to Order 14 Rule 4 (3) of the Rules of the Supreme Court in favour of the Respondent who claimed that an option to purchase the property - subject of the action - had been properly exercised by the Respondent who was in the premises to be treated as an equitable owner in possession.

4. The claim of the Respondent that the Appellant was in breach of contract which entitled the Respondent to relief by defence and counterclaim was supported by sufficient material before the Judge to become a triable issue.

5. The High Court erred in failing to take into account that the question of breach of an agreement to sell pursuant to the option claimed was already properly before the Court by way of defence and counterclaim in action No. 2603 of 1975 which on the said 5th May 1978 the Appellant sought and obtained leave of Mr. Justice McMillan to discontinue leaving the counterclaim undetermined and ought to have granted leave to the Respondent to defend and counterclaim in action No. 2982 of 1977 to avoid a

multiplicity of proceedings on the issue of breach of agreement.

6. The option subsisted on the material before the Court and was properly exercised on or before 15th June 1977 and this is sufficient to entitle the Respondent to defend the action herein.

7. The learned Judge erred in law in any event in failing to make an order granting leave to the Respondent to defend and counterclaim.

Dated this First day of ~~November~~ December, 1978.

Sgd. Wong & Sanguinette

Respondent's Solicitors

To: The Registrar,
Court of Appeal

- and -

To: Messrs. J. D. Sellier & Co.,
13, St. Vincent Street,
Port of Spain.

Plaintiff/Appellant's Solicitors

No. 11

JUDGMENT OF SIR ISAAC HYATALI C.J.

DATED 21st JUNE 1979

TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL
No. 85 of 1978

BETWEEN

TIFFANY GLASS LIMITED Plaintiff/Appellant

And

F. PLAN LIMITED Defendant/Respondent

Coram: Sir Isaac E. Hyatali, C.J.
M.A. Corbin J.A.
C.A. Kelsick J.A.

June 21, 1979.

M. de la Bastide, Q.C. and M. Daley - for the appellant
F. Ramsahoye, S.C. and C.D. Phelps - for the respondent

J U D G M E N T

Delivered by Sir Isaac Hyatali, C.J. :

I agree with the orders proposed by Corbin and Kelsick, JJ.A. that the plaintiff's appeal be allowed and the defendant's cross appeal be dismissed with costs and with the further order that leave be granted to the plaintiff to enter final judgment in the terms of its claim.

The reasons for my agreement with these orders follow: It is clear to me from the points raised on the claim for recovery of possession in the instant case (the second action) that they have a direct bearing on the circumstances attending the issue of the writ of summons on 31 October 1975 (the first action) and vice versa. The facts contained in the affidavits filed in the first action by the plaintiff and the defendant, respectively, furnish the background to the contest between them and I am satisfied that they were admitted by consent at the hearing of the plaintiff's summons applying for leave in the second action to enter final judgment. Kelsick, J.A. has narrated these facts in some detail and I shall accordingly refer only briefly to those which are necessary for the purpose of setting out my reasons.

The oral agreements for the lease and the option to purchase were made on or about 9 September 1974. The defendant entered into possession of the premises in pursuance thereof and installed plant and machinery thereon for the purpose of its business. The oral agreements were reduced to writing thereafter and submitted to the defendant for execution in the same month of September 1974 but up to the month of June 1975 the defendant had failed to execute them or return them to the plaintiff. In the meanwhile, however, the defendant paid the rent of $1,500 reserved under the oral agreement for the lease and the fee of $1,000 reserved under the oral agreement for the option.

By reason of the failure of the defendant to execute the written agreement the plaintiff wrongly proceeded to regard the oral agreements for the lease and the option as ineffective and void. It was under the influence of that error that the plaintiff treated the defendant as a monthly tenant and purported to determine the tenancy by serving on it on 25 June 1975 a month's notice to quit the premises on 31 July 1975.

On the expiry of that notice the defendant continued in possession. It then tendered to the plaintiff the rent and option fee of $2,500 due under the oral agreements for the month of August. The plaintiff, however, appropriated the whole of that sum as rent for the premises for the month of August 1975, and issued a receipt therefor, stating therein that it was without prejudice to the notice to quit of 25 June 1975. The plaintiff sent that receipt to the defendant under cover of a letter dated 25 August 1975. In it the plaintiff reminded the defendant of its failure to vacate the premises and requested it to deliver possession immediately in order to avoid the necessity of legal action in the matter.

At that stage therefore the plaintiff had unequivocally repudiated the oral agreements for the lease and the option. That repudiation was re-affirmed by the issue of its writ for possession on 31 October 1975 (the first action) and the allegation in the statement of claim indorsed thereon that the defendant's tenancy had been determined by the notice to quit of 25 June 1975.

The defendant on its part clearly elected to accept the repudiation aforesaid when it wrote the plaintiff on 28 August 1975 stating, inter alia, that it was holding the plaintiff liable for all damage and consequential loss flowing from the determination of the lease agreement and that it

hoped to deliver up possession of the premises at its earliest opportunity. The defendant then reinforced its election by ceasing to tender any rent or option fee after September 1975.

This unambiguous stance assumed by the defendant was fortified by its application for leave (which was granted) to defend the first action and to counterclaim for damages for breach of the oral agreement for the lease and, most significantly, for a refund of all moneys paid under the oral agreement for the option.

It is true that it sought declarations at the same time to the effect that it held the premises under an oral agreement for a lease and at a rental of $1,500 per month, but it is manifest from the circumstances that the declarations were sought for the sole purpose of providing the formula for the quantification of the damages for which it had elected to sue and not to found a claim for specific performance which, rather curiously, it omitted altogether to seek.

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 28 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. See Denmark Production Ltd. v Boscobal Productions Ltd. (1968) 3 All E.R. 513, 527 per Winn, J; Cheshire & Fifoot's on the Law of Contract (9th Edn.) 573-4, 576.

Matters stood still between them thereafter until 15 June 1977. On that date the defendant purported to exercise the option reserved under the oral agreement. It was a futile exercise however since the option, as I have already demonstrated, had ceased to exist on 28 August 1975.

The next development in the dealings between them occurred on 4 November 1977 when the plaintiff commenced the second action by issuing a writ indorsed with a statement of claim containing, after it was amended, the following allegations and claims:

> "1. By an oral agreement for a lease which was reduced to writing in September 1974 the plaintiff let to the defendant the premises situate at and known as Lot No. 7 Diamond Vale Industrial Estate, Diamond Vale in the Ward of Diego Martin for a term of three years from the 15th day of September 1974 at a monthly rent of $1,500.00 payable in advance on the 15th day of each and every month.

2. The said term expired on the 14th of September 1977.

3. The defendant failed to deliver up possession of the said premises on the said 14th day of September 1977 and still remains in possession.

4. Further the defendant has not paid the monthly rent which fell due on the 15th day of each month from the 15th day of September 1975 to date or any part thereof.

5. And the plaintiff claims:

(1) possession of the said premises.

(2) $36,000.00 arrears of rent

(3) Mesne Profits at the rate of $1,500.00 per month from the 15th day of September 1977 to the date of delivery of possession."

It is evident from this writ and the statement of claim indorsed thereon that the plaintiff was basing its claim for possession on the expiry of an oral agreement for a lease which had ceased to exist since 28 August 1975. The plaintiff's summons for leave to enter final judgment was opposed by the defendant who sought leave to defend the second action on the grounds set out in his affidavits to the following effect: (a) that the second action was an abuse of the process of the court since the plaintiff was claiming the same relief therein as in the first action and in which the defendant had obtained unconditional leave to defend and counter-claim; and (b) that in any event the defendant was entitled to remain in possession in pursuance of an option which it had properly exercised on 15 June 1977, under the oral agreement made in that behalf.

The defendant also sought leave to counterclaim for 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 said option which it claimed it had duly exercised.

It is important to note that the defendant did not deny the allegation that the plaintiff had entered into an oral agreement for a lease of the premises for three years from 15 September 1974 and that it had expired on 14 September 1977. On the contrary, in para 1 of the draft defence attached to the affidavit of Gordon Farah, a director of the defendant filed in support of its application for

leave to defend, it was pleaded as follows:

> "The defendant admits so much of paragraph 1 of the statement of claim as alleges and/or implies the existence of a lease of Lot 7, Diamond Vale Industrial Estate and no more."

By common consent therefore the oral agreement for the lease which had ceased to exist since 28 August 1975 was revived by the parties. The defendant confirmed this revival by admitting at the hearing that it owed the arrears of rent of $36,000 claimed by the plaintiff. But for this revival of the oral agreement for the lease, it would have been incompetent for the plaintiff, in my view, to found his claim for possession on the expiry of the lease on 15 September 1977.

There was no similar consensus however on the oral agreement for the option. This option as Kelsick, J.A. has pointed out in his judgment was a contract separate and distinct from the lease agreement. It cannot be said therefore that the option was an integral part of the lease, as counsel for the defendant contended, and was consequently also revived by the common consent of the parties. It follows that the defendant could not validly exercise an option on 15 June 1977 when it had ceased to exist on 28 August 1975. The defendant cannot in these circumstances rely on the exercise of the option to obtain leave to defend the second action, nor to counterclaim for a declaration that it is entitled to have the premises assigned to it in accordance therewith.

At the hearing of the summons for leave to enter final judgment counsel for the defendant objected to the validity of the writ in the second action on the ground that it omitted to state in the endorsement therein that the plaintiff's right to possession is not subject to statutory restriction as is required by 0.6 r.2(1)(c). The learned judge quite rightly ruled that the fresh steps taken in the action by the defendant with knowledge of the irregularity disqualified it from objecting to the validity of the writ. Both Corbin and Kelsick, JJ.A. have rightly upheld this ruling of the learned judge on this point and I do not wish to add anything to their reasons for so doing.

The learned judge also ruled that no reasonable defence was disclosed to the claim for possession but notwithstanding that conclusion he dismissed the plaintiff's application for judgment holding (a) that the statement of claim indorsed on the writ was defective for want of a statement therein that the premises were free from statutory restriction;

(b) that by reason of that deficiency the claim was not good and complete in itself; and (c) that an affidavit verifying the facts of such a good and complete claim was lacking.

Counsel for the plaintiff challenged these conclusions contending that the learned judge erred in failing to take into account that the proceedings in the first action which were admitted by consent in the second action, contained not only the statement required by 0.6 r.2(1)(c) but also an admission by the defendant that the premises were free from statutory restriction. It was submitted that these proceedings supplied the omission contained in the writ. It was further submitted that the learned judge's ruling that this defect in the statement of claim could only be cured by an amendment, was inconsistent with his ruling that the said defect in the endorsement on the writ was cured by the fresh steps taken in the action.

