
JUDGMENT dated 30 January 2002

BINNS-WARD AJ:

Introduction

- 1] The first defendant leased premises in 'The Pinnacle' building in central Cape Town from the trustees of the Pinnacle Trust (the plaintiffs) for the purpose of conducting a restaurant business. The contract provided for an initial lease period of ten years, until 2008. The second and third defendants stood as sureties for the fulfilment by the lessee of its obligations. The lessee's restaurant did not prosper and, after less than a year of the lease had elapsed, the plaintiffs were informed that the premises were to be vacated. The first defendant's repudiation of the contract was accepted, so terminating the lease. It took some time before the trustees were able to find a replacement tenant. The replacement tenant, Cape Town Tourism ('Captour'), concluded a lease for only five years and the rental that it agreed to pay was slightly less than the landlords would have received during the same period had the lease with the first defendant survived. The limited duration of the replacement lease meant that a tenant was not assured for the premises for the period 2005-2008. Shortly before the new tenant took occupation, the building was sold and transferred by the trustees to a company. That was the factual background to the action

for R991 108 in damages (with an ancillary claim against the sureties) which came to trial before me in October 2001.

- 2] The matter raised a number of issues for determination; one of them, unexpectedly, apparently novel.
- 3] The first one went to the plaintiffs' legal standing to institute and prosecute the action at all. The property had been mortgaged to Syfrets Bank. The mortgage bond contained a cession of claims clause. The first and second defendants contended that the effect of this was that at the time the summons was issued the claim had vested in the mortgagee and not in the plaintiffs. If the contention were to be upheld, the further question arose whether the court could nevertheless entertain the action at the plaintiffs' instance if the claim had since revested in the plaintiffs after the cancellation of the mortgage bond and the repayment of the debt secured thereby.
- 4] Also in issue was the proper approach to the quantification of damages in the context of the peculiar facts of the case. This was the issue that had an element of novelty. After the institution of proceedings, 'The Pinnacle' was sold by the trust to a company and then resold by that company not long afterwards to another company. The first and second defendants contended that these transactions bore on the proper calculation of the damages sustained as a consequence of the

termination of the lease. The plaintiffs maintained that the sales were not relevant to the quantification of damages.

- 5] The other salient issue in the trial was the construction and effect of a limitation of liability clause in the deed of suretyship signed on behalf of the second defendant.

The Cession Clause in the Mortgage Bond

- 6] ‘The Pinnacle’ was only one of a number of properties mortgaged to Syfrets Bank under the bond. The mortgagors were not only the trustees of the Pinnacle Trust, but also three of the plaintiffs in their personal capacities. The mortgaged properties had been given as security in respect of a R60m credit facility.

- 7] Clause 8 of the mortgage bond read as follows:

‘CESSION OF RENTALS AND REVENUES

*The Mortgagor cedes, transfers and assigns to the Bank all the Mortgagor’s rights title and interest in and to all rentals and other revenues of whatsoever nature, which may accrue from the mortgaged property as additional security for the due repayment by the Mortgagor of all amounts owing to or claimable by the Bank at any time in terms of this bond, with the express right in favour of the Bank irrevocably and **in rem suam**-*

8.1 to institute proceedings against lessees for the recovery of unpaid rentals, and/or eviction from the mortgaged property;

8.2 to let the mortgaged property or any part thereof, to cancel or renew and enter into leases in such manner as the Bank decides, to evict any trespasser or other person from the mortgaged property;

8.3 to collect on behalf of the Mortgagor any monies payable in respect of the

alienation by the Mortgagor of the mortgaged property or any portion thereof; provided, however, that the cession, transfer, assignment and the authorities and powers specified above shall not be acted upon by the Bank without the consent of the Mortgagor unless the Mortgagor has failed to comply with any term or condition of this bond or any loan secured thereby or has otherwise committed a breach thereof. The Bank is further entitled to charge a commission of five (5) percentum of the gross amount of all rentals and other revenues collected and to recover such commission under this bond.'

It was common cause that the provisions of clause 8 constituted a form of agreement of cession *in securitatem debiti*. It was also common cause that the plaintiffs' damages claim involved the exercise by them of their right and interest as owners and landlords in the rentals or 'other revenues of whatsoever nature' accruing from the mortgaged property. In issue was whether the affected right had been transferred in terms of the agreement.

- 8] Mr *Owen Rogers*, who appeared for the first and second defendants, submitted that the effect of clause 8 of the bond was that the plaintiffs had divested themselves of any right to the rentals and other revenue of whatever nature which might accrue from the property and had transferred such right to the mortgagee. The plaintiffs had therefore lacked *locus standi* to institute the claim. It was contended that the cession clause in the instant case was practically indistinguishable from the cession in issue in *P.G. Bison Ltd and Others v The Master and Another* 2000 (1) SA 859 (SCA) and that, consistently with the result in that case, the attack on the plaintiffs' legal standing should be upheld.

- 9] Mr *Louw*, who appeared for the plaintiffs, contended that the cession was subject to suspensive conditions and became effective only upon the happening of one or the other of the events stated in the proviso to the clause; viz. the consent of the mortgagors, or the non-compliance with or breach of the mortgage contract or any agreement of loan in respect of which the mortgage bond afforded security. Plaintiffs' counsel relied on *Louw v WP Koöperatief Bpk en Andere* 1994 (3) SA 434 (A) and *Ovland Management (Tvl) (Pty) Ltd and Another v Petrin (Pty) Ltd* 1995 (3) SA 276 (N), being cases in which attacks on the cedents' legal standing to prosecute claims subject of cessions *in securitatem debiti* had failed.
- 10] While reference to the cases cited by counsel has been useful, none of them affords direct authority for their conflicting contentions. In each case the result turned on the proper construction of the contracts in issue. The effect of clause 8 of the mortgage bond is also a matter of construction. The cession provisions in the three cases referred to by counsel were not on all fours with each other, nor with the wording of clause 8 of the mortgage bond.
- 11] In *Louw's* case, *supra*, Smalberger JA, after quoting the succinct summary of the usual legal consequences of cessions *in securitatem debiti* in *Land- en Landboubank van Suid Afrika v Die Meester en Andere* 1991 (2) SA 761 (A) at

771C-F, remarked, at 443F-G, ‘*n Sessie in securitatem debiti het dus tot gevolg (tensy die partye anders ooreenkom) dat die sedent ontdoen word van sy reg om die gesedeerde skuld in te vorder, en gevolglik geen locus standi het om dit af te dwing nie.*’ The words in parentheses confirm that the ordinary or usual consequences of a cession *in securitatem debiti* may be varied in the context of the parties’ agreement. A cession is a bilateral contract and its consequences are determined by the terms and conditions agreed upon by the contracting parties. Cf. *Louw’s* case at 443A-B, *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 294E-F; *P.G. Bison, supra*, at para [7], 863B-D and *Jerome Investments (Pty) Ltd v Gluckman* 1970 (3) SA 67 (W) at 69H-70.

