Case No 320/91

IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the matter between:

OK BAZAARS (1929) LTD Appellant

and

CASH-IN CC Respondent

CORAM: HOEXTER, VIVIER, KUMLEBEN, NIENABER JJA et KRIEGLER AJA

HEARD: 1 November 1993 DELIVERED:

2 December 1993

J U D G M E N T

HOEXTER, JA

.....

HOEXTER JA,

A contract of lease between the respondent as lessor and the appellant as lessee gave the latter a conditional right of renewal of the period of the lease. When the appellant sought to renew the lease the respondent challenged its right to do so. Thereafter the respondent instituted an action against the appellant in the Cape of Good Hope Provincial Division. The respondent sought a declaratory order to the effect that the appellant was not entitled to exercise the right of renewal. The action, which was resisted by the appellant, came before Scott J. Having heard evidence and argument thereon the learned judge ruled in favour of the respondent. The appellant was ordered to pay the costs, including the costs of two counsel. The judgment of the court below has been reported as Cash-In CC v OK Bazaars (1929) Ltd 1991(3) SA 353 (C). With leave of the trial judge the appellant

appeals to this court against the whole of the order of the court a quo.

In the heart of the town of Knysna the respondent is the owner of six erven on which there stands a building housing, inter alia, extensive supermarket premises ("the premises") which have a shopping floor area of about 1700 square metres. Bounded by two parallel streets, Nelson Street to the south and Main Street to the north, the premises face Main Street but are separated from it by an asphalt parking area ("the car park") which is able to accommodate some 150 motor cars. Cars enter the car park from Main Street and leave it by an exit ramp to the west of the premises, which descends into Nelson Street. The car park is on a higher level than Nelson Street. Between the exit ramp and the east side of the building there is a grass embankment as well as a gravel area abutting Nelson Street.

On 11 July 1980 the respondent entered into a written contract of lease ("the original lease") with a private company ("Knowles") in terms of which the latter hired the premises for a period of 9 years and 11 months, subject to a conditional right of renewal. Knowles took occupation under the original lease in 1981 and successfully operated a supermarket in the premises until 1986 when it experienced financial difficulties and sought to cede its rights under the original lease to the appellant. The respondent refused to consent to the cession and litigation between the respondent and Knowles followed. Ultimately a settlement was reached in terms whereof, and subject to certain amendments to the original lease, Knowles ceded its rights and assigned its obligations thereunder to the appellant. This agreement was recorded in a written contract entitled "Agreement of Cession and Amendment of Lease" to which Knowles, the

appellant and the respondent were parties. To this agreement reference will hereunder be made as "the lease".

The appellant signed the lease on 4 July 1986 and it took occupation of the premises at about that time.

The lease involved amendments, inter alia, to the method of calculation of the rental fixed in the original lease. The rental payable by the appellant was determined by means of a rather elaborate formula. Broadly speaking the annual rental payable was the greater of the following two amounts: (1) a multiple of certain minimum rentals payable monthly to the respondent and (2) a fixed percentage of the appellant's nett annual turnover augmented by further sums calculated by reference to the turnover and rental of sub-tenants. Of importance in regard to the matter are the provisions of clause 6.6 of the lease. It reads as follows:-

"Within THREE (3) months after the end of each Lease Year the Lessee shall deliver to the Lessor

an Auditor's certificate -

(1) setting out its Nett Annual Turnover for that Lease Year and the Nett Annual Turnover from the sub-tenants referred to in sub-clause (5)(b)(ii) above during that Lease Year.

(2) setting out the rental payable by subtenants of the Lessee as referred to in sub-clause (5)(c) above, as well as the Lessor's share thereof;

signed by its Auditors and it shall pay to the Lessor the balance if any of the Annual Rental payable for that Lease Year within SEVEN (7) days after delivery of the Auditor's certificate. The said Auditor's certificate shall set out all such information as is necessary or desirable to enable the Lessor to calculate the Annual Rental payable during the Lease Year concerned."

The lease contained various provisions aimed at

ensuring the cleanliness of the premises and their environs

and the prevention of nuisance. One amendment of the

original lease involved the insertion of a new clause ("the

litter clause") in terms of which -

"....it shall always be and remain the obligation of the Lessee to keep the car park in a clean and

tidy condition and free of litter."