An affidavit in support of an application for judgment under 0.14 r.1 must comply with the provisions of 0.14 r.2. Hence the affidavit must (a) verify the facts on which the claim is based; and (b) contain a statement of the deponent's belief that there is no defence to the claim or part thereof in respect of which the application is made. One of the fundamental purposes of the rule is to allow proof by affidavit evidence of the facts alleged in the statement of claim. Being evidence it cannot be employed to correct or supply any defect or omission in the writ or statement of claim.

This principle, which was enunciated in Gold Ores Production Co. Ltd. v Parr (1892) 2 Q.B. 14 has remained unaffected both under the English Rules and Rules of the Supreme Court 1975. In that case a specially indorsed writ claimed against the defendant instalments of shares in the plaintiff company payable under the terms of an allotment and for interest thereon at 10% per annum from the date of the writ to the date of payment. However the affidavit in support of the application for summary judgment showed that the interest of 10% claimed was due under an agreement contained in the articles of association, but this fact was not pleaded in the statement of claim. Leave to sign judgment was refused. It was held that as the writ did not show that interest was payable under the agreement a good special endorsement was lacking; and that the allegation in the affidavit could not be used to supply the omission in the endorsement on the writ.

In the second action herein, the statement of claim constituted the endorsement on the writ. As an endorsement therefore the defect therein was capable of being cured by a fresh step taken in the

action by the defendant but as a statement of claim a defect in its sufficiency as such could not be so cured.

And as the principle enunciated in the Gold Ores case (supra) shows, the affidavit being evidence by which the facts alleged in the statement of claim is proved, it cannot be used to cure a defect in the sufficiency thereof. The real question for decision therefore is whether the statement of claim failed to disclose a good and complete cause of action. In my judgment it did not fail to do so and the learned judge erred in so holding. The plaintiff did establish by the verification of the facts in its statement of claim, a right to possession of the premises, and all that was necessary to enforce that right thereafter was an assurance to the court that the premises were not subject to statutory restriction. Note in this connection the expression "right to possession" in 0.6 r.2(1)(c). Such an assurance was necessary to avoid the making of an order in vain but it was not essential to the sufficiency of the statement of claim. In other words, the assurance required was a matter for evidence and not of pleading. In the result, the proceedings in the first action, having furnished the assurance needed for the purpose of 0.6 r.(1)(c), leave should have been granted to the plaintiff to enter final judgment. In this connection I agree with the conclusions at which Corbin and Kelsick, JJ.A. have arrived on the sufficiency of the statement of claim and the reasons they have given for them.

I am of opinion for these reasons that the learned judge was wrong to hold that an amendment to the statement of claim was necessary to make it good and complete. In the course of his submissions counsel for the plaintiff applied for an amendment to his pleading if it was necessary for that purpose but, in my view, it was not. On the other hand if it was, then I am quite satisfied from the circumstances of the case that it would have been just and convenient to grant it.

Counsel for the plaintiff contended at one stage that for the purposes of 0.6 r.2(1)(c) the court ought to take judicial notice of the fact that the premises were not subject to the control of the Rent Restriction Ordinance Ch.27 No.18 by reason of the fact that the Industrial Development Corporation, the head lessor of the premises in this case, did not come into existence until after 1954 the year when new buildings were freed from such control. I do not agree that this court can do so. To take judicial notice of that fact as suggested would constitute, in my judgment, an unwarranted extension of, or departure from, the principles applicable to judicial notice. The orders of the court will accordingly be in the

terms proposed in the judgments which have preceded mine.

Isaac E. Hyatali
Chief Justice

The following additional orders were made on the application of the plaintiff for interest on the rent and mesne profits and on the application of the defendant for a stay of execution and a refund of option fees paid to the plaintiff:

1. Interest at the rate of 4% (being half of the going rate) is to be paid on the arrears of rent and mesne profits at the rate of $1,500 per month from 15 September 1975 to date of judgment viz. 21 June 1979.

2. The order for recovery of possession is stayed until 15 July 1979.

3. The defendant's application for a stay of execution of the order for the payment of the arrears of rent and mesne profits with interest thereon is refused.

4. The defendant's application for a refund of option fees paid to the plaintiff is refused on the ground that they are not relevant to these proceedings.

No. 12

JUDGMENT OF CORBIN, J.A.

DATED 21st JUNE 1979

TRINIDAD AND TOBAGO:

IN THE COURT OF APPEAL

Civil Appeal
No. 85 of 1978

BETWEEN

TIFFANY GLASS LIMITED — Plaintiff/Appellant

and

F. PLAN LIMITED — Defendant/Respondent

Coram: Sir Isaac Hyatali, C.J.
M.A. Corbin, J.A.
C.A. Kelsick, J.A.

June 21, 1979

M. de la Bastide Q.C. and M. Daly - for appellant
F. Ramsahoye S.C. and C.D. Phelps - for respondent

J U D G M E N T

Delivered by Corbin, J.A.

It does not indicate any lack of appreciation on my part of the industry of Counsel on both sides in presenting their very helpful arguments if I express the view that the several points discussed in this appeal and cross-appeal may be dealt with quite shortly.

The appellant had applied by way of summons to McMillan J. in Chambers for leave to sign final judgment against the respondent in an action claiming possession of premises occupied by the respondent under an oral agreement for a lease which has terminated. At the hearing of that summons the respondent filed an affidavit in opposition and sought leave to defend and counterclaim in the action. McMillan J. having refused both applications there is an appeal and cross-appeal.

It is important to bear in mind that, on the face of it, the only question for McMillan J. to decide at the hearing of the appellant's summons was whether the respondent had, by its affidavit shown that there was a triable issue such as would entitle him to hereto defend action and to counter-claim.

Counsel for the respondent, however, took a preliminary objection before the Chamber Judge that the writ initiating the action (No. 2982 of 1977) was not valid because the appellant did not state in the endorsement whether or not the premises are subject to any statutory restriction as a plaintiff is required to do by 0.6 r2(1)(c) of the Rules of the Supreme Court, 1975.

The trial judge ruled that this omission was an irregularity which the respondent had waived by taking a fresh step in the action by filing affidavits, and that consequently the writ was valid. Although the respondent has not cross-appealed against the ruling at the hearing of this appeal it was contended by Counsel that the ruling was wrong since the omission was not a mere irregularity. The requirement in the rule, he said, is a condition precedent to the issuing of the writ and its omission renders the writ a nullity which cannot be cured by the steps taken in the matter by the respondent.

I think the omission in the writ is an irregularity which had been waived and that the judge was right to rule on the preliminary objection as he did, but, in any event, there is no merit in Counsel's submission because the different consequences which flow from the distinction between a nullity and an irregularity have been now abolished by 0.2 r1(1) of Rules of the Supreme Court 1975 which reads:

> "1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these or any other Rules of court, whether in respect of time, place manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, or any document, judgment or order therein."

The learned judge repeated his ruling in his written reasons for decision, but he refused the appellant leave to sign final judgment because he said that :

> "In order to obtain leave, the statement of claim must be complete and good in itself and must, therefore, comply with the rule. Further the affidavit in support must verify the facts (Order 14 Rule 2) and this has not been done in relation to the endorsement required by Order 6 Rule 2(1)(c). In my view it is an

essential part of the endorsement to the specially endorsed writ for possession of premises which, as is apparent from the writ itself, is situated in the Ward of Diego Martin, an area specified in the Schedule to the Rent Restriction Ordinance."

While it is correct to say that to obtain leave to sign judgment under 0.14 of the Rules of the Supreme Court the Statement of Claim must be good and complete in itself, I must differ from the learned judge in holding that the Statement of Claim in the instant case did not satisfy that requirement. The appellant had pleaded -

(1) an agreement for a lease for a term of three years from 15th September, 1974 at a monthly rental of $1,500.00;

(2) that the said term had expired;

(3) that the respondent had failed to deliver up possession; and

(4) that the respondent was in arrears with the rent.

These were all the ingredients necessary to constitute a good and complete cause of action, and it was not necessary for this purpose to include a Statement as required by 0.6 r2(1)(c) showing whether or not the right to possession is subject to any statutory restriction. The purpose for which that statement is included in the endorsement of a writ is to alert the judge to consider whether or not it is reasonable to make the order in cases where the premises are shown to be protected by the Rent Restriction Ordinance, and avoid the embarrassment of making an order which is a nullity.

This does not in any way affect the question of whether a good and complete cause of action has been shown, and the omission to include it in the endorsement was an irregularity which, as we have seen, was waived by the respondent entering an appearance. The learned trial judge erred when he held that the statement was essential to show a good and complete cause of action. Moreover, he had before him the proceedings filed in action No. 2603/75, put into evidence by consent at the hearing of this summons, in which there was an admission by the respondent that these premises are not protected. The evidence made it clear therefore that the appellant's right to possession (the word used in the rule) was not subject to any statutory restriction and that there was nothing to prevent the judge from giving leave to sign final judgment.

In deciding if there was a triable issue the only question for determination was whether the respondent had shown that he was entitled to remain in possession of the premises by reason of having properly exercised an option to purchase, granted to him by an agreement made at the same time as the agreement for lease under which he held.

The history of the matter may be stated thus: the appellant was owner of the premises; the respondent had gone into occupation under an oral agreement for a lease at the rental of $1,500.00 per month, and an option to purchase in consideration of the payment of $1,000.00 per month during the period of the lease; this oral agreement was reduced into writing and tendered to the respondent, but was never signed; the appellant purported to terminate the tenancy by a month's notice dated 25th June, 1975 on the basis that the respondent held under a monthly tenancy.

By letter dated 28th June, 1975 the respondent treated that notice as a repudiation of the agreement for lease and option to purchase, and impliedly accepted the termination of the tenancy by asking for time to vacate; the respondent failed to make any payments due as rent or on the option after 25th August, 1975; it failed to vacate the premises and the appellant issued a writ No. 2603/75 claiming possession on the basis that the respondent had been in occupation as a monthly tenant; the respondent sought and obtained leave to defend the claim on the basis of its contention that it was in occupation by virtue of an agreement for lease and an option to purchase and not under a monthly tenancy, and it counter-claimed for damages and for certain declarations including a declaration that the respondent holds the premises under and by virtue of the said agreement for lease and the option.

The appellant took no further steps to enforce the writ; the respondent continued in occupation and by letter dated 13th June, 1977 purported to exercise the option granted under the agreement aforesaid; the appellant subsequently sought and obtained leave to withdraw the first writ and by another writ No. 2982/77 claimed possession on the basis that the said agreement for lease had terminated by an effluxion of time; the respondent applied to McMillan J. for leave to defend the second action on the ground that it was entitled to remain in possession because it had properly exercised the option to purchase. Immediately before the hearing of this summons in Chambers the appellant obtained leave to withdraw action No. 2603/75.

At the hearing of this appeal Counsel for both parties have made careful and detailed submissions on the issue of whether the agreement for lease had been repudiated by the appellant when he served the notice to quit on 25th June, 1975 of whether the respondent had elected to treat that notice as a repudiation, and of the legal consequences which followed.