- 12] In determining the meaning of the clause it is appropriate to construe its language having regard to the contract as a whole, including its the nature and purpose, as well as to the to the matters probably present to the minds of the parties when they contracted. If the language is on the face of it ambiguous, consideration may be given to prior negotiations and correspondence between the parties and to the subsequent conduct of the parties showing the sense in which they acted on the document. See *Coopers and Lybrand v Bryant* 1995 (3) SA 761 (A) at 768A-E.
- 13] Certain features of clause 8 of the mortgage bond are indeed comparable to the provisions of the contract in issue in the *P.G. Bison*

case. The most notable is the recordal of the cession in both contracts in the present tense, suggesting the immediate transfer of rights. However, the apparent immediate and unconditional transfer of rights inferable from the use of the present tense was also manifest in the cession provisions in the agreements in issue in the Louw and Ovland Management cases. By itself, that feature was not sufficient to override other indications in both those agreements that an immediate effective transfer of rights was not intended.

- 14] The P.G. Bison contract provided that the cession would not be ‘implemented’ by the cessionary unless the cedent fell 30 days or more into arrears in servicing the secured indebtedness and then only after seven days notice. That provision is equivalent on the face of it to the proviso in clause 8 to the effect that the cession would not be ‘acted upon’ unless the cedents were in breach of their principal obligations. As appears from the judgment, however, the word ‘implement’ was amenable to different constructions, including one which would denote that the cession had been incomplete. See PG Bison, *supra*, at paragraphs [9]-[12]; 863F-864B. The appropriate connotation of the word was determined with reference to contextual features of the deed of cession and the identified purpose and object of the parties.
- 15] An important feature of the agreement in P.G. Bison, which finds no equivalent in clause 8 of the mortgage bond, was the provision that in

collecting payment of its book debts during the currency of the agreement the cedent would be acting as the agent of the cessionary. That provision was irreconcilable with any notion that, in proceeding against its debtors, the cedent in P.G. Bison would be acting in the exercise of its own rights. That provision (which confirmed the incidence of the ordinary consequences of a completed cession *in securitatem debiti* – compare Bank of Lisbon and South Africa, supra, at 294C-D) materially influenced the court’s determination of the proper construction of the deed of cession. See P.G. Bison, supra, at paragraph [13], 864D-G. A further indication of the divestment by the cedent in P.G. Bison of its rights in the ceded book debts was the clause confirming the right of the cessionary ‘*at any time or times hereafter to give notice of this cession to all or any of my/our debtors and to take such steps as they may deem fit to recover the amounts respectively owing by my/our debtors to me/us from time to time and for the time being..*’, which it could exercise simply by terminating the cedent’s mandate to act as collection agent.

15]In terms of the proviso to clause 8 of the mortgage bond, the mortgagee was not entitled, without the consent of the mortgagors, to exercise any of the ordinary rights of a cessionary such as notifying the debtors of the cession and requiring payment from them, unless the mortgagors were in default in respect of their relevant obligations to the mortgagee. Ordinarily, the only title a cedent *in securitatem debiti*

retains in the rights that have been ceded is the bare dominium or 'reversionary interest'. The provision in clause 8 that the mortgagee might act on the cession only with the consent of the mortgagors is inconsistent with the retention by the mortgagors of only a 'reversionary interest' in the relevant 'rentals and other revenues'. The provision is inconsistent with an effective transfer of the subject rights. An effective transfer of the rights did not occur if the rights could not be exercised without consent, the grant or refusal of which was entirely within the discretion of the mortgagors.

16]The additional and alternative provision that the mortgagee could exercise any of the rights described in sub-clauses 8.1-8.3 of the bond in the event of the mortgagors failing to comply with any term or condition of the bond or any loan secured thereby or being otherwise in breach thereof falls, particularly when considered in its juxtaposition to the consent provision, to be characterised as a suspensive condition. There was no suggestion in the evidence that the condition to which the effective transfer of rights was subject was fulfilled.

17]Accordingly, I consider that the mere conclusion of the mortgage contract, including the ancillary agreement in terms of clause 8 thereof, did not, without more, achieve an effective transfer by the plaintiffs to the mortgagee of the rights which the plaintiffs sought to exercise by the institution of this action. I am fortified in this conclusion by the following additional considerations.

18]The nature of the plaintiffs' commercial enterprise in the ownership of the

property was the letting of the space in the building at the best return they could achieve. The collection and appropriation of the periodic rentals was an essential feature of this business. The right to enforce payment of the rentals and penal interest on late payments was an important integral aspect of the efficient administration of the business. If the cessionary was not to have the right to enforce payment of the rentals, which is the clear effect of the proviso, it would seem to follow that the intention was that the plaintiffs retained the right to do so. In the context of the agreement as a whole, and the purpose it was intended to serve, there is no doubt in my mind that the intention was that the mortgagors were to continue to collect the rentals for their own benefit, unless and until the cession was made complete by being 'acted upon' by the bank in either of the situations contemplated by the proviso to clause 8.

19] 'The Pinnacle' is central business district commercial property. There was no direct evidence of the nature of the 28 other properties mortgaged in terms of the bond, but many of them, particularly those with Roggebaai erf numbers, are identifiable by anyone with local knowledge as situate in the central business district. The mortgage bond was registered in February 1998. The market value of 'The Pinnacle' was determined in July 2001 as being over R77 million. Mr *Rogers* suggested (in another connection) that this value was unlikely to have been materially less in July 2000. The circumstances therefore suggest that the value of the 29 mortgaged properties probably far exceeded the maximum extent of the credit facility which the bond secured.

20] Clause 8 of the bond was directed at the provision of ‘additional security’. Where the mortgaged property provided more than adequate security for the liquidation of the capital debt, the practical need for such additional security, in the form of a right to the revenues of the mortgaged property, would arise if there were a default by the debtor in its obligation to timeously and efficiently service the debt. In the context of their already having provided adequate capital security, it is understandable that the mortgagors would wish to retain the right to enforce their rights as lessors in their own names in the ordinary course of business. Acknowledging the Bank’s interest in a scrupulous discharge by the mortgagors of their periodical executory obligations as debtors, the furnishing of additional security on an appropriately contingent basis would effectively address the interests of both the Bank and the mortgagors. There is nothing unbusinesslike in those circumstances in construing the provision to make the cession effective only in the event of the debtor defaulting in its periodic payment obligations. By contrast, in the *PG Bison* case, if the cession were not construed as having been immediately effective or complete, the starkly unbusinesslike result would have been that the agreement would have provided the creditor with no security whatsoever, thereby negating its very object and purpose.