In terms of clause 7.5 ("the nuisance clause") of the lease the Lessee -

> "Shall not do or permit to be done anything which may cause or be a nuisance or annoyance to the Lessor or to the persons occupying other portions of the Lessor's building or to the neighbours generally."

During the course of the trial the respondent amended its particulars of claim by pleading a variation of the lease ("the later term"). It was reflected, so it was alleged, in an exchange of letters, in terms whereof the appellant had also agreed to keep certain further areas, and in particular the grass embankment, the gravel area and the pavements surrounding the car park, in a clean and tidy condition and free of litter. The existence of such a term so alleged was denied by the appellant.

Of crucial importance in the dispute between the parties are the provisions of the renewal clause in the

lease. Clause 3 reads as follows:-"3. RIGHT OF

RENEWAL

(3) Provided the Lessee shall have faithfully carried out the terms and conditions of this Lease and provided the Lessee is in no way in default hereunder at the expiration of this Lease, then the Lessee shall have the right of renewing this Lease for a further period of NINE years and eleven months upon the same conditions and at the same rental as herein set out save that there shall be no further right of renewal.

(4) In the event of the Lessee desiring to exercise the right of renewal aforementioned, written intention to exercise such option must be given to the Lessor not less than six months before the date of expiry of this Lease, failing which such right of renewal shall cease and determine."

Within the time limit prescribed by clause 3.2

the appellant gave to the respondent written notice of its

intention to exercise the option of renewal. Contending

that the appellant had not satisfied the conditions to

which the right of renewal was subject, the respondent disputed the appellant's right to renew the lease.

The second proviso in clause 3.1 requires that at the expiry date the Lessee -

> "....is in no way in default hereunder...."

Whatever may or may not have taken place earlier during the currency of the lease, it is common cause that at the expiry date the appellant was not in breach of any of its obligations under the lease. The bone of contention in the case is the first proviso in clause 3.1 which requires that the Lessee -

> "....shall have faithfully carried out the terms and conditions of this Lease ...."

The respondent contended that the first proviso had not been satisfied. It alleged that the appellant had no right to exercise the option to renew the lease for the reason that during the currency of the lease, and in various respects, the appellant had failed to carry out

faithfully the terms and conditions of the lease. In its particulars of claim as amended the respondent alleged that:-

(5) in breach of clause 6.6 the appellant had persistently failed timeously to deliver the auditor's certificate; and,

(6) in breach of the litter clause and the nuisance clause the appellant had continually failed to keep the car park in a clean and tidy condition and free of litter; and,

(7) in breach of the nuisance clause the appellant had failed to clean the drains at the rear of the premises and to keep in a clean condition the delivery area and the wet rubbish storage area, in consequence whereof noxious odours and infestations of flies had created a nuisance to a neighbour, Mr M Zeelie; and,

(d) in breach of the later term the appellant had continually failed to keep the grass embankment, the gravel area and the pavements surrounding the car park in a clean and tidy condition and free of litter. Although the legal consequences flowing therefrom were throughout a matter sharply in issue between the parties, the fact that the breach of contract indicated in (a) above (failure timeously to deliver the auditor's certificate) had been repeatedly committed was common ground. In the court below much of the evidence adduced was devoted to the factual issues raised by the alleged breaches (denied by the appellant) mentioned in (b), (c) and (d).

In the result Scott J found (at 363A-C) that in the light of the meaning properly to be assigned to clause

3.1, and having regard to the persistent nature of the appellant's breach of the provisions of clause 6.6, the appellant had no right to a renewal of the lease. Accordingly the learned judge (at 363C-D) found it unnessary to decide whether during the currency of the lease the appellant had breached any other clauses of the lease.

When attention was given to the preparation of the appeal record the attorneys respectively representing the parties formally agreed in writing to limit the record. Pursuant to such agreement there was excised from the appeal record the bulk of the evidence dealing with the disputed factual issues raised by the alleged breaches (b), (c) and (d). The agreement so to truncate the appeal record was no doubt inspired by a laudable desire to save time and reduce legal costs. What was overlooked, however, was that such truncation improperly precluded

adjudication on appeal of issues which were still alive.

