Privy Council Appeal No. 7 of 1981

F. Plan Limited – – – – – – – – *Appellants*

v.

Tiffany Glass Limited – – – – – – – *Respondents*

FROM:

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH MAY 1982

Present at the Hearing:

LORD RUSSELL OF KILLOWEN

LORD SCARMAN

LORD ROSKILL

LORD BRIGHTMAN

SIR SEBAG SHAW

[*Delivered by* LORD ROSKILL]

This appeal is brought by the appellants against the judgment of the Court of Appeal of Trinidad and Tobago (Sir Isaac Hyatali C.J. and Corbin and Kelsick JJ.A.) dated 21st June 1979 reversing a judgment of McMillan J. dated 5th May 1978 in favour of the appellants in Order 14 proceedings brought by the respondents as plaintiffs against the appellants as defendants in the High Court of Trinidad and Tobago. Those proceedings, which bore the number 2982 of 1977 and to which their Lordships will refer as "the second action", were brought by the respondents as lessors against the appellants as lessees of certain industrial premises at Lot No. 7 Diamond Vale Industrial Estate in the ward of Diego Martin in Trinidad. In the second action the respondents sought judgment under Order 14 for possession of those premises, arrears of rent and mesne profits against the appellants. McMillan J. dismissed the respondents' claim. The Court of Appeal allowed an appeal by the respondents and entered judgment for them for possession, $36,000 arrears of rent and mesne profits. The Court of Appeal subsequently gave leave to appeal to this Board. Their Lordships are only concerned in this appeal with the respondents' claim to possession of the premises; for the appellants, in answer to that part of the respondents' claim, asserted that on 13th June 1977 they exercised an option to purchase the premises which option had been given to them by the respondents and which, as the appellants claimed, was then still

available to them. It is right for their Lordships to point out that on the crucial question of the respondents' entitlement to possession and of the appellants' claim to have validly exercised this option, McMillan J. reached the same conclusion as did the Court of Appeal. The learned trial judge dismissed the respondents' claim for possession on other grounds which were rejected by the Court of Appeal and are no longer relevant. Thus, on the crucial question the appellants have failed in both courts below and on a matter of this kind, their Lordships would, in any event, hesitate to interfere with the conclusions of two courts below, unless they were fully satisfied that those conclusions were erroneous in point of law.

Learned Counsel for the appellants properly conceded that, unless the appellants could show an arguable defence based upon the alleged availability of the option, the appeal must fail. He sought to argue that there were, or at least might be, other factual matters which when investigated at the trial would or might shed light upon the construction of the relevant documents. But the hearings in the courts below were conducted by reference only to the documents and without oral evidence and there is no reference in any of the affidavits filed on behalf of the appellants to any other factual matters which if proved by oral evidence might assist the appellants. Accordingly their Lordships are of clear opinion that this appeal must be determined by reference to the same written material as was available in the courts below.

The respondents held a lease of the premises in question from the Industrial Development Corporation. In September 1974 they orally agreed to sublet these premises to the appellants for a term of 3 years certain from 15th September 1974, at a monthly rental of $1,500 payable in advance on the fifteenth day of each month. A second and indeed supplementary oral agreement was made on the same day between the appellants and the respondents whereby the respondents granted the appellants an option to purchase the premises, that option to be exercised on or before 15th June 1977. The consideration for the grant of the option was stated to be $36,000 to be paid in 36 equal monthly instalments in advance beginning with 15th September 1974, and payable on the fifteenth day of each succeeding month. The option price was stated to be $375,000 inclusive of the $36,000 and was to be paid, in the event of the exercise of the option, on or before 15th September 1977. The appellants duly took possession of the premises.

These oral agreements were never the subject of executed written agreements. Documents incorporating the terms of both oral agreements were prepared at the instance of the respondents but for some reason the appellants did not execute them. It was not disputed before their Lordships that the draft documents accurately recorded the terms of the two oral agreements. Their Lordships do not find it necessary to set out the terms of the draft lease. The material parts of the draft option agreement read thus:—

> "1. In consideration of the sum of $36,000 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 $375,000 inclusive of the said sum of $36,000.
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> 2. The said sum of $36,000 shall be paid by 36 equal monthly instalments of $1,000 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 $375,000 whereupon the Grantor will at the expense of the Grantee give to the Grantee a proper assurance of the said premises.

. . . . . .

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.

7. 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."

The appellants thereafter for a while duly paid the monthly rent and the monthly instalments. But on 25th June 1975 the respondents served upon the appellants notice to quit on 31st July 1975, apparently claiming that because of the appellants' failure to execute the documents already referred to the lease had subsisted only as a monthly tenancy at a rent of $2,500 per month and was thus terminable by one month's notice. The appellants however paid the sums of $1,500 and $1,000 due on 15th July 1975 and again on 15th August 1975. On 25th August 1975 the respondents sent under cover of a letter of that date a receipt, stating that it was without prejudice to the notice to quit, which had, of course, by this time expired, and asking for possession to be given. The receipt described the sums received as " $2,500 being rent for August 1975 ".

Their Lordships did not in the event find it necessary to invite Counsel for the respondents to address them. But as they read the judgments of the Court of Appeal no attempt was made in the courts below to justify the giving of that notice to quit or the respondents' appropriation of the whole of the $2,500 to rent and their Lordships will consider this appeal on the basis that neither action by the respondents could be justified. But the appellants' reply to the letter enclosing the receipt was sent on 28th August 1975. It held the respondents liable for loss resulting from their determination of the lease and added that the appellants were trying to re-locate their plant. There is no reference to the option agreement in this letter or any suggestion that either the lease or the option agreement still remained in being.