21] If it can be said that Mr *Rogers*’ argument as to the meaning and effect of clause 8 nevertheless has an arguably valid basis on a strictly grammatical analysis of the clause, it has to be acknowledged that Mr *Louw*’s contentions also find support in the language of the provisions. In the context of the ambiguity thus demonstrated, it is relevant to have regard to the evidence of Mr Jeffrey Solomon, the third plaintiff, that

he had specifically stipulated in negotiations with the mortgagee prior to the conclusion of the credit facility agreement that the cession of rental and other revenue should not be effective unless the mortgagors were in default. This evidence was relevant also on the basis that if the contracting parties intended the wording to bear a particular meaning any linguistic analysis would have to defer to the parties' common intention; cf. *Louw's* case, *supra*, at 445B-D.

22]Mr Solomon was under the impression that the wording of the proviso to clause 8 of the mortgage bond had been especially inserted to cater to his aforementioned stipulation. It appeared from other evidence that the mortgage bond was actually one of the standard form documents used by the Bank. I do not consider that that evidence materially detracted from the evidence of Mr Solomon that the proviso to clause 8 reflected the stipulation he made in negotiating the credit facility with various named officials of the Bank. Mr Solomon considered that the proviso met his requirement and it seems to me that the representatives of the Bank may have considered, correctly in my judgment, that the standard form document used for this transaction was sufficient to satisfy Mr Solomon's stipulation. The evidence that Mr Solomon made the stipulation and that the Bank's representatives agreed to it was not challenged, save on the basis of the contention that the language of clause 8 did not give effect to it. A bank official testified that in practice the proviso was applied in accordance with the plaintiffs' understanding of its tenor, which affords further support to the existence of a common understanding to that effect.

23]There was no suggestion that the mortgagee had 'acted upon' the cession of

revenues provision in the bond. I am of the view therefore that the cession did not become effective and that the defendants' challenge to the plaintiffs' *locus standi* must fail.

24]As a consequence of this finding it is strictly unnecessary to deal with the effect of a related amendment to the particulars of claim introduced by Mr *Louw*, against the objection of Mr *Rogers*. In the amended pleading it was alleged, in the alternative, that if the provisions of clause 8 had effected a transfer of rights, the rights had reverted in the plaintiffs upon the cancellation of the mortgage bond subsequent to the institution of the action, but prior to the trial. The pleaded alternative allegation was that any initial lack of legal standing to institute the action had therefore been cured and the claim should be entertained.

25]However, when I allowed the amendment, I undertook to furnish my reasons for doing so in this judgment and accordingly, and in case this case goes further, I shall do so, briefly. I shall also indicate what effect the amendment would have had in the event of my having upheld the defendants' argument on the proper construction of clause 8.

26]Mr *Rogers* accepted that, as he put it, 'the preferred view' is that if the debt secured by a cession *in securitatem debiti* has been finally liquidated, the ceded rights automatically revert in the cedent; cf. *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235 at 246-7; *Bank of Lisbon and South Africa Ltd*, *supra*, at 294D-F and Scott, *The Law of Cession* 2nd ed at 238-9. *Marais en Andere NNO v Ruskin NO*

1985 (4) SA 659 (A) at 671A can be read to hold that the cedent must obtain a re-cession of the rights; see also African Consolidated Agencies (Pty) Ltd v Siemens Nixdorf Information Systems (Pty) Ltd 1992 (2) SA 739 (C) at 746D-G. However, in Inclendon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation Ltd 1990 (4) SA 798 (A) at 804H-I (where the cedent's 'reversionary interest' is also described as the entitlement 'to claim the re-cession of the rights'), the passages in the Bank of Lisbon and Marais en Andere NNO cases, just cited, are referred to without any suggestion of a perception of any conflict between them. If there had been any intention in Inclendon or Marais to disapprove the authority of the passage in the National Bank case, *supra loc cit*, I am confident the point would have made expressly. The difference in approach apparent in the cases may perhaps be explained on the basis of the sometimes differentiated treatment of cessions *in securitatem debiti* as either pledges (which are accessory in nature) or out and out cessions subject to reversionary rights. Cf. also Johnson v Incorporated General Insurances Ltd 1983 (1) SA 318 (A) at 332, which affords authority for the notion of tacit resolutive agreements in respect of cessions.

27]Counsel did not argue these nice points of distinction and I do not consider in any event that it would have been necessary to make a determination on them. The provisions of clause 8 are integral to the mortgage bond. Had it been necessary to decide the case on the alternative basis, I would have inferred that the parties intended that a cancellation of the bond would also terminate the ancillary agreement in terms of clause 8 thereof. It would be artificial in the extreme to maintain that any cession in

terms of clause 8 required termination by an express re-cession as a separate act to the cancellation of the bond.

28]The defendants opposed the amendment on technical and practical grounds. Mr *Rogers* argued that it is trite that a cause of action, vested in the plaintiff, must exist at the institution of an action. I agree that this is the 'general rule' (cf *Philotex (Pty) Ltd and Others v Snyman and Others; Textilaties (Pty) Ltd v Snyman and Others* 1994 (1) SA 710 (T) at 717B-C). Contending that the effect of the clause 8 of the mortgage bond was that the plaintiffs had no cause of action when the summons was issued, counsel submitted that to allow the amendment would be an impermissible infringement of the rule. The practical basis of objection was directed to the lateness of the application and the prejudice potentially attendant on investigating and dealing with the factual issue of the re-vesting of the claim in the plaintiffs.

29]An amendment of the nature sought by the plaintiffs has previously been allowed in a number of cases. A useful collection of references to relevant authority and comment is to be found in *Marigold Ice Cream Co (Pty) Ltd v National Co-Operative Dairies Dairies Ltd* 1997 (2) SA 671 (W) at 677H-679B. The approach has been that, subject to considerations such as the absence of any prejudice to the defendant which cannot be cured by an appropriate relief such as an order for costs or a postponement or otherwise, the court may, in the exercise of its discretion, entertain a claim which, by reason of a cession, did not vest in the plaintiff when action was instituted. It has been stated that the court will exercise its discretion in favour of the plaintiff in special or extraordinary circumstances. As appears from the passage from the

unreported judgment of Howie J (as he then was) in Simonsig Landgoed and Coastal Wines (Pty) Ltd v Theron van der Poel Brink Roos (CPD 26 August 1991- the judgment has gone missing from the court record), quoted in Marigold Ice Cream, supra, at 679D-680B, special or extraordinary circumstances may include the fact that to refuse the amendment would unnecessarily result only in the subsequent reappearance of the same parties on the same issue in a fresh action. Common sense and considerations bearing on the efficient administration of justice should not be unduly stultified by objections based on pure technicality; cf. Marigold Ice Cream, supra, at 676H and Ritch v Bhyat 1913 TPD 589 at 593. A further factor that weighed with me in granting the application was that even if the defendants' construction of clause 8 were to be held to be correct, the plaintiffs' view of the construction of the clause was reasonable and their institution of the action had not occurred with cavalier disregard for the general rule.