Although the trial court found in favour of the respondent on the narrow ground indicated above, when regard is had to the pleadings and the evidence adduced at the trial, it is clear that in the absence of any agreement between the parties limiting the ambit of the issues on appeal it was open to the respondent to argue to this court that the court a quo should have found that the appellant had also been guilty of one or more of the other breaches ((b), (c) or (d)) alleged; and that on the strength thereof the appellant had not acquired its right to a renewal of the lease. In the event that this court might be disposed to disagree with the decision of the trial court based on (a), non constat that this court might not be prepared to find in favour of the respondent by holding that the evidence established also one or more of the remaining breaches; and that upon a proper interpretation

of clause 3.1 such breach or breaches, either independently or in conjunction with breach (a), operated to preclude a renewal of the lease. In short, unless the respondent were to abandon his further reliance upon the alleged breaches (b), (c) and (d) , they remained live issues for the purposes of the appeal. The appeal record lodged was therefore incomplete and irregular.

In apparent conformity to the abridged appeal record counsel on both sides in their original heads of argument confined their submissions to the correctness or otherwise of the trial court's finding based solely on the admitted breach (a). Having regard to the way in which the actual argument on behalf of the appellant tended to develop, however, this court inquired of counsel for the respondent whether the latter had in fact abandoned its reliance on the breaches alleged in (b), (c) and (d). When counsel for the respondent answered this question in the

negative the court took a brief adjournment in order to enable counsel to take instructions from their respective clients. When the court reconvened, and by agreement between the parties, an order was made in terms whereof: (1) the further hearing of the appeal was adjourned to a date to be arranged with the registrar of this court; (2) leave was granted to the appellant to augment the appeal record; and (3) each party was to bear its own costs occasioned by the postponement.

The first and abortive hearing of the appeal took place on 1 March 1993. In due course the balance of the record of the trial proceedings was lodged. When the hearing of the appeal was resumed on 1 November 1993 argument was presented to us also in respect of the alleged breaches (b), (c) and (d).

For the reasons which follow I take the view that

when regard is had both to the proper construction to be put on clause 3.1 of the lease and to the nature and extent of the appellant's admitted breaches of clause 6.6, the result achieved in the court below was the correct one; and that the appeal may be disposed of without embarking upon any further inquiry into the alleged breaches (b), (c) and (d).

The end of the lease year was the end of the month of February. In terms of clause 6.6 the appellant was obliged to deliver the auditor's certificate to the respondent within three months after the end of each lease year, namely by 31 May. The appellant consistently failed to deliver the auditor's certificate within the period stipulated. The extent of the delay involved in each of these breaches is as follows:-

(8) The certificate due on 31 May 1987 was delivered only on 17 February 1988 - a delay of eight-and-a-half months.

(9) The certificate due on 31 May 1988 was delivered only on 14 June 1988 - a delay of a fortnight.

(10) The certificate due on 31 May 1989 was delivered only on 26 September 1989 - a delay of almost four months.

(11) The certificate due on 31 May 1990 was delivered only on 6 July 1990 - a delay of more than a month.

That the respondent viewed the appellant's dereliction with concern is apparent from the correspondence proved at the trial. When the appellant failed timeously to deliver the certificate due on 31 May 1987 the respondent repeatedly called the attention of the appellant to its remissness in this respect. After a

delay of more than two months the respondent in a letter dated 19 August to the appellant's Group Financial Accountant complained:-

> "We note that we have not yet received your auditors' certificate referred to in your letter dated 18 May 1987."

When the certificate was almost five months overdue the respondent again adverted to the matter in a letter to the appellant's Group Financial Accountant dated 27 October 1987:-

> "We draw your attention to clause 6 of the Agreement of Cession and would like to point out that the Auditor's Certificate referred to therein is long overdue."

On 19 January 1988 the respondent wrote again to the appellant's Group Financial Accountant. The opening paragraph of the letter stated:-

> "We refer to our letter dated 27 October 1987 to which we have had no response. (A copy is attached.)"

The said letter contained a further request for delivery of

the certificate.

In its plea to the respondent' s particulars of claim the appellant denied that it had breached any of the provisions of the lease. However, for the event that any such breaches might be established, the appellant pleaded in the alternative as follows:-

> "5.3.1 Upon a proper construction of Clause 3.1 of the lease, the Defendant was entitled to renew the lease provided it had faithfully carried out the terms and conditions of the lease in the sense that it was not in breach or default upon such renewal.
>
> 5.3.2 The Defendant was not in breach or default of its obligations under the lease upon its renewal."