In my judgment these matters do not arise for consideration having regard to the state of the pleadings being dealt with by the Chamber Judge at the hearing of this summons. There was before him a Statement of Claim in which the appellant had pleaded an agreement for lease which had expired by effluxion of time, and there was an admission of this by the respondent. It was clear that both sides treated the lease as having subsisted for the full term and that the respondent sought leave to defend solely on the validity of its exercise of the option to purchase granted under the agreement.

The learned trial judge recognised that this was so, and decided, quite rightly, that the respondent could not base a defence on this since it had failed to pay the monthly instalments due and had lost its right under the option. Consequently he held that -

> "in action 2603/75 the declaration sought could only relate to the defendant's rights as at 31st July, 1975, the date on which the plaintiff purported to determine the tenancy. In the instant action what is in issue is the validity of the purported exercise of the option by the letter of June 13, 1977. In my view Counsel for the plaintiff was correct when he submitted that if the defendant wished to keep the option alive it should have 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. In the circumstances not having paid either the rent due or the option instalments there can be no possible defence based on the purported exercise of the option on 13th June, 1975."

Authority for this proposition is to be found in Australian Hardwoods Pty. Ltd. v Commissioner for Railways (1961) 1 All E.R. 751.

Unfortunately, he then misguided himself by deciding that he should refuse the appellant leave to sign final judgment on the ground that if the premises are protected by the Rent Restriction Ordinance the respondent may become a statutory tenant. As we have seen, this possibility did not exist because the premises were not protected and the respondent could

not become a statutory tenant. /Cow v Casey (1949) 1 All E.R. 197/.

In my judgment the appellant had shown a good cause of action, the respondent had failed to raise a triable issue on its application for leave to defend and the learned judge fell into error when he refused the appellant leave to sign final judgment.

In the result I would allow the appeal and dismiss the cross-appeal, with costs both here and in the Court below. I would order the respondent to deliver up possession of the premises and to pay the appellant the sum of $36,000.00 as rent due up to 15th September, 1977 to pay mesne profits calculated at the rate of $1,500.00 per month from 15th September, 1977 until such date as it vacates the premises.

MAURICE A. CORBIN
Justice of Appeal.

The following additional orders were made on the application of the plaintiff for interest on the rent and mesne profits and on the application of the defendant for a stay of execution and a refund of option fees paid to the plaintiff:

1. Interest at the rate of 4% (being half of the going rate) is to be paid on the arrears of rent and mesne profits at the rate of $1,500 per month from 15 September 1975 to date of judgment viz. 21 June, 1979.

2. The order for recovery of possession is stayed until 15 July 1979.

3. The defendant's application for a stay of execution of the order for the payment of the arrears of rent and mesne profits with interest thereon is refused.

4. The defendant's application for a refund of option fees paid to the plaintiff is refused on the ground that they are not relevant to these proceedings.

No. 13

JUDGMENT OF KELSICK J.A.

DATED 21st JUNE 1979

TRINIDAD AND TOBAGO:

IN THE COURT OF APPEAL

Civil Appeal
No. 85 of 1978

BETWEEN

TIFFANY GLASS LIMITED Plaintiff/Appellant

and

F. PLAN LIMITED Defendant/Respondent

Coram: Sir Isaac Hyatali, C.J.
M.A. Corbin, J.A.
C.A. Kelsick, J.A.

June 21, 1979

M. de la Bastide S.C. and M. Daley - for appellant
F. Ramsahoye S.C. and C.D. Phelps - for respondent

J U D G M E N T

Delivered by Kelsick J.A.

The defendant/respondent F. Plan Limited ("the defendant") is in possession of Lot No. 7, Diamond Vale Industrial Estate, Diego Martin ("the premises") of which the plaintiff/appellant Tiffany Glass Limited ("the plaintiff") is the leasehold owner. The defendant has installed plant and machinery for the manufacture of furniture in a factory building located on the premises.

This action was commenced on November 4, 1977, by a writ with an indorsement of claim (formerly referred to as a specially indorsed writ) to which appearance was entered.

By summons dated December 2, 1977, the plaintiff applied, under O.14 of the Rules of the Supreme Court, 1975, ("R.S.C. 1975"), to a judge in chambers for leave to sign final judgment in this action for the reliefs claimed in the writ, namely:-

(a) possession of the premises;

(b) $37,500. arrears of rent;

(c) mesne profits at the rate of $1,500. per month from 15th November, 1975, to date of delivery of possession;

(d) costs.

O. 14 so far as relevant provides:-

"1. (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, . . . apply to the Court for judgment against that defendant.

... ...

2. (1) An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim . . . is based and stating that in the deponent's belief there is no defence to that claim....

... ...

3. (1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, . . . that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim . . . the Court may give such judgment for the plaintiff against that defendant on that claim . . . as may be just having regard to the nature of the remedy or relief claimed.

... ...

4. (1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court.

... ...

(3) The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, . . . either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit."

In an affidavit filed in opposition to the application the defendant sought leave to defend and to counterclaim in the action.

The writ was with leave of the judge amended by substituting "$36,000." for "$37,500." and "September 1977" for "November 1975".

McMillan J. dismissed the application with costs on May 5, 1978. He neither gave leave to sign judgment or conditional or unconditional leave to defend. Nor did he make an order for payment of arrears of rent or of mesne profits. No formal order embodying the judge's decision has been filed.

The plaintiff in its appeal and the defendant in its cross-appeal are seeking the respective reliefs denied to them by the trial judge.

At the hearing of the summons before McMillan J., when the application to amend the writ was made, a preliminary objection was taken for the defendant that the writ was invalid for non-compliance with O.6 r.2 (1)(c) of R.S.C. 1975 which reads:-

"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."

For convenience I shall refer to this indorsement as the "O. 6 indorsement".

There was no such indorsement on the writ. In particular it did not appear whether or not the premises were subject to the Rent Restriction Ordinance Ch. 27 No. 18 ("R.R.O.").

The judge did not sustain the objection. He ruled that the omission of the indorsement from the writ was waived by the defendant when he took a fresh step in the action by filing affidavits in the proceedings.

That ruling, with which I am in agreement, has not been questioned by the defendant in his cross-appeal. Nor has the defendant appealed against the order giving leave to amend the writ, which amendment would be ineffectual if the writ were a nullity. Counsel for the defendant nevertheless contended before us that the ruling was incorrect in law.

In his Reasons for Decision however McMillan J. held that the O. 6 indorsement was an essential part of the statement of claim, in the absence of which it did not disclose a complete and good cause of action.

In giving the grounds for his decision to dismiss the application and for his refusal to give leave to defend, the learned judge stated:-

> "In order to obtain leave, the statement of claim must be complete and good in itself and must, therefore, comply with the rule. Further the affidavit in support must verify the facts (Order 14 Rule 2) and this has not been done in relation to the endorsement required by Order 6 Rule 2(1) (c). In my view it is an essential part of the endorsement to the specially endorsed writ for possession of premises which, as is apparent from the writ itself, is situated in the Ward of Diego Martin, an area specified in the Schedule to the Rent Restriction Ordinance.
>
> The question remains whether I should dismiss the application or give leave to defend. I think I ought to dismiss the application since it may be open to the plaintiff to amend his Statement of Claim with leave if necessary, and apply again for summary judgment. See Gurney vs. Small (1891) 2 Q.B. 584, Wills J. at p. 587. I think I should not enter judgment for the liquidated sum claimed as arrears of rent and give leave to defend as to the rest of the claim since, if the premises are subject to the Rent Restriction Ordinance the question as to the standard rent applicable to the premises would be in issue and the plaintiff may not be entitled to recover the sum claimed or mesne profits. In any event the defendant may be entitled to remain in occupation as a statutory tenant. I do not think it right to give leave unconditional leave to defend 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."

It would appear that the stand taken by the judge was that the omission of the O. 6 indorsement is an irregularity which could be waived, but that its omission from the statement of claim was fatal to the proceedings.

In my view O. 6 r.2(1)(c) refers and relates only to the writ, and not to the statement of claim.

In its grounds of appeal the plaintiff states that the learned judge erred in law in holding that:-

(a) the statement of claim was defective for non-compliance with O. 6 r. 2(1)(c);

(b) if it was so defective, such defect did not constitute an irregularity which was effectively waived by the respondent;

(c) the affidavit in support of the summons did not sufficiently verify the facts on which the plaintiff's claim was based.

The Rules of the Supreme Court 1946 ("R.S.C. 1946") were revoked and replaced by R.S.C. 1975 as from January 2, 1976. Under O. III r. 6(2) of R.S.C. 1946 there were specified actions in which the writ of summons could at the option of the plaintiff be specially indorsed with or accompanied by a statement of claim or of the remedy or relief to which he claimed to be entitled. Among these was an action by a landlord for recovery of possession of land, with or without a claim for rent and mesne profits, against a tenant whose term had expired or had been duly determined by notice to quit or had been liable to forfeiture for non-payment of rent.

It is in respect of such actions only that leave to sign summary judgment could have been obtained pursuant to O. XIV r. 1. Under O. 6 r. 2 any cause may now be indorsed on a statement of claim and judgment obtained therefor under O. 14.

O. LXVIII r. 1 of R.S.C. 1946 provided that:-

"Non-compliance with any of these Rules, or with any rule of practice for the time being in force shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular or amended, or otherwise dealt with in such manner as upon such terms as the Court or a Judge shall think fit."

The effect of this rule was that non-compliance with some rules was treated as an irregularity and with others as a nullity. An irregularity could be waived by the defendant taking a fresh step in the action; whereas a nullity, which deprives the court of jurisdiction, could be so waived.

The distinction between a non-compliance with a

rule which rendered the proceedings a nullity and one which merely rendered them irregular, was abolished by O. 2 r. 1(1) of R.S.C. 1975 according to which:-

> "Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these or any other Rules of Court, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, or any document, judgment or order therein."

Entry of an unconditional appearance to a defective writ waives any objection to the jurisdiction of the Court as well as any irregularity in the commencement of the proceedings. So also does any fresh step taken, with the knowledge of the irregularity, with a view to defending the action on its merits. See the note to O. 2 r. 2 in the Supreme Court Practice 1979 p. 10 and the cases therein cited.

In my judgment the failure to comply with O. 6 r. 2(1) (c) was an irregularity which was waived by the defendant when it entered an unconditional appearance to the writ.

A similar result would have ensured from the affidavit of Gordon Farah, one of the defendant's directors, filed on February 1, 1978, in opposition to the summons, wherein the defendant sought leave to defend the action and counterclaim. This constituted a fresh step in the action.

O. 6 r. 2(1)(c) is meant for the protection of the tenant. In respect of premises to which the R.R.O. applies, s. 14 thereof prohibits the making of an order or the giving of a judgment for the recovery of such premises unless one or more of the conditions specified in that section are met and the court considers it reasonable to make such order or to give such judgment. The purpose of the rule is to guard against the entering and enforcement of a judgment which is so prohibited.