30]The amendment was moved at a very late stage, during argument after the conclusion of the evidence. However, some material which supported the allegations had already been introduced during the evidence and I was in any event not persuaded that there was any prejudice to the defendants that could not have been cured by a postponement at the plaintiffs' cost. Mr Louw tendered that relief when he argued the application for amendment. Implicit in the plaintiffs' tender was an invitation to the defendants, if necessary, to obtain further discovery, to reopen their case or recall the plaintiffs' witnesses for further cross-examination. I considered that Mr Louw's tender met the practical considerations urged by Mr Rogers in support of the defendants'

opposition to the application. As it was, after a short adjournment to consider his position, Mr *Rogers* elected not to take up the tendered postponement.

31]The evidence established that the secured debt had been repaid and the mortgage bond had been cancelled. In the circumstances, had I upheld the defendants' contentions on the proper construction of clause 8 of the mortgage bond, I would have found that the ceded rights had reverted in the plaintiffs and proceeded to determine the quantum of their damages.

The Calculation of the Plaintiffs' Damages

32]I turn now to the quantification of the plaintiffs' damages.

33]The fundamental principle in the quantification of contractual damages is that the object is, as far as it is possible without undue hardship to the party in breach to do so by an award in money, to place the innocent party in the position that party would have been had the contract not been breached or repudiated. See e.g. *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; *Culverwell and Another v Brown* 1990 (1) SA 7 (A) at 29F and *Rens v Coltman* 1996 (1) SA 452 (A) at 458E. How that object is to be achieved will depend on the peculiar facts of a case.

34]As mentioned earlier in this judgment, the plaintiffs sold the property. It was sold to Solomon Brothers Property Holdings (Pty) Ltd for R45million. The contract of sale was concluded in July 2000 and transfer was effected to the purchaser on

12 September 2000. Being part of an ‘internal re-arrangement’ of the Solomon family’s proprietary affairs, the transaction was not at arms length and the selling price did not reflect the true market value of the property. This was borne out by the subsequent sale of the property by Solomon Brothers Property Holdings to Shay Properties 1 (Pty) Ltd (‘Shay’), not long afterwards, for nearly R78m. At the time of its acquisition of ‘The Pinnacle’, Shay was a wholly owned subsidiary of a company which was in the process of obtaining a public listing. As the property was to be described in the listing prospectus of the holding company, an independent professional valuation of the property was obtained and used in the determination of the price paid by Shay. The defendants did not dispute that the sale to Shay occurred at a fair open market price.

35]The five-year replacement lease of the premises to Captour was concluded subsequent to the initial close of pleadings. The plaintiffs’ claim was amended to make allowance for the mitigatory effect of the conclusion of a replacement lease. Captour became liable to pay rental with effect from 1 October 2000. (The rental in terms of the Captour lease was payable monthly, in advance.) It was not suggested by the defendants that a replacement tenant could have been found earlier, or on terms more advantageous to the landlords. The first defendant had also been liable to pay rental monthly, in advance. It had last paid rent under the lease in respect of the payment due on 1 September 1999.

36]The pleaded formulation of the plaintiffs’ damages took no account of the alienation of the property by the plaintiffs on 12 September 2000. The claim, as

amended, was formulated on the basis of a loss of rental from 1 October 1999 until 30 September 2000, plus the difference between the value of the ‘rental stream’ which would have been payable in terms of the lease between the plaintiffs and the first defendant during the period October 2000 until 1 October 2008 and that of the ‘rental stream’ under the Captour lease from its commencement on 1 October 2000 until 1 September 2005, actuarially discounted to the date of trial.

37]A consequence of the alienation of the property by the plaintiffs was that, as trustees of the Pinnacle Trust, they ceased to be entitled to the receipt of the rental revenue of the ‘The Pinnacle’ once it had been transferred to the purchaser. This consequence would have obtained even if the lease with the first defendant had not been cancelled. The transaction’s character as an ‘internal re-arrangement’ of the Solomon family’s affairs did not affect the legal consequences of the alienation of the property by the trust to a company. Therefore, having regard to the fundamental principle of contractual damages referred to above, I consider that the plaintiffs’ formulation of their damages with reference to the comparative values of future rental streams after the alienation of the property was misconceived, in the particular circumstances.

38]I was informed by counsel that they had been unable to find any authority on the quantification of a landlord’s damages in a factual setting analogous to that in this case. This was surprising, as the situation cannot be unprecedented; but I have also not found a reported case closely in point.

39]It is clear that from date of the transfer of the property by the trustees to the company, the plaintiffs suffered no damages due to loss of rental. It is conceivable that the vacant space in the building or the less advantageous replacement lease could have adversely affected the market value of the property. If that were so, it would have been appropriate for the plaintiffs to have formulated their damages claim with regard to the value of lost rental up to the date of the transfer of the property and the adverse effect of the loss of the tenant on the market value of the property.

40]Reference to any consequent differential in the market value price obtainable for the property may be relevant in cases like the present one because it can enable a quantification of damages in accordance with the fundamental principle of contractual damages, referred to above.

41]Mr *Louw*, however, sought to support the plaintiffs' formulation of damages by contending that the sale of the property was irrelevant. He characterised it as *res inter alios acta*. He submitted that the plaintiffs' damages accrued on the date of the plaintiffs' acceptance of the first defendant's repudiation of the lease. Mr *Louw* equated the effect of the cancellation of the lease to that of the loss or destruction of tangible property. In his written argument, he submitted that the lease had '*had an economic value and constituted part of the plaintiffs' patrimony. The cancellation of the lease necessarily led to a diminution of the plaintiffs' patrimony. The damages fall to be determined at the date of cancellation*'.

42]Mr *Louw* cited Culverwell's case, *supra*, in support of his contention. Culverwell's case concerned the calculation of damages sustained by the plaintiff as a consequence

of the cancellation of an agreement of sale upon the acceptance by the seller of the purchaser's repudiation of the contract.

43]On my reading of them, neither of the judgments given in Culverwell's case supports the plaintiffs' approach. In the majority judgment, Hefer J.A. (as he then was) held that there is no fixed rule as to the relevant date for the computation of damages for contractual breach; the determination must be coupled with the fundamental principle that the innocent party is to be placed as far as possible in the position it would have occupied had the agreement been fulfilled. At pages 30 –31 of the judgment, the learned Judge of Appeal said, in respect of the calculation of damages sustained consequent upon the cancellation of agreements of sale, *'It does not follow, however, that the assessment should in all cases of an accepted repudiation be made in relation to the time of the acceptance. In cases, for example, where the res vendita is resold or similar goods repurchased it would often be inappropriate to do so. In such cases the resale or the repurchase itself may, of course, be regarded as a tacit acceptance but cases do occur where it is preceded by an express acceptance. In that event, provided there is no undue delay either in the acceptance or in the resale or repurchase, it is the price fetched on resale or paid for similar goods in the market that has to be taken into account. This principle has been established in a long line of cases.'*

44]In Rens v Coltman, *supra*, the Court stressed the fundamental object of contractual damages and, with regard to quantifying a claim in damages arising in connection with remedial work to a building where the cost of repairs was the appropriate measure, approved the following passage in *Chitty on Contracts* 26th ed vol 1 at para

1780: *'The time at which the cost of repairs should be assessed is when it was reasonable for the plaintiff to begin repairs, which may be as late as the date of the hearing if the plaintiff was acting reasonably in not mitigating earlier.'* See Rens's case at 458B-459F.