For an exercise of the option of renewal, clause 3.2 prescribed notice in writing of such intention to be given by the appellant not less than six months before the date of expiry of the lease. The lease expired on 28 February 1991. In fact the appellant twice gave written

notice of its intention to renew the lease for a further period of nine years and eleven months. The first notice was given on 30 May 1990; and the second on 2 August 1990. The reason for giving the second notice was that at the date of the first notice the appellant had not yet delivered the auditor's certificate for that lease year. It did so prior to the second notice.

The alternative plea raises the question whether upon a proper construction of clause 3 "spent breaches", i e breaches which have been subsequently cured, preclude a renewal of the lease by the appellant. The trial judge interpreted the provisions of clause 3 in the following way (at 358I-J):-

> "....the conditions which have to be fulfilled for the lessee to be entitled to a renewal are the following:
>
> (i) notice must have been given in terms of clause 3.2; (ii) the lessee must in no way be in default under the lease at its expiration; and

> (iii) as at that date the lessee must have faithfully carried out the terms and conditions of the lease."

For the reasons which follow I consider that Scott J correctly construed the meaning of clause 3.

In construing clause 3 as he did the trial judge relied upon the decision of a Natal full court in Seaborn v Smith 1955(4) SA 339 (N). In that case a lessor applied for the ejectment of his lessee under a written lease and there fell to be interpreted clause 11 of the lease which stated at 341 G:-

> "The lessee observing all the terms and covenants of this lease shall have the right after the expiration of the term hereof to renew this lease for a further period of three years"

provided she gave written notice of her intention three months before the expiry of the original term of the lease. From time to time the lessee had failed to pay the rent on due date. Before the expiration of the original lease the

lessee wrote stating that she intended to exercise such option. The lessor replied by letter that the right to renew had been forfeited through the lessee's failure to pay rent timeously. After this letter by the lessor the lessee again paid her rental late; and she did not vacate at the end of the lease.

In the court of first instance the learned judge held that the lessee could exercise her right of renewal . provided that at the date of giving such notice she had paid her rent to date, and that she had remedied any previous breaches. This decision was reversed on appeal. The full court ruled that the right of renewal could not come into existence until the end of the lease, and therefore that the lessee's performance should be examined until the expiry of the lease. Assuming in favour of the lessee that the lessor had previously waived late payments of rent,the full court proceeded to hold that the lessee's

late payment after the lessor's aforementioned letter was a

breach; and that the lessee had therefore forfeited the

right to renewal.

The judgment of the full court was delivered by

Holmes J. His remarks at 343D-344A are instructive.

Having referred to the findings of the court of first

instance the learned judge said the following:-

> "In coming to the conclusion to which he did as to the interpretation of clause 11 of the lease, the learned Judge relied on three English cases viz. Bastin v Bidwell, 18 Ch.D. 238; Finch v Underwood, 2 Ch.D. 310; and Robinson v Thames Mead Park Estates Ltd., 1947(1) A.E.R. 366. We have carefully considered these cases, but the conclusion to which we have come is that they are not a dependable guide in the present case, because the words of the lease which fell to be considered were different, and so were the circumstances.
>
> I refer to the words in clause 11
>
> > 'The lessee observing all the terms and covenants of this lease shall have the right after the expiration of the term hereof to renew this lease...'

> In my view the word 'observing', in its context, imports the idea of the continuing present, throughout the term of the lease. In other words the signatories were regarding the matter of the tenant's conduct prospectively, and at the end of the term her conduct was to be reviewed, in order to ascertain whether she had fulfilled the condition precedent to her right of renewal. The interpretation of the Court a quo results in the startling position that the lessee could be thoroughly unsatisfactory in the matter of punctuality for the greater part of the lease, to the inconvenience and even prejudice of the lessor, but could nevertheless insist on a right of renewal if at the moment of giving notice of renewal she was up to date in the performance of her obligations.
>
> With regard to the learned Judge's view that the date for deciding whether the lessee was entitled to a renewal was the date when she gave notice of intention to exercise her right, I point out further that clause 11 confers, on fulfilment of the condition therein stated, 'the right after the expiration of the term hereof to renew this lease.' Hence the right to a renewal cannot come into existence until the end of the lease, and the lessee's conduct is to be under review right to the end, and not merely up to the date of the giving of the notice."

In Naicker v Pensil 1967(1) SA 198 (N) a written lease made

the exercise of a right of renewal conditional upon "the

lessee .... paying the rent and observing the other terms and conditions of this lease...." Caney J (in whose judgment Friedman J concurred) followed the reasoning of Seaborn v Smith (supra) in holding (at 200H-202G) that the language of the condition imported the idea of the continuing present and, therefore, of faithful and diligent performance throughout the term of the lease.