The appellants however remained in possession and on 31st October 1975 the respondents began Action No. 2603 of 1975, " the first action ". By their statement of claim the respondents claimed possession of the premises and arrears of rent at the rate of $2,500 per month, up to 31st October 1975, which was the date of the writ in the first action, and mesne profits at the like rate thereafter. Judgment was entered against the appellants in default of their appearance on 12th November 1975. But that judgment was later set aside by consent and the appellants entered an appearance on the same date, namely 9th December 1975. On 22nd January 1976 judgment was again entered against the appellants, on this occasion in default of defence. That judgment was in its turn set aside on 15th June 1976 and a defence was ultimately filed together with a counter-claim. Paragraph 10 of this defence and counter-claim asserted that the respondents had wrongfully elected to treat the lease and the option agreement as at an end as a result of which the appellants had had to make alternative arrangements and had lost profits. The prayer to the counter-claim claimed the return of moneys paid under the option agreement. It also, their Lordships think somewhat inconsistently in view of

the contents of paragraph 10 of the defence and counter-claim, claimed a declaration that the respondents held the premises by virtue of the lease and the option agreement.

The appellants remained in possession but, after the payment of rent and option moneys already referred to, no further payments under either head were made by the appellants to the respondents. Nevertheless by letter dated 13th June 1977 the appellants purported to exercise the option. No reference was made in this letter to the payments both due and overdue but on 14th June 1977 in a further letter the appellants asserted that they were not only ready and willing but able to pay the sums due by way of rent and option moneys. The respondents replied on 29th June 1977 to the letter of 13th June 1977 stating that they had been advised that the appellants were not entitled to exercise the option because no moneys had been received from them by way of option payments or otherwise for more than twelve months. This last statement was in their Lordships' view factually correct. No further action appears to have been taken by either party during the next two or three months and the appellants remained in possession but once again made no payments during this period by way of rent or option moneys.

On 14th September 1977 the three-year term of the lease expired by effluxion of time. Unless the appellants could successfully assert their claim to have validly exercised the option on 13th June 1977, their continued possession after 14th September 1977 must on any view have been tortious. It was in these circumstances that the respondents issued their writ in the second action, out of which the present appeal arises, on 4th November 1977. In their statement of claim in the second action, which was specially endorsed, the respondents again claimed possession, arrears of rent and mesne profits. The appellants appeared to this writ on 24th November 1977 and on 2nd December 1977 the respondents issued two summonses, one in the first and one in the second action. The summons in the first action sought leave to discontinue that action. The summons in the second action sought leave to sign final judgment in that action. In connection with the latter proceedings the appellants' managing director swore an affidavit in which he asserted—their Lordships find this statement somewhat surprising—that the appellants " observed and performed all the covenants and conditions contained in the said unsigned agreement and the said option ". The affidavit contained no reference to the appellants' continuing failure to pay any option moneys which, on the appellants' case, would have been due if the option agreement subsisted. The affidavit also exhibited a draft defence and counter-claim of which paragraph 10, when read with paragraph 9 of the affidavit, is quite inconsistent with the claim that the option continued to subsist and paragraph 2 of the prayer to the counter-claim was unsupported by any antecedent factual foundation. The respondents ultimately obtained leave to discontinue the first action. The summons for judgment in the second action came before McMillan J. in due course.

As their Lordships read the judgments in the courts below, the view which found favour with the majority of the Court of Appeal, and indeed on the crucial question with McMillan J., was that since the appellants had paid no option moneys nor indeed any rent after the last payment in 1975 to which their Lordships have already referred, the option was not available to the appellants some eighteen months later even though both parties appear to have considered that the lease, as distinct from the option agreement, continued notwithstanding the events of 1975, since the respondents in the second action claimed rent down to September 1977 and their Lordships were told that in the Court of Appeal the appellants expressly admitted liability for that rent.

Their Lordships are in agreement with the majority of the Court of Appeal and indeed with McMillan J. on this question and are of the clear opinion that it is not open to the appellants, having failed timeously to make any option payments, to turn round in June 1977 and then claim to exercise the option originally accorded to them. Their Lordships are of the view that, on the true construction of the option agreement, it was essential, before the appellants could claim to have validly exercised the option, for them to have maintained the option payments. This they never did and therefore there was no arguable defence open to them which would have justified granting them either unconditional or, as was faintly suggested in the alternative, conditional leave to defend.

It thus becomes unnecessary for their Lordships to consider the alternative ground upon which the learned Chief Justice rejected the appellants' submissions, agreeing that judgment for possession must issue in favour of the respondents. The learned Chief Justice was of the opinion that the appellants had accepted the respondents' notice to quit as a repudiation both of the lease and of the option agreement, and that while the lease had been revived by subsequent conduct of the parties, the option agreement had not. It was contended for the appellants on the strength of the decision of the Court of Appeal in England in *Total Oil Great Britain Limited v. Thompson Garages (Biggin Hill) Limited* [1972] 1 Q.B. 318 that the lease was incapable of repudiation and that the option agreement was so closely linked with the lease that if the former were not susceptible of repudiation the latter must also have subsisted at all material times. Their Lordships do not find it necessary to consider how far the reasoning underlying that decision, which was founded upon two speeches delivered in the House of Lords in *Cricklewood Property & Investment Trust Limited v. Leighton's Investment Trust Limited* [1945] A.C.221, can still be supported in the light of the recent decision of the House of Lords in *National Carriers Limited v. Panalpina (Northern) Limited* [1981] A.C. 675, in which the majority of their Lordships felt unable to agree with those two speeches.

In the result this appeal must be dismissed. The appellants must pay the respondents their costs before this Board.

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In the Privy Council

F. PLAN LIMITED

v.

TIFFANY GLASS LIMITED

DELIVERED BY
LORD ROSKILL

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