45]The judgments in Culverwell and Rens, *supra*, illustrate that while on the facts of a case the dates of due performance, repudiation or cancellation may well be important in the appropriate computation of contractual damages, the overriding consideration is the calculation of a figure which fairly achieves the object of putting the innocent party in the position it would have occupied had the agreement been fulfilled. See also Mostert NO v Old Mutual Life Association Co (SA) Ltd 2001 (4) SA 159 (SCA) at 187B-E. Whichever approach to quantification achieves that object most effectively in the context of the peculiar facts of a case is the appropriate one. This entails the application of pragmatism and common sense rather than formalism. It will in general be appropriate in quantifying contractual damages which, from the perspective of the dates of breach or cancellation, involve a component of prospective loss, to have regard to the effect of relevant events intervening between those dates and the trial insofar as that will facilitate a more accurate achievement of the object. In the present case, that means that the effect of the trust's alienation of the property is relevant.

46]The flaw in Mr Louw's argument with regard to the proper approach to the computation of the plaintiffs' damages is that it does not recognise the necessity of adopting a method of computation which will achieve a fair award in realisation of the object of the fundamental rule. It fixes the computation of the plaintiffs' damages in aspic, subject only to the consequences of any successful mitigation of loss, as at the

date of the cancellation and excludes any cognisance of subsequent relevant events unrelated to mitigation. Its application would in many cases (the present one affords an example) subvert the fundamental rule.

47]The contention that the effect of the sale of the property fell to be left out of account in the quantification of the plaintiffs' damages as *res inter alios acta* was misconceived. The maxim properly pertains in the context of an issue as to whether a particular extraneous source of recoupment is to be regarded as legally irrelevant to the quantum of damages recoverable by a plaintiff from a defendant; cf. H.K. Outfitters (Pty) Ltd v Legal & General Assurance Society Ltd 1975 (1) SA 55 (T) at 63G-64. The proceeds of the sale of the property did not constitute a collateral recoupment. The effect of the sale, quite apart from its proceeds, was to render it inappropriate to allow the plaintiffs any damages calculated with reference to loss of rental from the date of the alienation of the property – hence its relevance to the issue of computation.

48]It is necessary then to consider the evidence on the market value of the property.

49]It is the effect, if any, of the cancellation of the lease on the market value of the property at the time of the first sale that is relevant. The interval between the first sale of the property at an artificially low value and the subsequent sale to Shay at market value was short. It may be accepted that the market valuation undertaken for the purposes of the second sale provided a reasonable approximation of the property's value at the time of the first sale. Mr *Louw* did not take issue with Mr *Rogers'*

submission to this effect.

50]Mr Jeffrey Solomon, who has considerable experience dealing in commercial property, gave evidence under cross-examination about the basis upon which the property was valued for the purpose of the second sale. The valuation was done on the basis of a capitalisation of the first year's net rental proceeds of the property at a yield determined by the valuator's estimation of the period within it would be reasonable, having regard to the marketability of the property, for the notional purchaser to achieve a gross recoupment of the purchase price. A certificate by the registered valuer, Mr G.C. Fraser, appeared in the listing prospectus of Shay's holding company. The relevant part thereof recorded that *'As all of the properties are income producing properties, we (sic) have adopted the Investment method of valuation whereby the expected Net Income for the first year is calculated and capitalised at a market related rate to yield the estimated market value of each property.'*

51]Mr Solomons testified that shorter leases with 'weaker' tenants were characteristics which would impact negatively on the anticipated yield of an income producing property and result in a lower market value being attributed to it. Implicit in this evidence was the suggestion that the market value of 'The Pinnacle' had been adversely affected by the shorter duration of the Captour lease and by the less commercially attractive character of a lease with Captour (a company incorporated in terms of s 21 of the Companies Act) than one with a commercial tenant with a 'national brand' attached to it, like the first defendant.

52]The considerations mentioned by Mr Solomons are not implausible. Assuming,

however, that the market value of 'The Pinnacle' was affected by the cancellation of the lease with the first defendant and the subsequent conclusion of the shorter replacement lease with Captour, no evidence was tendered by the plaintiffs as to the measure of any such effect. If the market value determined by Mr Fraser would have been higher had the lease with the first defendant still been in place, it would have been expedient for the plaintiffs to have adduced his evidence to this effect.

53]It is not feasible to calculate the relevant differential in market value by applying the capitalisation rate used by Mr Fraser to the rental receipts assuming the continuation of the lease to the first defendant and deducting from the product thereof the product of the same calculation using the Captour lease rentals. Firstly, there was no evidence as to what the comparable 'net income' figures would have been (see the passage from Mr Fraser's certificate, quoted above). Secondly, on the basis of Mr Solomons' evidence, it is questionable whether the application of the capitalisation rate used by Mr Fraser would be appropriate in both calculations, for it was determined with no regard to the existence of the first defendant's lease. Mr *Rogers*, however, handed in a note showing that an exercise of the sort just postulated would render a result in favour of the plaintiffs in the sum of just under R60 000. Mr *Rogers*' calculation was done on the basis (correctly, in my view) that the date of the first sale was the relevant date for the market valuation. Using the date of the second sale as the relevant date, Mr *Louw* arrived at a figure of about R66 500 as the amount of the diminution of the market value of the property. The property was in fact sold to Shay at a price more than R84 000 higher than its attributed market valuation.

54]In the circumstances, the plaintiffs have failed to prove any component of damages corresponding to the possible diminution in market value of the property when they disposed of it.

55]The loss of rental for the period between 1 October 1999 and 30 September 2000 was R250 990 (R19 000 for the month of October 1999 and thereafter R21 090 per month for the 11 months between 1 November 1999 and 30 September 2000). From that amount falls to be deducted that portion of the September 2000 rental, in the sum of R12 654, in respect of the period after date of the alienation of the property on 12 September. This gives a resultant amount of R238 336, in respect whereof the first defendant is liable to the plaintiffs in damages. (Consistently with the calculations submitted by both counsel, I have left out of account the R57 000 deposit paid by the first defendant to the plaintiffs. Its repayment is a separate issue, which was not gone into. I have also excluded any provision in respect of income tax – it seems to me *prima facie* that the damages calculated with direct reference to the loss of rental are of a revenue nature and therefore taxable in the hands of the trustees, but this is a matter between the plaintiffs and the Revenue Service; cf. *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (3) SA 465 (A) at 475-6; De Koker, *Silke on South African Income Tax* (Memorial ed) Vol I (loose leaf) at § 3.23 and Visser, *The Law of Damages* at pp200-203.)