At the trial and again on appeal Mr Kuny (with him Mr Bennett) appeared for the appellant. Both in the court below and before us counsel for the appellant contended that upon a proper construction of clause 3 only subsisting breaches were legally effective to preclude renewal by the appellant. In support of his argument Mr Kuny relied heavily upon the decision of the English Court of Appeal in Bass Holdings Ltd v Morton Music Ltd [1987] 2 A11 ER 1001 (CA). The judgments of the Court of Appeal in that case examined a long line of English authorities upon

the point in issue including Bastin v Bidwell 18 Ch D 238 (decided in 1881) and Finch v Underwood 2 Ch D 310 (decided in 1876) which in Seaborn v Smith (supra) at 343D-EW Holmes J regarded as being not dependable guides in the matter before the full court.

In the Bass Holdings case (supra) the lease in question contained a clause 9 in terms whereof the lessees were granted the option of acquiring a further lease upon the fulfilment of certain conditions. The relevant portions of clause 9 read as follows:-

> "If the Tenant shall be desirous of taking a further lease of the demised premises for a further term ... from the date of the term hereby granted and shall ... give to the Lessors notice in writing of such its desire and if it shall have paid the rent hereby reserved and shall have performed and observed the several stipulations on its part herein contained and on its part to be performed and observed up to the date thereof then the Lessors will..."

The lessees having purported to exercise the option the

lessors applied for a declaration that by reason of past breaches of covenant the lessees were precluded from exercising the option. The question which arose in the appeal was whether clause 9 required for its fulfilment that throughout the entire term up to the specified date there should have been no breach of any of the covenants by which the lessees were bound, or whether the condition would have been fulfilled if at the specified date there was no subsisting breach of any of these covenants. The Court of Appeal held that the condition precedent embodied in clause 9 had been drafted in a familiar and standard conveyancing formula whose interpretation was governed by long-established principles of construction which required merely that there be no subsisting breaches at the date of exercise of the option. A perusal of the three judgments respectively delivered by Kerr, Nicholls and Bingham LJJ leads me to agree with the analysis in the court below by

Scott J (at 359B-G) of the rationale of the decision in the Bass Holdings case, and for purposes of this appeal nothing further need be said in this connection.

In seeking the proper meaning to be assigned to clause 3 in the instant case a South African court is untrammelled in its approach by any long-standing current of authority such as that which in England decrees that an ordinary linguistic interpretation should yield to a time-honoured conventional construction. It was the function of the court a quo to determine the ordinary sense of the language in clause 3 and to give effect to its plain meaning. Upon a natural construction of the words of clause 3 they do not signify, I think, that the right of renewal is dependent simply on the lessee not being in default at the time of the expiry of the lease. The intention behind clause 3.1 is, in my view, manifest. The clause reflects upon the part of the lessor

an understandable aversion to being saddled, after the ordinary expiry of the lease and for a further period of nine years and eleven months, with a lessee whose performance of its obligations during the ordinary currency of the lease had been unsatisfactory. The language of the clause means no less, so it seems to me, than that in considering whether the prerequisite for renewal has been established, the lessee's whole track record up to the date of the expiry of the lease is relevant.

In Seaborn v Smith (supra) it was pointed out (at 343F-G) that inasmuch as the words of the relevant clause in that case ("The lessee observing all the terms ....") imported the notion of the continuing present, they were indicative of an intention of a prospective review, upon expiry of the lease, of the lessee's performance. Mr Kuny sought to detect a significant difference between the wording of the relevant clause in Seaborn v Smith (supra)

and the use of the future perfect tense ("shall have faithfully carried out the terms and conditions...") in clause 3.1 in the present matter. Upon an ordinary grammatical construction of clause 3.1 it appears to me that the use of the future perfect serves, if anything, to lay emphasis upon the prediction of future conduct in the light of past performance. Subject to an important qualification hereafter to be mentioned I find myself in agreement with the following conclusions reached by Scott J (at 360C-E) in the course of his careful and closely-reasoned judgment:-

> "... the language employed, construed literally, together with the use of the future perfect tense, suggests that what is required is compliance with all the terms and conditions of the lease throughout the lease period. When the first proviso ["shall have faithfully carried out the terms..."] is read in conjunction with the second proviso, the position becomes even clearer. The second proviso ["the Lessee is in no way in default ... at the expiration..."] relates solely to subsisting breaches. To construe the first proviso as having the same

> meaning would be to render it tautologous. It is true, of course, that the second proviso is not strictly necessary in that a lessee who is in breach would not have faithfully carried out the terms and conditions of the lease. Nonetheless, it is clear that what the signatories to the agreement intended was that the first proviso was to relate to past, i e spent breaches, while the second proviso was to cover subsisting breaches."