In Smith v. Poulter [1947] 1 All E.R. 216, the English Court of Appeal set aside a judgment in default of appearance for possession of premises that were subject to the Rent Restriction Acts on the ground that it was invalid for non-compliance with the analogue to S. 14 of R.R.O.

Denning J. (as he then was) said at p. 217B

ibid:-

> "That provision limits the jurisdiction of the court, with the result that in any case where there is reason to think that the house is within the Acts, it is the duty of the Court to see whether the conditions required by the Acts are satisfied, even though not pleaded or raised by the tenant."

The English counterpart to O. III r. 6 of R.S.C. 1946, was then operative, and that to O. 6 r. 2(1)(c) of R.S.C. 1975 had not yet been enacted. Denning J. at p. 217G ibid nevertheless suggested as a rule of practice that :-

> "In actions for possession of a dwellinghouse, the endorsement of the writ should state either the reason why the house is not within the Rent Restriction Acts, or, if it is within the Rent Restrictions Acts, what is the ground on which possession is sought."

A similar conclusion to that in Poulter's case (supra) was reached in Peachey Property Corporation Ltd. v. Robinson and another /1966/ 2 All E.R. 981. The affidavit in support of the summons applying for the issue of a writ of possession to enforce the judgment in default of appearance averred that the Rent Acts applied to the tenancy of the dwelling house (see p. 986A ibid). The Court of Appeal ruled at p. 983 CD that the judgment was a nullity because no Court had determined whether it was reasonable to make such an order or give such a judgment and that in consequence the judgment was a nullity.

S. 14 of R.R.O. is directed to the order or judgment for possession, not to the writ, or to the statement of claim. Where R.R.O. does apply the plaintiff may be deprived of his judgment under s.14 if there has been a failure by the judge to comply with that section. The section has no effect on the entering of a judgment where R.R.O. does not apply to the premises.

Where the writ states that the premises are not subject to R.R.O., this fact must be established by evidence, which may be in the form of an affidavit. Where there is an indorsement that R.R.O. does apply, it was decided in Robinson's case (supra) that the court must in addition be satisfied that the judgment is in conformity with s. 14, whether or not an appearance has been entered to the writ. As Winn J. puts it at p. 983 ibid:-

> "In my view therefore by express force of that

"section the judgment in default of appearance here was a nullity. It was, according to its terms, a judgment for recovery of possession of these premises, and that is something which the section prohibits unless there has been a prior determination by the court that it was reasonable to give such a judgment."

Though by virtue of O. 2 the writ is not now a mullity but an irregularity which was waived by the defendant, the court could declare the judgment to be invalid if it is established that there is no jurisdiction to give the judgment under s. 14.

As previously mentioned, the O. 6 indorsement applies to writs and not to indorsements qua statements of claim. The indorsement is not required to be made on the claim, but on the writ; though there can be no objection to its being inserted in the claim of a specially indorsed writ, since the claim forms part of the writ.

A statement of claim indorsed on a writ is a pleading as well as a writ. It is also part of the writ on which it is indorsed and is served as part of the writ.

When a claim is indorsed on a writ that claim constitutes both the indorsement on the writ as well as the statement of claim.

In so far as it is an indorsement the defect, if any, is waived by a fresh step taken in the action. But in so far as it is a statement of claim not disclosing a complete cause of action, the defect is not waived by a fresh step taken in the action. That defect can only be cured by an amendment of the statement of claim.

A provision corresponding to O. 6 r. 2(1)(c) was contemporaneously embodied in O. 13 r. 4(2) and O. 19 r. 5(2) of R.S.C. 1975. This provides for the entering of a judgment in default respectively of appearance and of defence to an action for recovery of possession of land. It reads:-

> "The plaintiff shall not be entitled, except with leave of the court to enter judgment . . . unless he produces a certificate by his solicitor, or (if he sues in person) an affidavit stating that his right to possession is not subject to any statutory restriction."

All three rules were adapted from their English counterparts which were made following the decision

in Robinson's case (supra). The English rule however is confined to a reference to the Rent Acts, and the indorsement must indicate whether the land to be recovered is a dwelling house with a rateable value that is protected by the Rent Acts.

One of the objects of the English rule, and I would say also of our rule, is to enable the plaintiff who, as in the present case, is claiming possession of premises to which R.R.O. does not apply, to enter judgment under O. 13 or O. 19 or to apply for such a judgment under O. 14 (See Supreme Court Practice 1979 Vol. I p. 43 note).

The rule does not enjoin the plaintiff to plead (in terms of s. 14 of R.R.O.) which of the relevant conditions specified in that section are applicable, that these conditions have been satisfied and that the Court ought to consider it reasonable to allow judgment to be entered. It suffices for the negative assertion to be made (on the writ and not on the statement of claim) that the plaintiff's right to possession is not subject to any statutory restriction.

In these circumstances I do not consider that this is a material fact which must, in compliance with O. 18 r. 7, be pleaded. A material fact is one which is necessary for formulating a complete cause of action, the omission of which makes the statement of claim bad, and the claim demurrable and liable to be struck out under O. 18 r. 17 on the ground that it discloses no reasonable cause of action. See Bruce v. Odhams Press Ltd. [1936] 1 All E.R. 287.

If I am right in my conclusion that the O. 6 indorsement is a matter of form and not of substance, the omission of which has been waived, these consequences follow. The facts pleaded in the claim disclose a good and complete cause of action, and neither the statement of claim nor the affidavit need be amended so as to include respectively the indorsement and its verification.

By consent of the parties, there was admitted in evidence before McMillan J. the pleadings and other documents in High Court Action No. 2603 of 1975 ("the first action"), including the specially indorsed writ of summons dated October 31, 1975, in which the plaintiff claimed recovery of possession of the premises from the defendant. In the statement of claim there was an allegation that the premises are excluded from R.R.O. by virtue of the Rent Restriction (Exclusion of Premises) Order 1969. There was a specific admission to that effect by the defendant in its defence to that action, which supplied the

omission from the affidavit of a statement to that effect. See Les Fils Dreyfus et Cie Societe Anonyme v. Clarke /1958/ 1 All E.R. 459 per Parker L.C.J. at p. 462E.

That the evidence to satisfy the requirement of O. 6 r. 2(1)(c) is not restricted to the affidavit is apparent from O. 13 and O. 19 under which a certificate of a solicitor suffices, and the affidavit may be dispensed with by leave of a judge.

Where the judge, as in the present case, is satisfied by evidence that R.R.O. does not apply, the judgment cannot be a nullity by virtue of non-compliance with s. 14 and the plaintiff is entitled to judgment if its cause of action is otherwise complete and there is no bona fide triable issue raised by the defendant.

McMillan J. accordingly erred in refusing leave to the plaintiff to enter judgment for the reason that the statement of claim had not complied with O. 6 r. 2(1)(c) by the omission therefrom of a pleading that the plaintiff's right to possession was not subject to any statutory restriction and for the reason that the affidavit in support omitted to verify that fact.

Gurney's case (supra) on which McMillan J. relied is not relevant. It did not relate to the English rule corresponding to O. 6 r. 2(1)(c), which had not yet been enacted. There the claim was not only for a liquidated sum, but was also for use and occupation of the plaintiff's premises, which was not a cause of action listed in O. III r. 6. The ratio of Wills J.'s decision, that the writ was not a specially indorsed writ and was not amendable, is to be found in the following passage in his judgment at pp. 586-7:-

> "... to hold otherwise would be to deprive the expression 'seek only to recover' in that rule of all its significance. The operation of Order XIV, r. 1, is confined, therefore, to the case of a defendant appearing to a writ of summons specially indorsed with a liquidated demand under Order III r. 6, and with nothing else. Where that is the case, leave may be given to enter judgment 'for the amount so indorsed' - an expression which shows, if further argument were necessary, that the order is only intended to apply to writs previously specially indorsed under Order III, r. 6."

If I had been of the opinion that the O. 6 indorsement was an essential part of the statement

of claim I would have acceded to the request of counsel for the appellant for an amendment of the statement of claim.

I now direct my attention to the merits of the cross-appeal in which the defendant requested that it be allowed to defend in terms of a draft defence and counterclaim annexed to the affidavit filed on its behalf by Gordon Farah in opposition to the summons for summary judgment.

In its statement of claim the plaintiff stated that the defendant was in possession of the premises under an oral agreement reduced to writing by which the plaintiff had let the premises to the defendant at a monthly rent of $1,500. payable in advance, for a term of three years commencing September 15, 1974, which expired on 14th September, 1977.

It also alleged that the defendant was in arrears of rent and mesne profits. Although the liability for these arrears was denied in the defence, they were admitted by counsel for the defendant before McMillan J.

The real defence to this action, as acknowledged by counsel for the defendant, is that the defendant is an equitable owner in possession, in consequence of its exercise of an option to purchase the premises at the price of $375,000. conferred on it by an oral agreement reduced to writing.

In its counterclaim, after stating that the plaintiff wrongfully refused to sell the premises to the defendant, thus depriving it of that option and causing it to suffer loss and damage, the defendant claimed damages for breach of contract, including special damage in the sum of $200,000. which represents the difference between the market value of the premises ($575,000) and the agreed purchase price. The defendant also claimed a declaration that it is entitled to have the premises assigned to it in terms of the oral option.

In support of the plaintiff's statement of claim the following material facts were proved before McMillan J.

The plaintiff had a lease from the Industrial Development Corporation (I.D.C.) of the premises, including the house or factory building erected thereon.

The defendant entered into possession of the premises in September 1974. It remained in possession by virtue of an oral agreement, which was subject to the consent of I.D.C., whereby the

the plaintiff undertook to grant to the defendant a sub-lease of the premises for three years commencing on September 15, 1974.

Supplemental thereto was another oral agreement under which, subject also to the consent of I.D.C., the defendant was granted an option, to be exercised not later than June 15, 1977, to purchase the leasehold of the premises on September 15, 1977. Both these agreements were reduced to writing and copies were supplied to the defendant with requests for its signature that it never complied with. I shall refer to these agreements as "the lease agreement" and "the oral agreement" respectively.

The consideration in the lease agreement was a rent of $1,500., payable in advance as from 15th September, 1974, on the 15th day of each month.

The fee for the option specified in the option agreement was the sum of $36,000., payable at the same time as the rent in monthly instalments of $1,000. In the event of the valid exercise of the option, the option fee was to be credited towards the purchase price of the premises, which was $375,000. and was payable on or before September 15, 1977.

There is a clause in the option agreement that if the lease agreement or a lease granted thereunder is determined for any reason whatsoever, the option shall be void and of no effect.

Rent under the lease agreement and instalments of option fee under the option agreement were unpaid from September 15, 1975.