56]There were some additional components to the plaintiffs' damages claim. These comprised claims for compensation in respect of certain costs incurred in obtaining Captour as a replacement tenant. The plaintiffs were liable in terms of the replacement

lease to provide the new tenant with a 'clean shell'. The cost of complying with this requirement was estimated at R50 000. The plaintiffs were also responsible in terms of the replacement lease to make an investment of R125 000 in respect of fixtures and fittings. In order to secure the contract with Captour, the plaintiffs had to agree to let a parking bay to the new tenant, with effect from 1 October 2000, at R250 per month instead of the R500 per month rental ordinarily obtainable for the amenity. They also had to agree to make Captour a R50 000 interest free loan, repayable in 20 monthly instalments of R2 500 commencing on 1 October 2000.

57]The evidence in support of the R50 000 claim for delivery of a 'clean shell' concerned the expenditure of R54 622,56 (excluding VAT) on the installation of air-conditioning units and a related vent. An unspecified further amount was expended on labour, paint, glazing, locks and keys and other sundries. Mr *Rogers* submitted that the proven expenditure under this head was actually in respect of the capital improvement of the premises and there was no evidence of any reduction in the patrimony of the trust as a consequence of its incurrence. I consider that the point was well made. Where a plaintiff claims for the cost of mitigating its damages, it is entitled only to its net pecuniary loss, being the difference between the expenditure in so doing and the beneficial results, if any, thereof. See *Sandown Park (Pty) Ltd v. Hunter Your Wine & Spirit Merchant (Pty) Ltd and Another* 1985 (1) SA 248 (W) at 256C-D. It also seems to me that the installation of air-conditioning was a separate issue to the cost of the provision of a 'clean shell'. There was no evidence to substantiate the cost of the provision of the 'clean shell' and accordingly nothing will

be allowed under this head.

58]In terms of the replacement lease, the fixtures and fittings provided by the plaintiffs at a cost of R125 000 were to remain the property of the landlords until the end of the initial period of the Captour lease, whereupon they were to become the property of the tenant. It seems to me improbable that this essentially contingent vesting of ownership in the landlords would have contributed to any increase in the market value of the property or in any other way have commensurately maintained the value of the trust's patrimony. In my view, the expenditure of R125 000 on fixtures and fittings in terms of the Captour lease was a cost of mitigation, which the plaintiffs are entitled to recover from the first defendant as part of their damages.

59]The plaintiffs disposed of the property before any loss was sustained in respect of the agreement to let Captour have a parking bay at a discount of R250 per month. There was no evidence that this incidence of the Captour lease resulted in the reduction of the market value of the property. Accordingly, no amount will be allowed for this component of the plaintiffs' claim.

60]The R50 000 interest free loan by the trust to Captour obviously carried a cost. In the quantification of the plaintiffs' pleaded claim, the cost was actuarially calculated on the basis of an 'implied interest cost' of 17% p.a. on the reducing balance, calculated monthly in arrears for 20 months. The rate of 17% was used because it was consistent with the rate of interest (prime + 3%) that would have been payable by the first defendant in terms of its lease with the plaintiffs on any amounts overdue under

the contract. It was an arbitrary and inappropriate basis to formulate the quantum of the claim. I accept, however, that in the context of the significant commercial interests and operations of the trust it would no doubt have been virtually impossible for the plaintiffs to prove empirically the cost of making a R50 000 interest free loan, repayable over 20 months. In the circumstances, being satisfied that the plaintiffs did suffer a loss, I consider that it would be appropriate to award an amount robustly estimated to be fair and reasonable. Cf. e.g. *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 969H-970H and *Thompson v Scholz* 1999 (1) SA 232 (SCA) at 248J-249C.

61]With regard to the actuary's evidence on prime rates over the last two years, I consider that an implied interest cost at 10% p.a. before tax, while perhaps conservative, is more realistic. Taking into account the steadily diminishing capital balance of the 20-month loan, I consider that the plaintiffs would be adequately compensated if I were to award R2000 under this head. The amount involved does not warrant a reference back for actuarial calculation.

62]The total sum of the damages award to be made in the plaintiffs' favour against the first defendant is therefore R365 336 (R238 336 + R125 000 + R2000).

Interest on Damages

63]The capital sum of the plaintiffs' claim for damages was computed including an actuarially calculated provision for 17% p.a. interest. This was done on the basis that damages constituted some form of substitute for the rentals payable under the lease

and with regard to a term of the lease entitling the landlord to payment of interest at three percent above prime on amounts overdue in terms of the contract. The computation of the damages including an interest component on this basis was misconceived. It overlooked that a consequence of the cancellation of the contract was that specific performance of any of its provisions, save insofar as the right to enforce a particular provision had fully accrued before cancellation, was thereafter not an available remedy. Astute to the frailty in the plaintiffs' computation, Mr *Louw* asked in the alternative for *mora* interest at the prescribed rate on any damages awarded on the usual basis, calculated from date of service of the summons.

64]In my view, it is appropriate in awarding interest to distinguish between the three components of the total sum of damages awarded. See s 2A(5) of the Prescribed Rate of Interest Act 55 of 1975.

65]The main component of R238 336 became capable of calculation at the earliest only when the Captour lease was concluded on 17 July 2000. The summons was served on 10 May 2000. Considering that this component of the damages claim is intended to compensate the plaintiffs for a loss of rental during the period October 1999 to September 2000, I think it would be fair to direct that this component of the damages award bear interest at the prescribed rate from 10 May 2000.

66]There was no evidence as to precisely when the plaintiffs incurred the expenditure of R125 000 in respect of the provision of fixtures and fittings in terms of the Captour lease. It is, however, reasonable to infer that it would have been during the interval

between the conclusion of the lease on 17 July 2000 and the effective commencement of the lease on 1 October 2000. Accordingly, I propose to award interest at the prescribed rate on this component of the damages with effect from 1 October 2000.

67]Interest at the prescribed rate on the third component of R2000 will be awarded with effect from the date of this judgment.

Second Defendant's liability under the Deed of Suretyship

68]The second defendant executed a deed of suretyship in favour of the Pinnacle Trust for the due and proper fulfilment by the first defendant of its obligations under the lease and for the payment of all sums which might be due, arising in any way whatsoever out of the lease, including any cancellation thereof.

Clause 8 of the Deed of Suretyship (Certificate of indebtedness)

69]In terms of clause 8 of the deed of suretyship, the parties had agreed that a certificate signed by the landlord as to the amount of the surety's indebtedness under the suretyship would constitute *prima facie* proof thereof. The plaintiffs handed in a certificate in terms of this clause, dated 22 October 2001, stating that the amount of the second defendant's indebtedness to the plaintiffs under the suretyship was R848 546.