It follows that the appellant's main contention based on the Bass Holdings case (supra) cannot be sustained. The second argument advanced by Mr Kuny was that even if the first proviso in clause 3.1 embraced spent breaches, only such spent breaches as were "material" sufficed to preclude the lessee's right of renewal. In this connection counsel for the appellant invoked clause 13.1 of the lease. Its provisions read as follows:-

> "In the event of the Lessee failing or neglecting to make payment of the rental payable hereunder on due date, or being in breach or default of any other term or condition of this Lease on the Lessee's part to be observed and performed, and failing to make such payment or remedy such breach or default within a period of seven (7) days after being called upon by written notice

> from the lessor to make such payment or remedy such default or breach then in any such case the Lessor shall be entitled to terminate this Lease by written notice to the Lessee, but such termination shall be without prejudice to and under reservation of the Lessor's rights to recover any arrear rental then owing and/or damages for breach or default hereunder, and without prejudice to any other claim competent to the Lessor."

It was common cause that the respondent had never given the appellant written notice in terms of clause 13.1 to remedy its breach under clause 6.6. Counsel urged upon us that the parties could hardly have intended to invest the lessor with a greater right "to bring the lease to an end" at the time of the lessee's attempted renewal thereof than the lessor enjoyed during the currency of the lease. In the absence of a written notice in terms of clause 13.1 putting the appellant in mora, so the argument proceeded, the appellant was entitled to renew the lease notwithstanding any breach it may have committed during the currency of the lease.

In my view this argument is misconceived. It confuses two entirely discrete legal concepts. The basic flaw in the argument is exposed by the learned trial judge (at 361D-E) in the following words:-

> "... the non-fulfilment of either condition in clause 3.1 cannot be equated with the cancellation of the lease. Clause 13.1 deals with steps to be taken before the lease can be cancelled during its currency on the grounds of a breach by the lessee. Clause 3.1, on the other hand, affords the lessee no more than a conditional right to renew the lease upon its expiry by effluxion of time. In the latter case, there is no question of bringing the lease to an end."

Mr Kuny's third and final submission was that upon a proper construction of clause 3.1 the word "faithfully" should be taken to mean no more than "reasonably"; and that the appellant's delivery of the auditor's certificate, although belated and technically in breach of clause 6.6, represented a reasonable carrying out by the appellant of its obligations under clause 6.6. In

developing this argument counsel for the appellant called our attention to the following features in the case:

(1) During each year, and within the period of three months from the end of the lease year, the appellant furnished to the respondent a certificate certified by its internal accountant setting forth the nett annual turnover for that lease year, the nett annual turnover from sub tenants and the rental payable by sub-tenants as well as the respondent's share thereof. It also certified the additional rental to which the respondent was entitled in respect of that lease year.

(2) Save for the year 1988, when the additional rental was paid three weeks late, the additional rental payable by the appellant to the respondent flowing from the increased turnover for the lease

year was paid in the correct amount and timeously.

(12) Each year the auditor's certificate when furnished confirmed the figures already reflected in the internal accountant's figure.

(13) Despite the respondent's complaints about the appellant's breach of clause 6.6 the respondent never put the appellant in mora by written notice in terms of clause 13.1.

(14) The respondent suffered no tangible pecuniary prejudice as a result of the appellant's breach of clause 6.6.

(6) In terms of clause 6.7 of the lease the respondent's own auditors were entitled at all reasonable times to inspect and take extracts from the books of the appellant and its sub tenants.

In weighing this last submission seeking to equate "faithfully" with "reasonably" the trial judge considered (at 361G-H) various dictionary meanings of the word "faithfully". Having done so Scott J, quite correctly in my view, rejected the argument. The learned judge stated (at 361I-J):-

> "Had the parties intended 'substantial' or 'reasonable' compliance only, they would presumably have said so (cf Bassett v Whitely (1982) 45 P & CR 87). They would certainly not have used the word ' faithfully' which, in the context in which it is used in the proviso, implies the very opposite, namely strict compliance with the terms and conditions of the lease."