In the defence it is recited that the defendant exercised the option by letter of June 13, 1977. In that letter the defendant declared that it was exercising the option to purchase under the option agreement and it requested the plaintiff to forward particulars of its title for approval of the plaintiff's lawyers; and thereafter for subsequent execution by the parties, a time (in September) and place for which were suggested in the letter.

Neither payment nor tender of the purchase price has been pleaded in the defence and there is no evidence to support such a plea.

There is an incorrect allegation in the defence that by letter dated June 14, 1977, the defendant:-

> "called upon the plaintiff to accept payment of monies due for rent and monies due on the said option but the plaintiff refused and still refuses to conform."

The statement in the letter is that the defendant was:-

> "not only ready and willing but also able to pay [the plaintiff] the sum of $1,500. per month as rent and $1,000. per month towards an option to purchase."

In its reply thereto dated June 29, 1977, the plaintiff wrote that it was advised that the defendant was not entitled to exercise the option:-

> "for the reason that no monies have been received from [the defendant] by way of option payments or otherwise, for more than twelve months."

This contention was repeated in an affidavit by George Janoura sworn to on February 17, 1978, on behalf of the plaintiff, and would no doubt be restated in the reply to the defence and counterclaim if leave were granted to deliver the same.

McMillan J. considered that this retort effectively demolished the defence, when in his Reasons for Decision he wrote:-

> "if the defendant wished to keep the option alive it should have 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. In the circumstances not having paid either the rent due or the option instalments there can be no possible defence based on the purported exercise of the option...."

The nature of an option to purchase land is lucidly described in 23 Halsbury's Laws (3rd edn) p. 470 para 1090. I quote:-

> "A lease may confer upon the tenant an option to purchase the interest of the landlord in the demised premises. This usually takes the form of a covenant by the landlord that, if the tenant within a specified period shall give to the landlord notice in writing of a specified length of his desire to purchase the fee simple, or other the interest of the landlord in the premises, the landlord will on payment of a specified purchase price, and of any arrears of rent, convey the demised premises to the tenant. Such an option is collateral to, independent of, and not incident to the relation of the landlord and tenant. It is not therefore one of the terms which will be incorporated in the terms of a yearly tenancy created by the tenant holding over after the expiration of the

original lease;

... ...

An option to purchase creates an interest in land which vests on the exercise of it and upon payment of the purchase money."

In Griffith v. Pelton [1957] 3 All E.R. 75 Jenkins L.J., who delivered the judgment of the Court of Appeal, adverted to the nature of an option to purchase land at pp. 83-4:-

"It is by no means uncommon for leases to contain (as did the present lease) provisions conferring on the lessee an option to purchase the freehold. Options to purchase land are also, however, not uncommonly granted in cases where the grantor and the grantee of the option do not stand in the relationship of landlord and tenant. Options of the latter class may conveniently be referred to as 'options in gross'. An option in gross for the purchase of land is a conditional contract for such purchase by the grantee of the option from the grantor, which the grantee is entitled to convert into a concluded contract of purchase, and to have carried to completion by the grantor, on giving the prescribed notice and otherwise complying with the conditions on which the option is made exercisable in any particular case....

An option contained in a lease for the lessee to purchase the freehold differs from an option in gross only in the respects that the grantor and the grantee stand in the relationship of landlord and tenant, and that the contract creating it is made part of the terms on which the lease is granted. However, albeit collateral to the lease, it is in itself a distinct contract possessing all the essential characteristics of an option in gross."

From the above statement of the law it is apparent that the option agreement was a contract separate and distinct from the lease agreement.

While the defendant gave the prescribed notice, it did not comply with two important conditions subject to which the option was made exercisable. These 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.

The defendant therefore did not in law exercise the option and convert it into a concluded contract of purchase, which the plaintiff could be compelled

to carry to completion, in the last resort by a court order for specific performance of that contract.

For the above reasons I am satisfied that, on the present state of the pleadings, the plaintiff has made out a good and complete cause of action and that the defence cannot be sustained.

Before McMillan J. and this court there were submissions made by counsel for the defendant by which he endeavoured to establish that there was another defence or defences to this action.

Let me examine the evidence to see whether by appropriate amendment of the pleadings any of these matters can avail the defendant of an arguable defence.

The chronicle of events begins with a notice to quit the premises on July 31, 1975. This was served on the defendant by the plaintiff on June 25, 1975.

In a covering letter to the defendant dated August 25, 1975, Mr. Janoura, director of the plaintiff, enclosed a receipt for $2,500. "being rent for August 1975", which was accepted without prejudice to the notice to quit; and he threatened legal action if the premises were not immediately vacated.

In a reply thereto dated August 28, 1975, the defendant wrote:-

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

The writ in the first action for possession of the premises (filed on October 31, 1975) was based on the assumption that the defendant's tenancy had been determined by the notice to quit. Included therein was a claim for $2,500. representing one month's

arrears of rent and for mesne profits at the rate of $2,500. per month.

On January 22, 1976, the plaintiff entered judgment in default of defence in the first action. That judgment was set aside on June 15, 1976, by Cross J., who, in compliance with the application by summons in that behalf by the defendant, granted leave to the defendant to defend the action.

To an affidavit, in support of the defendant's summons, by Gordon Farah, one of its directors, sworn to on 20th February, 1976, there was annexed a copy of the draft defence and counterclaim. Mr. Farah deposed that the defendant had duly paid the monthly rents and instalments of the option fee; that it was advised that the notice to quit was ineffective to determine the tenancy created by the lease agreement, and that the defendant wished to counterclaim for damages for breach of the covenant for quiet enjoyment.

In the defence the defendant referred to the contents of the lease and option agreements; it alleged that the notice to quit was not in accordance with the lease agreement and that, contrary to the lease and option agreements, the payment of the instalments of the option fee had been purportedly treated by the plaintiff as rent after the serving of the notice to quit.

In the counterclaim the defendant asserted that the plaintiff had wrongfully elected to treat the lease and option as at an end, in consequence of which the defendant was forced to make arrangements to remove its business from the premises and to seek alternative accommodation, in respect of which it claimed damages, which comprised special damage and damages for breach of covenant and quiet enjoyment. It also claimed a declaration that the monthly rental of the premises was $1,500. and a refund of money paid on account of the option. Finally it sought a declaration that the defendant holds the premises under and by virtue of the lease agreement and the said option.

Cross J. ordered the defendant to deliver its defence within three days; and the plaintiff, if necessary, to deliver its reply to the defence and counterclaim within fourteen days.

The defence and counterclaim were filed and delivered on 20th February, 1977. No reply was delivered.

On December 2, 1977, simultaneously with the filing of the writ in the present action, the plaintiff took out another summons in the first

action for leave to discontinue that action. That application was opposed by the defendant but leave was granted by McMillan J. immediately before he heard the present application.

The defendant's counterclaim in the first action was not affected by that decision.

From the above facts counsel for the defendant countered the application by the plaintiff for summary judgment with the following propositions.

Cross J. 's order giving leave to defend and to counterclaim in the first action is res judicata and obliged McMillan J. as a matter of course to grant similar leave in the present action.

This question was broached by Gordon Farah, a director of the defendant, who on February 1, 1978, swore to an affidavit in opposition to that summons. In that affidavit it was alleged that the action was frivolous and vexatious and an abuse of the process of the court for the reasons that the relief claimed in the first action, which was pending, was the same as that in the present action, namely, possession, arrears of rent and mesne profits; and that Cross J. had already ruled that the defendant had a good defence to the first action. Nevertheless there was no request that on those grounds the action should be stayed or dismissed under O. 18 r. 19 of R.S.C. 1975.

McMillan J., in rejecting this argument, pointed out that the basis of the first action was a notice to quit whereas in the present action it was the determination of the tenancy by effluxion of time.

I find that McMillan J. was not obliged to grant leave to defend by virtue of Cross J. 's order in the first action being res judicata or creating an estoppel in the present action. 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.

Moreover as there has been no appeal against the grant of leave by the judge to discontinue the plaintiff's claim in the first action, there is no longer a defence in the first action and the counterclaim is in effect a statement of claim.

Another possible line of defence in the present action which was explored before us was that the defendant had in effect pleaded and was entitled to specific performance - presumably as an alternative to its claim for damages.

In the defendant's proposed counterclaim it applied for a declaration that it is entitled to have the premises assigned to it in accordance with the terms of the option. Counsel for the defendant submitted that this is tantamount to a claim for specific performance of a contract to sell the premises concluded by the exercise of the option. I do not agree. The declaration may be regarded as the base or foundation for, and as complementary to, the claim for damages for breach of the option agreement and/or the contract to purchase the premises. The contract was said to have resulted from the offer set out in the option agreement and its acceptance by the exercise of the option. If valid, the contract entitled the defendant to an assignment of the premises. But it elected instead to sue for damages.

The plea is not in the usual form for specific performance, examples of which may be found in Atkin's Court Forms Vol. 37 (2nd edn), Forms 13 and 17 at pages 51 and 55 and in Bullen, Leake and Jacobs Precedents of Pleadings (12th edn), Forms 517 and 521 at pp. 840 and 844. There are no allegations in the defence or counterclaim to support a claim for the relief of specific performance and no direct request for that remedy.

The agreement to be performed must be the agreement to purchase the premises which for its coming into existence is dependent on the valid exercise of the option. At the date of the issue of the writ the defendant was not entitled to have the premises assigned to it in accordance with the terms of the option agreement - since the time limit for complying with those terms had expired on June 15, 1977. The defendant is therefore not entitled to the declaration to that effect prayed for in its counterclaim.

In any event the Court would refuse the equitable remedy of specific performance to a petitioner who is in breach of his obligation at or before the exercise of the option, to pay, or even to tender, the balance of the purchase price due and payable, not to mention the arrears of rent, unpaid in breach of the lease agreement.

Finally the argument was advanced that the defendant was excused from making further payments under the lease and option agreements because it could be inferred that the plaintiff had repudiated

those agreements, firstly by the service of the notice to quit, which treated the defendant as a monthly tenant, and its sequel in the writ of the first action; and secondly by the issue of the receipt solely for rent.

The plaintiff's rejoinder in this regard, with which I agree, was that the defendant elected to accept the repudiation in the first instance by its letter of August 28 and thereafter by its defence and counterclaim in the first action.

I shall now outline the principles of law applicable to an option incorporated in a lease and the remedies for its repudiation or renunciation with special reference to this action.

Repudiation of a contract by a party thereto does not automatically bring an end to the contract.

Where, as in this case, the allegation is that there was a renunciation or repudiation of the lease and option agreements by one of the parties before performance was respectively completed or due, the contract is not ipso facto discharged and terminated by the breach.

The innocent party must make his election. He may accept the repudiation of the agreement by the other party and treat the contract as at an end; whereupon both parties are discharged and excused from further performance, and the innocent party's sole remedy is damages for breach of contract.