70]It was argued on behalf of the plaintiffs that the production of the certificate cast an evidential duty on the second defendant to rebut its content. If at the end of the

case the certificate remained ‘unrebutted’, the plaintiffs were entitled to judgment in the amount stated in the certificate. No evidence was tendered by the second defendant and accordingly, so contended plaintiffs’ counsel, with reference to Bank of Lisbon International Ltd v Venter and Another 1990 (4) SA 463 (A) at 481H-482C and Berlesell (Edms) Bpk v Lehae Development Corporation 1998 (3) SA 220 (O), the plaintiffs were entitled to judgment against the second defendant in the sum of R848 546.

71]In the cases cited, despite the criticism to which some of the relevant evidence was amenable, there was nothing at the relevant stage of the cases (the judgment in Berlesell concerned an application for absolution at the close of the plaintiff’s case) to displace the *prima facie* evidence afforded by the certificates put in to prove the extent of the defendants’ liability. Evidence which, when it is admitted, amounts to *prima facie* proof of a question in issue becomes sufficient proof if, at the end of the case, it is unaffected by other evidence; see Senekal v Trust Bank of Africa Ltd 1978 (3) SA 375 (A) at 382 *in fine*-383. The certificate evidence in the two cases relied on by Mr Louw was therefore regarded as sufficient proof of the quantum of the respective claims in issue there. The present case is distinguishable from the cases cited by Mr Louw. The claim against the second defendant is in respect of an ancillary liability that arose from and is contingent upon the primary obligation of the first defendant. The second defendant’s liability could not exceed that of the first defendant. As the first defendant’s liability has been determined in the trial in an amount different to and lower than that stated in the certificate, the content of the

certificate cannot prevail.

Clause 20 of the Deed of Suretyship (Limitation of surety's liability)

72]The plaintiffs had agreed to a stipulation by the second defendant that its potential liability under the suretyship should be limited. Clause 20 of the deed was intended by the parties to give effect to this agreed limitation of liability. The clause provided:

'Notwithstanding anything to the contrary contained or implied in this Suretyship, our liability under this Suretyship in the aggregate (in the event that more than one claim is made under this Suretyship) shall be limited to an amount determined in accordance with the following formula:

$$X = a + (b \times 1,2)$$

Where:

X = the limitation of our liability in the aggregate, under this Suretyship;

a = all or any amounts payable by the Tenant to the Landlord which are overdue as at then (sic) notice date and in respect whereof the Landlord has notified the Tenant;

b = the aggregate of all monthly rentals payable by the Tenant to the Landlord under the Lease during the 24 (twenty four) month period reckoned from the first day of the calendar month immediately following the notice date,

and for the purposes of this clause 20 the "notice date" shall mean the date on which the Landlord, in its discretion, invokes the provisions of this Suretyship on written notice to the Tenant to such effect.'

73]Mr Rogers argued that a proper construction of clause 20 of the suretyship agreement precluded any liability by the second defendant for any sum for which the first defendant might be liable in damages as a consequence of the cancellation of the lease. Referring to the role of the 'notice date' in the limitation of liability formula, he

submitted (I quote from his written argument) that *‘[I]n order to be valid, a notice under clause 20 would have to be issued during the existence of the lease. This is apparent from the following considerations:*

- 1.The introductory portion of clause 20 contemplates the possibility that several claims might be made under the suretyship. That presupposes the continuation of the lease beyond the giving of notice.*
- 2.Component “a” of the formula assumes that rent could notionally be due up to the date of the notice, while component “b” is premised on the proposition that rent would remain payable after the giving of notice...’.*

On this premise, Mr *Rogers* contended that as the lease had been cancelled before the giving of notice as contemplated by the provisions of clause 20, there was no scope for the operation of the suretyship obligation to be ‘triggered’. Defendants’ counsel developed his argument further by suggesting that the use of the word ‘rentals’ in component ‘b’ of the formula was inconsistent with the notion of damages and connoted a liability which could obtain only during the currency of a lease - not consequent upon its termination. He sought to equate the position of the second defendant with that of the surety in *Arenson v Bishop* 1926 CPD 73.

74]The reliance on *Arenson’s* case was misplaced. In *Arenson’s* case, the surety undertook to be liable for the payment of any rent not paid by the principal debtor on due date. The Court held, with particular reference to the word ‘rent’, that the surety had not undertaken any contingent liability for *damages* sustained by the creditor consequent upon the cancellation of the lease due to the default of the principal debtor. The second Defendant, however, bound itself as surety and co-principal debtor

‘for the due and proper fulfilment of all the obligations of, and for the punctual payment of all sums which are or may become due by [the first defendant] in terms of, or in connection with or arising in any way whatsoever out of the Agreement of Lease (or any amendment or renewal or cancellation thereof)....’. I consider that the undertaking to be liable to pay any amount becoming due by the tenant to the landlord arising in any way whatsoever out of the cancellation of the lease includes an undertaking to pay any damages for which the tenant becomes liable to pay the landlord upon a termination of the lease due to a default by the tenant. Cf. Beaufort West Municipality v Krummeck's Trustees 5 S.C. 5; Demetriou v O’Flaherty and Another 1973 (4) SA 691 (D) at 694C-695H and Norex Industrial Properties (Pty) Ltd v Monarch SA Insurance Co Ltd 1987 (1) SA 827 (A) at 840F-H.

75] Clause 20 of the deed of suretyship executed by the second defendant was not intended to define the nature of the suretyship obligation undertaken; it was intended only to limit the monetary amount of any liability which might arise. The words *‘the aggregate of all monthly rentals payable by the Tenant to the Landlord under the lease’*, used in the definition of component ‘b’ in the formula, are intended to provide a basis for the computation of the maximum extent of the surety’s monetary liability. They do not require the actual existence of the obligation to pay rent between tenant and landlord when the landlord seeks performance from the surety. The maximum extent of the surety’s liability is determined not in relation to an actual liability by the tenant to pay 24 month’s rental, but in relation *inter alia* to an amount equivalent to 24 month’s rental subject to a multiple of 1,2. The reference to 24 month’s rental in

conjunction with a 'notice date' provided that the maximal extent of the surety's liability potentially increased in line with the escalation of the rentals payable under the lease during its 10-year anticipated duration. (It is not necessary in the context of the present claim to address the question of any difficulties which might conceivably have arisen in respect of the application of the limitation formula in the event of multiple claims being made over a period of time.)

76]The opening words of clause 20, '*Notwithstanding anything to the contrary contained or implied in this Suretyship...*' do not detract in any way from the nature of, or range of the obligations in respect of which the second defendant undertook a contingent liability. The words merely stress the absolute extent of the limitation on the monetary amount of such liability in the face of any provisions, elsewhere in the deed, which might otherwise have been amenable to suggest that the amount of the liability was qualified only by the amount of the principal debt.