In the court below it was common cause that the onus of proving that it was entitled to renew the lease was upon the appellant. After mentioning the agreement upon this point (at 362A) the trial judge proceeded to say (at 362A-C):-

> "In my judgment, on a proper construction of clause 3, the defendant [the appellant] was

obliged, in order to be entitled to renew the lease, to establish:

> (i) that notice had been given in terms of clause 3.2, and (ii) that it was not in default of any of the provisions of the lease upon its expiry; and (iii) that it had complied with all the terms and conditions of the lease throughout the period of the lease, in the sense that during that period it had not breached any of its provisions." (Emphasis supplied.)

Save for the important qualification to which I have already adverted I am again in agreement with the above-quoted observations of the court below. The qualification is the following. It seems to me, with respect, that in requiring the appellant to establish that it had never been guilty of any breach whatever, the learned judge prescribed too exacting a test. It appears to me that "faithful" performance by a lessee in the position of the appellant cannot predicate the total absence of even a single breach

of the many and often burdensome terms and conditions of a complex contract. So to interpret clause 3 would be to import an unrealistic standard of near-perfection hardly capable of attainment by the most diligent and painstaking of tenants. Such a construction would render the option to renew practically worthless. In my opinion it cannot be supposed that such was the intention of the parties. On the. other hand the words in which the first proviso is couched are, I think, naturally and reasonably susceptible of indicating a test less onerous to the appellant. That less stringent test requires the making of a value judgment as to the broad merits and demerits of the apellant as a lessee based on an objective assessment of the appellant's whole conduct and overall performance of its contractual obligations during the currency of the lease. Such an appraisal must take into account the length of the period of the appellant' s tenancy and the full range of its

obligations as lessee. In weighing the significance of

such breaches as may have occurred relevant considerations

will include the nature and extent of any breach, the

frequency of its recurrence; and the appellant's response

or lack of response to the respondent's complaints and its

insistence upon strict compliance by the appellant.

Also relevant to the inquiry necessitated by the first proviso in clause 3.1 is the incidence of onus. In this court Mr Kuny informed us that upon reflection the earlier concession made by him at the trial now appeared to him to have been hasty; and he submitted to us that upon notice to renew by the appellant the respondent was burdened with the onus of demonstrating that the lessee had not faithfully carried out the terms and conditions of the lease. The argument seems to me to be unsound.

The issue here is not whether the appellant "forfeited" or "lost" a right to renewal. The simple

question is whether the appellant ever acquired it. It was for the appellant, as the party claiming something from the respondent, to satisfy the court that it was entitled to what it claimed. The first proviso stipulated satisfaction of a prerequisite. In this connection the appellant was unaided by any presumption in his favour, and in my opinion he was clearly saddled with the onus of establishing that the prerequisite to the exercise of the option had been satisfied.

The trial court came to the conclusion that the appellant had not discharged such onus. Applying to the facts of the case the test more lenient to the appellant which I have indicated above, I arrive at the same conclusion. Looking first at the intrinsic nature of the breach in question when viewed in the context of the contract of lease as a whole, it seems to me that the failure timeously to deliver the auditor's certificate was

a serious and not a trifling transgression. That in the result the breach occasioned the respondent no actual financial loss is no doubt a factor which goes into the scales, but it is, so I consider, by no means a decisive one. As correctly pointed out by Scott J (at 362F) the object of the requirement was to furnish the respondent with independent verification of the turnover. This was, in my view, a matter of substantial importance to the respondent. So far from having tacitly allowed the appellant to be tardy in this respect the respondent made it quite clear to the appellant its dissatisfaction at the breach and its insistence upon prompt delivery of the certificate. The breaches were persistent and none was of brief duration. The first breach lasted more than eight months and the third almost four months.

The first proviso to clause 3.1 reflected the respondent's desire to be quite sure that the appellant was

an exemplary tenant before it could renew the lease. In considering whether the appellant discharged the onus which it bore the following consideration should not be overlooked. During the currency of the lease the appellant appreciated that renewal of the period of the lease was conditional upon punctilious performance by it. It therefore had a powerful incentive to render such performance. Despite that incentive it persistently failed timeously to deliver the certificate. Were the period of the lease to be renewed the said incentive would no longer operate.

The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

G G HOEXTER, JA

Vivier, JA) Kriegler, AJA)