Alternatively the innocent party may insist on the continuation of the contract; in which event both parties must carry on with the performance of the contract by observing their respective obligations thereunder.

Winn J. set out the applicable principles of law in Denmark Productions Ltd. v. Boscobel Productions Ltd. [1968] 3 All E.R. 513, 527 H, I:-

> "It seems to me that the process of ending or indeed of varying a contract by repudiation is the converse of that of making the same contract; each process operates by offer and acceptance, or their equivalents; each is essentially bilateral. Where A and B are parties to an executory contract, if A intimated by word or conduct that he no longer intends, or is unable, to perform it, or to perform it in a particular manner, he is, in effect, making an offer to B to treat the contract as dissolved or varied so far as it relates to the future. If B elects to treat the contract as thereby

repudiated, he is deemed, according to the language of many decided cases, to 'accept the repudiation' and is thereupon entitled: (a) to sue for damages in respect of any earlier breach committed by A for damages in respect of the repudiation; (b) to refrain from himself performing the contract any further."

Under and in accordance with a lease agreement from the respondent the appellant in Australian Hardwoods Pty. Ltd. v. Commissioner for Railways [1961] 1 All E.R. 737 served on the respondent a three months notice to purchase a sawmill. Before the expiry of that period the respondent gave to the appellant notice terminating the agreement for breaches which were admitted. If the appellant purchased the sawmill it was under cl. 9(c) of the agreement entitled on request to a transfer of the respondent's occupation permit and sawmill licence.

The Full Court of Australia concluded that the appellant had not succeeded in exercising the option, because of the termination of the agreement by notice before payment of the purchase price was made.

Delivering the advice of the Privy Council that the appeal should be dismissed, Lord Radcliffe declared that events had occurred before the date of payment which brought about a fundamental alteration in the position of the parties and of their respective rights and liabilities under the agreement (p. 741G). He went on to say at p. 742 A, E:-

> "Long before the trial took place the agreement was at an end, and no one could recall it into existence....
>
> It follows therefore that if the appellant had fallen into default through breaches of the agreement, and by so doing had brought down on itself the notice of termination, the respondent was by that fact discharged from compliance with a clause such as cl. 9(c) which was essentially part of a working scheme that had by then become abortive."

He continued at p. 742 F:-

> "A plaintiff who asks the court to enforce by mandatory order in his favour some stipulation of an agreement which itself consists of inter-dependent undertakings between the plaintiff and the defendant cannot succeed in obtaining such relief if he is at the time in breach of his own obligations."

The consequences of adopting the renunciation of a contract were expatiated upon by Lord Esher M.R. in Johnstone v. Milling (1886) 16 Q.B.D., 460 at 476:-

> "A renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract . . . . The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation";

and Cotton L.J. at p. 76 ibid. referred to the alternative situation where the promisee does not accept the renunciation and thereby loses his right to claim damages:-

> "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all the obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it...."

The conclusion I have arrived at is that there is no substance in law in any of these alternative submissions or in the matters which have not been pleaded, and that no amendment of the pleadings would provide the defendant with a triable issue which would entitle it to leave to defend in the present action.

With regard to the defence that was actually pleaded, the option agreement being a separate contract from the lease agreement, irrespective of whether the latter was discharged for breach before September 14, 1977, or remained in force until that date (as pleaded), the plaintiff can legitimately maintain that the option

was lost by the defendant's omission to pay the option instalments due at and after 15th September, 1975.

In any event the defendant was deprived of that option when it failed to pay or to tender the balance of the purchase price on or before June 15, 1977.

The balance is substantial. It amounts at least to $363,000., the difference between $375,000. and the maximum $12,000. paid on account of the option fee. If the defendant were entitled to a transfer of the premises he would have had the interest free use of, and the plaintiff would have been denied interest on, that amount from June 14, 1977, to the date of payment at some time in the future.

My decision is that the statement of claim is not defective for non-compliance with O. 6 r. 2(1)(c); that the plaintiff has made out a good and complete cause of action; that the defence pleaded cannot succeed in as much as the defendant's purported exercise of the option to purchase the premises was abortive; and that there is no other issue or question to be tried and no arguable defence to the action.

I would allow the appeal, dismiss the cross-appeal, and order the defendant to deliver up possession of the premises to the plaintiff.

I would also order the defendant to pay to the plaintiff $36,000. arrears of rent, mesne profits at the rate of $1,500 per month from September 15, 1977, to the date of delivery of possession of the premises, as well as the plaintiff's taxed costs of the appeal and cross-appeal and of the proceedings before McMillan J.

C.A. Kelsick,
Justice of Appeal

No. 14

FORMAL ORDER OF THE COURT OF APPEAL

DATED 21st JUNE 1979

TRINIDAD AND TOBAGO

In the Court of Appeal

A TRUE COPY OF THE ORIGINAL
WHICH I HEREBY CERTIFY
Sgd. Conrad Douglin
Registrar

Civil Appeal Nos. 80, 78 & 85/78
High Court 2603 of 1975

BETWEEN

TIFFANY GLASS LTD — Plaintiff/Appellant

And

F PLAN LTD — Defendant/Respondent

DATED AND ENTERED THE 21st day of JUNE 1979
BEFORE The Honourables The Chief Justice
Mr. Justice M. Corbin
Mr. Justice C. Kelsick

UPON READING the Notice of Appeal filed on behalf of the above-named Appellant dated the 6th day of November 1978 and the Cross-Appeal filed on behalf of the above-named respondent dated the 14th day of November 1978 and the judgment hereinafter mentioned.

AND UPON READING the Record filed herein

AND UPON HEARING Counsel for the Appellant and Counsel for the Respondent

AND MATURE Deliberation thereupon had

IT IS ORDERED

(i) That this Appeal be allowed.

(ii) That the Judgment of the Honourable Mr. Justice McMillan dated the 5th day of May 1978 be set aside.

(iii) That the Respondent do deliver up possession of that piece or parcel of land described in the Statement of Claim as Lot No. 7, Diamond Vale Industrial Estate, Diamond Vale in the Ward of Diego Martin.

(iv) That the Respondent do pay to the Appellant Thirty Six Thousand dollars ($36,000) arrears

of rent and mesne profits at the rate of $1,500.00 per month from the 15th day of September 1977 until they deliver up possession and interest at the rate of 4% per annum on the arrears of rent and mesne profits from the 15th day of September 1975 to the 21st day of June 1979.

(v) That the Cross Appeal be dismissed, with Costs.

(vi) That the Respondent do pay to the Appellant the taxed costs of the Appeal and in the Court below.

(vii) That Execution be stayed until the 15th day July 1979.

Sgd.
Asst. Registrar

No. 15
Order granting Condition leave to Appeal to the Judicial Committee of the Privy Council

13th July 1979

No. 15

ORDER GRANTING CONDITIONAL LEAVE TO APPEAL TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DATED 13th JULY 1979

TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 85 of 1978

BETWEEN

F. PLAN LIMITED — Appellant

And

TIFFANY GLASS LIMITED — Respondent

Before: The Honourable Chief Justice Sir Isaac Hyatali,
The Honourable Mr. Justice Corbin,
The Honourable Mr. Justice Kelsick.

Made the 13th day of July, 1979
Entered the day of 1979

UPON the Motion of the above named Appellant dated the 2nd day of July, 1979, for leave to appeal to the Judicial Committee of the Privy Council against the Judgment of the Court comprising the Honourable Chief Justice Sir Isaac Hyatali, the Honourable

Mr. Justice Corbin and the Honourable Mr. Justice Kelsick, Justices of Appeal, delivered herein the 21st day of June, 1979.

AND UPON READING the said Notice of Motion and the Affidavit of Richard Farah in support thereof, sworn to on the 2nd day of July, 1979 and filed herein:

AND UPON HEARING Counsel for the Appellant and for the Respondent.

THE COURT DOTH ORDER that subject to the performance by the said Appellant of the conditions hereinafter mentioned and subject also to the final Order of this Honourable Court upon due compliance with such conditions leave to Appeal to the Judicial Committee of the Privy Council against the said Judgment of the Court of Appeal of the Supreme Court of Judicature be and the same is hereby granted to the Appellant.

AND THIS COURT DOTH FURTHER ORDER :

(1) that the Appellant do within six (6) weeks from the date of this order enter in good and sufficient security to the satisfaction of the Registrar in the sum of £500 (Five Hundred Pounds) Sterling with one or more sureties or deposit into Court the said sum of £500 sterling for the due prosecution of the said Appeal and for the payment of all such costs as may become payable to the Respondent in the event of the Appellant not obtaining an Order granting it final leave to appeal or of the appeal being dismissed for non prosecution or for part of such costs as may be awarded by the Judicial Committee of the Privy Council to the Respondent on such appeal.

(2) that the Appellant do within six (6) months from the date of this Order take out all appointments that may be necessary for the settling and preparation of the record in such Appeal to enable the Registrar to certify that the said Record has been settled and that the provisions of this Order on the part of the Appellant have been complied with.

(3) that the Appellant apply to this Court within six (6) months from the date of this Order for final leave to appeal on the production of a Certificate under the hand of the Registrar of due compliance on its part with the conditions of this Order.

AND UPON THE ADMISSION by the Appellant that a company called Furniture Limited is now in possession of the premises AND UPON THE RESPONDENT UNDERTAKING as follows:

In the Court of Appeal

No. 15
Order granting Conditional Leave to Appeal to the Judicial Committee of the Privy Council

13th July 1979

(Continued)

1. To restore possession of the premises at Lot 7 Diamond Vale Industrial Estate in the Ward of Diego Martin now occupied by Furniture Limited to the appellant within one month of the Judgment of the Privy Council in the event that the Appeal is successful.

2. Not to dispose of the premises or encumber same in any way pending this Appeal.

3. To enter into a Bond for a period of eighteen months for the sum of $75,000.00 (Seventy-Five Thousand Dollars) for rent which may be incurred by the Appellant pending this Appeal.

AND UPON THE RESPONDENT'S SOLICITORS UNDERTAKING to repay the costs of this action to date in the event that the said appeal is successful.

THIS COURT DOTH FURTHER ORDER that its Judgment dated the 21st day of June, 1979 be carried into execution but not before the 15th day of August, 1979 and that the Appellant pay to the Respondent the costs of this action to be taxed in default of agreement, except the costs of this Motion which are to abide the event of the Appeal.

LIBERTY to the Appellant to apply in the event that this appeal is successful for an assessment of damages (if any) to its business as a consequence of having to give up possession.

LEAVE to the Respondent to write up this order.