77]Notwithstanding argument to the contrary by defendants' counsel, I do not think that anything turns on the indication in the introductory words of clause 20, which contemplate the possibility that several claims might be made under the suretyship. Construed in the context of the suretyship agreement as a whole, the wording admits of the possibility of claims being made during the currency of the lease, but does not exclude any relevant claim after its termination.

78]The quantification of the maximum extent of the surety's liability under the suretyship agreement is determined with reference to the date upon which the landlord

exercises its right to claim payment from the surety. The clause states that this is to occur on written notice by the landlord ‘to *the Tenant* to such effect’, but the context suggests that the reference to ‘the Tenant’ was *per incuriam*. What the parties probably intended was that the suretyship was to be invoked upon notice to the surety. (A finding that this was the parties’ common intention is justified on the basis of paragraph 8.3.3. of the plaintiffs’ amended particulars of claim, in which a rectification of clause 20 to this effect is sought, and the content of a letter from the second defendant to the plaintiffs, dated 8 September 2000 (exhibit C1), which shows that it was understood in that way by the second defendant.) Even so, the literal meaning of the provisions, even if modified to require notice to the surety rather than to the tenant, would indicate that the landlord could unilaterally increase the maximal extent of the liability of the surety simply by delaying the giving of notice. Such a construction would, however, defeat the object of the clause.

79]As it happened, the only notice given by the plaintiffs to the second defendant invoking the suretyship was by means of the summons served on 10 May 2000, some seven months after the cancellation of the lease.

80]Mr *Rogers* argued that service of the summons did not constitute the giving of notice in terms of clause 20 because it was apparent from the amount the plaintiffs initially claimed from the second defendant and from their response to a question put at the pre-trial conference that the plaintiffs, at least until their counsel’s opening address at the trial, had contended that their damages claim was not subject to the limitation imposed by the formula. I agree that the plaintiffs did not originally

conceive of the summons as a notice in terms of clause 20, but that does not mean it did not nevertheless have that effect. In my view, the plaintiffs' initially misconceived opinion of the applicability of clause 20 was irrelevant. Objectively, the second defendant can have been under no illusion when it received the summons that the plaintiffs were exercising their right under the suretyship. Accordingly, I consider that the summons did serve the purpose of giving notice within the meaning of clause 20.

81]Having regard to the object of clause 20, I consider that there is a compelling argument to be made in favour of the tacit imposition of a duty upon the plaintiffs, in the event of them exercising their discretion to invoke the suretyship, to give notice of their intention within a reasonable period of the accrual of the right. The giving of notice in terms of clause 20 is not a prerequisite to second defendant's liability under the suretyship agreement; it is merely a factor in the computation of the sum of the second defendant's maximum liability under the contract. The plaintiffs could not validly purport to increase the sum of that maximum liability by unreasonably delaying the giving of notice.

82]The question as to by when the plaintiffs should reasonably have given notice in terms of clause 20 was not an issue on the pleadings and it was not explored in the evidence. Nothing turns on this. Applying the formula on the assumption that notice had been given at the beginning of October 1999, as soon as the rent payable by the tenant on 1 October 1999 was not paid, and taking 'a' as nil, the maximum sum of the second defendant's liability under the suretyship would have been R635 506,68 (arrived at on the basis of the rental that would have been payable under the lease for

the 24-month period 1 October 1999-1 September 2001 multiplied by 1,2) whereas if, with reference to the date of service of summons, the calculation is done using the period 1 June 2000 to 1 May 2002 as the relevant period for the computation of component 'b', the resultant maximum limit is higher because of the incidence of the escalation of rental which would have occurred with effect from 1 November 2001. Where the sum of the principal debt has been determined in an amount below R635 000, the failure by the plaintiffs to give notice in terms of clause 20 at any stage earlier than 10 May 2000 is clearly not a matter of any consequence.

83]The plaintiffs are therefore entitled to obtain judgment against the second defendant in an amount equal to the sum of damages awarded against the first defendant. The liability of the first and second defendants to pay the said amount to the plaintiffs is joint and several.

Rectification of clause 20

84]I should mention that the plaintiffs amended their particulars of claim to introduce an alternative claim for the rectification of clause 20 of the deed of suretyship. Save to the extent stated in paragraph [78], above, no basis was laid in the evidence to justify the claim for rectification. It is not necessary in the circumstances to say anything more about it.

The Third Defendant

85]There was no appearance at the trial by or on behalf of the third defendant. This

prompted Mr *Louw* to ask for default judgment to be granted against the third defendant. The third defendant had delivered a plea, but his attorneys had subsequently withdrawn and thereafter continued to represent only the first and second defendants. There was no indication on the papers that the third defendant had been given notice of the setdown of the trial. In the circumstances, I declined to entertain the application for default judgment.

Costs

86]The trial lasted 4 days. The evidence was completed fairly early on the second day. Argument of the case lasted approximately a day. The extra time taken up was consequent upon the application by the plaintiffs to amend their particulars of claim to cater for the contingency that I might uphold the defendants' argument in respect of the proper construction of clause 8 of the Syfrets mortgage bond. The opposition to the application was not unreasonable. In the circumstances, I intend to allow the plaintiffs the costs of only the first three days of the trial and to award the first and second defendants the costs of the fourth day.

87]In the context of the amendment of the claim consequent upon the obtaining of a replacement tenant and the subsequent sale of the property, the actuarial evidence tendered by the plaintiffs was unnecessary. However, the employment of the services of an actuary to assist in the computation of the plaintiffs' claim as formulated at the time action was instituted was appropriate. Accordingly, only the costs attendant on obtaining the actuarial report annexed to the original particulars of claim will be

allowed as part of the plaintiffs' costs of suit.

Order

1. Judgment is accordingly granted in favour of the plaintiffs against the first and second defendants, jointly and severally, the one paying the other being absolved, for:

a) Payment of the sum of R365 336;

b) (i) Interest *a tempore morae* on the component amount of R238 336 at 15,5% per annum from 10 May 2000;

(ii) Interest *a tempore morae* on the component amount of R125 000 at 15,5% per annum from 1 October 2000

(iii) Interest *a tempore morae* on the component amount of R2 000 at 15,5% per annum from the date of this judgment

c) Costs of suit; which costs shall, in respect of the trial, be limited to the costs of the first three days of the hearing, and in respect of the qualifying fees of the actuary, Mr I.W. Morris, be limited to the costs attendant on the preparation of his report dated 02/03/2000, annexed as annexure 'PPC5' to the plaintiffs' particulars of claim, dated 14 April 2000.

2. The plaintiffs are ordered to pay the costs incurred by the first and second defendants in respect of the fourth day of the hearing.

BINNS-WARD, AJ