BY THE COURT

Sgd.
Asst. Registrar

No. 16

ORDER GRANTING FINAL LEAVE TO APPEAL

DATED 25th JANUARY 1980

TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 85/78

ON APPEAL FROM THE

BETWEEN

TIFFANY GLASS LIMITED — Plaintiff/Appellant

AND

F. PLAN LIMITED — Defendant/Respondent/Applicant

IN CHAMBERS

DATED and ENTERED the 25th day of January, 1980

BEFORE The Honourable Mr. Justice Cross

On the return of Summons issued on the 11th day of January, 1980 on behalf of the above-named Respondent/Applicant upon reading the said Summons and the Affidavit of Conrad Joseph Sanguinette

Sworn to on the 11th day of January 1980 together with the exhibits attached thereto all filed herein on the 11th January 1980

UPON HEARING Solicitor for the Plaintiff/Appellant and Solicitor for the Respondent/Applicant

IT IS ORDERED

That final leave be and the same is hereby granted to the Respondent/Applicant to appeal to Her Majesty in Her Majesty's Privy Council against the Judgment of the Court of Appeal dated 21st June, 1979 .

Sgd

Asst Registrar

In the Court of Appeal

No. 17
Amended Order granting final leave to appeal to the Judicial Committee of the Privy Council

3rd July 1980

No. 17

AMENDED ORDER GRANTING FINAL LEAVE TO APPEAL TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DATED 3rd JULY 1980

TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 85/78

ON APPEAL FROM THE

BETWEEN

TIFFANY GLASS LIMITED Plaintiff/Appellant

AND

F. PLAN LIMITED Defendant/Respondent

IN CHAMBERS

ENTERED the 3rd day of July 1980

BEFORE The Honourable Mr. Justice Hassanali J.A.

On the return of Summons issued on the 26th day of June, 1980 on behalf of the above-named Defendant/Respondent upon reading the said Summons and the Affidavit of Conrad Joseph Sanguinette

Sworn to on the 27th day of June, 1980 both filed herein

UPON HEARING Counsel for the Plaintiff/Appellant and Counsel for the Defendant/Respondent

IT IS ORDERED

that the Order dated 25th January, 1980 granting final leave to appeal against the judgment of the Court of Appeal herein be amended by substituting the words "to the Lords of Judicial Committee of the Privy Council" where they appear in the said Order and that the costs of this Application be costs in the cause.

Sgd.
Assistant Registrar
Supreme Court

EXHIBIT NO. 1

EXHIBIT

No. 1
Affidavit of
Gordon Farah

20th February
1976

AFFIDAVIT OF GORDON FARAH
DATED 20th FEBRUARY 1976

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. 2603 of 1975

BETWEEN

TIFFANY GLASS LIMITED Plaintiff

And

F. PLAN LIMITED Defendant

I, GORDON FARAH, of Collens Road, Maraval, in the Island of Trinidad, Company Director, make oath and say as follows:-

1. I am a Director of the above-named defendant and the facts deposed to herein are within my personal knowledge.

2. Under and by virtue of the terms of an unsigned agreement, the plaintiff let to the defendant certain premises known as No. 7 Diamond Vale Industrial Estate, Diamond Vale, Petit Valley, at the monthly rental of $1500.00 payable in advance commencing on the 15th day of September, 1974 for a term of 3 years for the purpose of setting up a furniture factory and finishing operation. The defendant, pursuant to the said agreement, went into possession and did set up the said factory and finishing operation with the necessary plans and machinery at considerable expense.

3. In and by virtue of the terms of an unsigned option to purchase forming part of the said agreement and of even date therewith the defendant was granted an option to purchase the said premises at the sum of $375,000.00 exercisable in writing on or before the 15th day of September, 1977. The consideration therefor being the monthly sum of $1000.00.

4. Since then the defendant has paid the monthly rent of $1500.00 and the said sum of $1000.00 pursuant to the terms of the said option to purchase.

5. The defendant has also observed and performed all the covenants and conditions contained in the said unsigned agreement and the said option but the plaintiff in breach thereof has wrongfully issued the writ for possession herein.

EXHIBIT

No. 1
Affidavit of
Gordon Farah

20th February
1976

(Continued)

6. I am advised and verily believe that the purported notice to quit served on the 25th June, 1975 is bad in law and has no effect to determine the tenancy created under and by virtue of the terms of the said lease.

7. The defendant wishes to counterclaim damages for breach of covenant for quiet enjoyment.

8. I am advised by my solicitors, Messrs. Wong & Sanguinette, and verily believe the same that by letter of the 19th December, 1975 an extension of time for 30 days was requested to deliver the Defence herein.

9. By letter of the 14th January, 1976 the plaintiff's solicitors reminded my solicitors that the time for the delivery of the defence was on the Sunday 18th January, 1976.

10. I am advised by Mr. Sanguinette of the firm of Wong & Sanguinette, the defendant's solicitors and verily believe the same, that he immediately contacted Mr. Bryan des Vignes, a solicitor of the firm of Messrs J.D. Sellier & Co., the plaintiff's solicitors, and informed him that counsel was actually settling the defence and the same would be delivered by Monday or Tuesday i.e. 18th or 19th January, 1976.

11. Counsel, however, I am advised and verily believe the same needed some further instructions relative to the counterclaim, and could not obtain same as I was out of the Country. I am further advised by Mr. Sanguinette and verily believe the same, that the defence was settled and sent to him by counsel at around 2.30 o'clock in the afternoon on the 22nd January, 1976 to be engrossed and delivered but judgment was taken up sometime during the said 22nd January.

12. I am advised by my said solicitors and verily believe the same that the defence and counterclaim are ready for delivery but the plaintiff's solicitors have refused to accept delivery of same.

13. A copy of the said Defence and Counterclaim is hereto annexed and marked exhibit "A".

SWORN to at No. 28 St. Vincent Street, Port of Spain, this 20th day of February, 1976.) G. Farah

Before me,
Darnley C. Jordan.
Commissioner of Affidavits

Filed on behalf of the Defendant herein
Sgd. Conrad Douglin Registrar and Marshall
Supreme Court

"A"

EXHIBIT

No. 1
Affidavit of
Gordon Farah

20th February
1976

(Continued)

This is the paper writing marked "A" referred to in the affidavit of GORDON FARAH, sworn to before me this 20th day of February, 1976.

Darnley C. Jordan
Commissioner of Affidavits

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. 2603 of 1975

BETWEEN

TIFFANY GLASS LIMITED — Plaintiff

And

F. PLAN LIMITED — Defendant

DEFENCE AND COUNTERCLAIM:

DEFENCE:

1. The defendant admits paragraphs 1 and 4 of the Statement of Claim.

2. The defendant denies paragraph 2 of the Statement of Claim and says that by virtue of an oral agreement for a lease which was put in writing on the 15th day of September, 1974, the plaintiff agreed to leave Lot No. 7 Diamond Vale Industrial Estate, Diamond Vale to the defendant for a term of three years at the monthly rental of $1,500.00 in advance on the 15th day of each and every month commencing on the 15th September 1974, for the purpose of setting up a furniture factory and finishing operation.

3. The defendant in further pursuance of and acting upon reliance of the said oral agreement took possession of the whole of the said leasehold premises paid the said rental proceeded to instal necessary plant and machinery and expended money in making improvements and installing electrical equipment on the said leasehold premises upon the usual covenants as are normal and proper in leases of property of the nature of the said leasehold premises. The defendant will refer at the trial of this matter to the unsigned written agreement for a lease containing all terms of the said oral agreement for its true meaning and office.

4. The defendant denies paragraph 3 of the Statement of Claim, save and except that a notice to quit was served on it on the 25th June, 1975, purporting to determine the said lease on the 31st July, 1975, but

EXHIBIT

No. 1
Affidavit of
Gordon Farah

20th February
1976

(Continued)

says that the said notice to quit is not in accordance with the said lease.

5. The defendant says that by virtue of an oral option to purchase supplemental to and induced by the said oral agreement for a lease and forming part thereof and of even date therewith, the plaintiff granted to the defendant an option to purchase the said leasehold premises for the price or sum of $375,000.00 such option to be exercisable by giving to the plaintiff notice in writing of its intention to exercise the same on or before the 15th day of September, 1977, that is to say on or before the termination of the said lease.

6. The defendant further says that the consideration for such option was the payment of $1,000.00 by 36 equal monthly instalments paid in advance on the 15th day of each and every month commencing on the 15th day of September, 1974, and it was part of the said option that should the said lease be determined for any reason whatsoever, the said option would become void and of no effect.

7. In further pursuance of the said option the defendant paid $1,000.00 each and every month commencing on the 15th day of September, 1974, up to and including the 15th day of October, 1975, but the said sum was purportedly treated as rent by the plaintiff after the said notice to quit was served on the defendant and contrary to the terms of the said lease and the said option. The defendant will refer at the trial of this matter to the unsigned Option to Purchase containing all the terms of the said oral option for its true meaning and effect.

8. The defendant says that it has performed and observed all the covenants conditions and stipulations contained in the said lease and the said oral option and in breach thereof the plaintiff wrongfully issued a writ which was filed on the 31st October, 1975, entered judgment in default of appearance and threatened to take process to enforce physical possession and has continued so to threaten and has told the defendant's trading partners of its intention to put the defendant out of the said leasehold premises in consequence whereof the defendant has been forced to seek alternative and/or other accommodation.

9. Save and except as hereinbefore expressly admitted the defendant denies each and every allegation and/or implication of fact in the Statement of Claim contained as if the same were set forth herein seriatim and specifically traversed.

AND BY WAY COUNTERCLAIM

EXHIBIT

No. 1
Affidavit of
Gordon Farah

20th February
1976

(Continued)

10. The defendant repeats paragraphs 1 to 9 inclusive of its defence herein and says that in the premises, the plaintiff wrongfully elected to treat the said lease and the said option as at an end in consequence whereof the defendant has had to make arrangements for alternative and/or other accommodation for the removal of its business elsewhere particularly having regard to the matters and facts set out in paragraph 8 above and has had to make arrangements to dismantle containerise and remove its furniture factory and finishing operations and as a result has lost profits thereby and has incurred expenditure loss and damage and is continuing to lose profits, incur expenses, loss and damage.

PARTICULARS OF SPECIAL DAMAGE:

1.	Costs of estimate for dismantling, containerising and removing plant, tackle, machinery and electrical installations, labour, materials and transport	$500.00
2.	Costs of estimate for re-assembly plant, tackle, machinery and electrical installations elsewhere, labour, materials and transport	$700.00
3.	Costs of advertising and seeking alternative accommodation	$200.00

AND the defendant Counterclaims:-

1. Damages for breach of covenant of quiet enjoyment.

2. (a) A declaration that the said monthly rental of the said leasehold premises was $1500.00

   (b) A declaration that the plaintiff refund to the defendant all money paid under and by virtue of the said option.

   (c) A declaration that the defendant holds the said premises under and by virtue of the said oral agreement and the said option.

3. Costs.

4. Such further or other relief as may be just.

Clive R.W. Phelps.

of Counsel.

EXHIBIT

No. 1
Affidavit of
Gordon Farah

20th February
1976

(Continued)

DELIVERED this day of January, 1976, by Messrs. Wong & Sanguinette, of No. 28 St. Vincent Street, Port of Spain, Solicitors for the Defendant.

Defendant's Solicitors.

To: Messrs. J.D. Sellier & Co.,
13 St. Vincent Street,
Port of Spain,
Plaintiff's Solicitors.

No. 2
Affidavit of
George Janoura

24th May 1976

EXHIBIT NO. 2

AFFIDAVIT OF GEORGE JANOURA

DATED 24th MAY 1976

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. 2603/1975

BETWEEN

TIFFANY GLASS LIMITED Plaintiff

And

F. PLAN LIMITED Defendant

AFFIDAVIT

I, GEORGE JANOURA, of No. 6 Nutmeg Avenue, Halaland Park, Maraval, in the Island of Trinidad, Company Director make oath and say as follows:-

1. I am a Director of the above named Plaintiff Company and the facts herein deposed to are within my personal knowledge.

2. I have read what purports to be a true copy of the affidavit of Gordon Farah sworn to and filed herein on the 20th day of February, 1976.

3. By an oral agreement made on or about the 1st day of September 1974 between myself on behalf of the plaintiff and one Richard Farah a director of the defendant company on behalf of the defendant the plaintiff agreed to let the premises known as No. 7 Diamond Vale Industrial Estate, Diamond Vale, Diego Martin for a term of three (3) years to the defendant for a monthly rental of $2,500.00, the agreement to be drawn up by the Plaintiff's Solicitors.

EXHIBIT

No. 2
Affidavit of
George Janoura

24th May 1976

(Continued)

4. Subsequently after I had consulted the plaintiff's Solicitors and acting on their advice, as to how best the agreement should be drawn up another oral agreement was made on or about the 9th day of September 1974 between myself on behalf of the plaintiff and the said Richard Farah on behalf of the defendant. By this agreement the oral agreement to let referred to in paragraph 3 hereof was varied in that the plaintiff agreed to let the said premises at a monthly rental of $1,500.00 and also granted to the defendant an option to purchase the said premises, the consideration for the said option being the sum of $36,000.00 payable by 36 equal monthl instalments of $1,000.00 each payable in advance on the 15th day of each and every month commencing on the 15th day of September, 1974.

5. The said agreement for lease and an option to purchase were reduced into writing in two documents and together were submitted to the said Richard Farah for execution by the defendant. Despite requests made by me from time to time between September 1974 and January 1975 of the said Richard Farah and of one Clive Phelps, Barrister-at-law and Chairman of the Board of Directors of the defendant company, the two documents have not been executed and returned to me and there are now produced and shown to me and marked "GJ1" and "GJ2" respectively copies of the unexecuted lease and option to purchase.

6. On the 25th day of June, 1975 my company served on the Defendant Company, a Notice to Quit which I had been advised by the plaintiff's Solicitors was and is valid in law.

7. Following upon the service of the said Notice to Quit, rent was accepted by the Plaintiff from the Defendant without prejudice to the said Notice to Quit and by a letter dated the 25th day of August, 1975 I wrote on behalf of the Plaintiff to the Defendant stating this. A true copy of my said letter is hereto annexed and marked "GJ3".

8. By a letter dated the 28th day of August, 1975 the Defendant replied to my said letter and did not challenge the Notice to Quit. A true copy of the Defendant's said letter is hereto annexed and marked "GJ4".

9. When the defendant failed to comply with the said notice to quit I consulted the plaintiff's Solicitors and I was advised that quite apart from the plaintiff's claim for possession because the two documents had not been executed I was entitled to claim a rental of $2,500.00 per month.

10. The defendant has consistently failed to pay

EXHIBIT

No. 2
Affidavit of
George Janoura

24th May 1976

(Continued)

the rent and the monies due under the option on the dates stipulated in the unexecuted lease and option to purchase and has paid neither rent nor monies due under the option at all since September, 1975 although it remains in occupation of the said premises and carries on its business there. I am advised that the Defendant is therefore in breach of the terms of the lease and has not observed and performed all the covenants and conditions contained in the unexecuted lease.

11. I deny that the Defendant has suffered the damage alleged in paragraph 10 of the Defence and Counterclaim exhibited to the said Affidavit of Gordon Farah.

12. I am advised by my legal advisers and verily believe that there is no defence to this action.

SWORN to before me at)
No. 15 St. Vincent Street) Sgd George Janoura
this 24th day of May 1976)

Before me

Sgd L G Weekes
Commissioner of Affidavits

"GJ1"

This is the exhibit marked "GJ1" referred to in the Affidavit of George Janoura, sworn to before me this 24th day of May 1976

Sgd L. G. Weekes
Commissioner of Affidavits

AGREEMENT FOR LEASE

BETWEEN

TIFFANY GLASS LIMITED ("the Lessor")

AND

F PLAN LIMITED ("the Lessee")

Subject to the consent of the Industrial Development Corporation the Lessor will grant to the Lessee and the Lessee shall take a sub-lease in respect of Lot No. 7 Diamond Vale Industrial Estate upon the following terms and conditions:-

1. The period of the sub-lease shall be Three Years and shall commence on the 15th September 1974.

EXHIBIT

No. 2
Affidavit of
George Janoura

24th May 1976

(Continued)

2. The monthly rent payable shall be the sum of $1,500.00 payable in advance on the 15th day of each and every month.

3. The Lessee shall not use the premises for purposes other than such purposes as may be permitted under the Head Lease from the Industrial Development Corporation under which the said premises are held, and shall observe and perform all the covenants and stipulations contained in the Head Lease, save that the Lessor shall pay the rent payable thereunder.

4. The Lessor shall be responsible for the maintenance and upkeep of the main structure and roof of the building on the said premises and the Lessee shall be responsible for all other repairs, maintenance and upkeep of the said building and the grounds.

5. The Lessee shall bear and pay to the Lessor (a) any charges for excess water which may from time to time become payable in respect of the premises, and (b) all amounts by which the annual sums payable for rates, taxes, charges and other assessments in respect of the premises shall exceed those now payable. The Lessor shall bear and pay the annual sums now payable for such rates, taxes, charges and assessments.

6. The Lessee shall not do or permit to be done anything whereby the existing policy of insurance on the said building against damage and other risks may become void or voidable or whereby the premium thereon may be increased and to repay to the Lessor all sums by it by way of increased premium and all expenses incurred by (illegible) about any renewal of such policy or policies rendered necessary in breach or non-observance of such covenant.

In other respects the said sub-lease shall contain such(illegible) terms and conditions as are normal and proper in leases (illegible) of the nature of the said premises.

Dated the day of September 1974.

For and on behalf of the Lessor in
(illegible by)
the presence of

For and on behalf of the Lessee in
(illegible by)
the presence of

EXHIBIT "GJ2"

No. 2
Affidavit of
George Janoura

24th May 1976

(Continued)

This is the exhibit marked "GJ2" referred to in the Affidavit of George Janoura sworn to before me on this 24th day of May 1976

Sgd. L.G Weekes
Commissioner of Affidavits

OPTION TO PURCHASE

Granted by

TIFFANY GLASS LIMITED ("the Grantor")

to

F PLAN LIMITED ("the Grantee")

Supplemental to an Agreement for Lease between the same parties of even date herewith

1. In consideration of the sum of $36,000.00 to be paid by the Grantee to the Grantor in manner hereinafter appearing, the Grantor hereby grants unto the Grantee the option to purchase on the 15th day of September 1977 free from encumbrances and with vacant possession the Leasehold premises known as Lot No. 7 Diamond Vale Industrial Estate for the price or sum of THREE HUNDRED AND SEVENTY-FIVE THOUSAND DOLLARS inclusive of the said sum of $36,000.00.

2. The said sum of $36,000.00 shall be paid by 36 equal monthly instalments of ONE THOUSAND DOLLARS each and such instalments shall be paid in advance on the 15th day of each and every month commencing on the 15th day of September 1974.

3. The option hereby granted may be exercised by the Grantee giving to the Grantor on or before the 15th day of June 1977 notice in writing of its intention to exercise the same and it shall on or before the 15th day of September 1977 pay to the Grantor the difference between the amount at the time of the exercise of the option paid in respect thereof hereunder and the said sum of Three Hundred and Seventy-five Thousand Dollars whereupon the Grantor will at the expense of the Grantee give to the Grantee a proper assurance of the said premises.

4. In the event of the exercise of the option by the Grantee the Grantor will provide a good marketable title to the said premises free from encumbrances.

5. Nothing herein contained shall relieve the Grantor from its liability to pay the rent payable under the said Agreement for Lease.

6. Should the said Agreement for Lease or the Lease granted thereunder be determined for any reason whatsoever the option hereby granted shall be void and of no effect.

The option hereby granted shall be conditional on the Industrial Development Corporation giving its consent to the absolute assignment of the said premises to the Grantee.

AS WITNESS the hands of the parties the day of September 1975.

Signed by
for and on behalf of Tiffany Glass)
Limited in the presence of:)

Signed by
and on behalf of F Plan Limited)
in the presence of:)

"GJ3"

This is exhibit marked "GJ3" referred to in the Affidavit of George Janoura sworn to before me this 24th day of May 1976

Sgd. L.C. Weekes
Commissioner of Affidavits

25th August, 1975

Mr. Richard Farah
F-Plan Limited
68-70 Henry Street
PORT OF SPAIN.

Dear Richard

Enclosed is our Receipt which as you will note is without prejudice to our Notice to quit dated 25th June, 1975.

We note that 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.

Yours sincerely
TIFFANY GLASS LIMITED

(Sgd) GEORGE JANOURA

EXHIBIT

No. 2
Affidavit of
George Janoura

24th May 1976

(Continued)

25th August, 1975

Received from F-Plan Limited the sum of ($2,500.00) two thousand, five hundred dollars being rent for August 1975 accepted without prejudice to our Notice to quit dated 25th June, 1975.

(Sgd) GEORGE JANOURA.

"GJ4"
This is the exhibit marked "GJ4" referred to in the Affidavit of George Janoura sworn to before me this 24th day of May 1976.
Sgd. L.C. Weekes
Commissioner of Affidavits

28th August, 1975

Messrs Tiffany Glass Limited,
58, Queen Street,
Port of Spain.

Dear George,

re: Lease of Lot No. 7 Diamond Vale Industrial Estate between Tiffany Glass Ltd and F. Plan Limited

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

Yours faithfully,
F. Plan Limited,

(Sgd)
Richard A. Farah

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 — Appellant (Defendant)

- AND -

TIFFANY GLASS LIMITED — Respondent (Plaintiff)

RECORD OF PROCEEDINGS

INGLEDEW, BROWN, BENNISON
& GARRETT
51 Minories
London EC3N 1JQ

Solicitors for the
Appellant

STEPHENSON HARWOOD
Saddlers' Hall
Gutter Lane
London EC2V 6BS

Solicitors for the
Respondent