NOVA SCOTIA COURT OF APPEAL

Citation: *Ivan Smith Holdings Ltd. v. Bolands Ltd.*, 2002 NSCA 146

Date: 20021127
Docket: CA 177214
Registry: Halifax

Between:

Ivan Smith Holdings Limited, a body corporate

Appellant
Respondent by Cross-appeal

v.

Bolands Limited, a body corporate, Loblaws Properties Limited, a body corporate, and The Oshawa Group Limited, a body corporate

Respondents
Appellants by Cross-appeal

Judges: Glube, C.J.N.S.; Cromwell and Saunders, JJ.A.

Appeal Heard: October 15, 2002, in Halifax, Nova Scotia

Held: Appeal allowed, cross-appeal dismissed and decision of arbitrator restored per reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Saunders, J.A. concurring.

Counsel: A. Douglas Tupper, Q.C. and Douglas Skinner, for the appellant/respondent by cross-appeal
David P.S. Farrar, for the respondents/appellants by cross-appeal

Reasons for judgment:

I. Introduction:

[1] The parties to this appeal are a landlord and a tenant under a lease. They had a disagreement about the tenant's duty to repair damage to the leased premises. The lease had an arbitration clause and so they submitted their disagreement to be settled by arbitration. The arbitrator decided that the tenant had the duty to repair the damage and ordered the tenant to pay the landlord both the cost of repairing the damage and compensation for loss of revenue resulting from it. The main issue in this case is whether the arbitrator had authority to order the tenant to pay these amounts. In addition, there are issues concerning the proper scope of arbitration under the lease and whether the arbitrator made reviewable errors in interpreting and applying its provisions.

II. Facts and Proceedings:

[2] The appellant, Ivan Smith Holdings, is the owner of a warehouse freezer and cooler facility in Dartmouth. Smith leased the warehouse to the respondent, Bolands Limited, for a two year term. The lease provided for final and binding arbitration stating that "[i]n case of any disagreement between the Landlord and the Tenant in regard to any clause or provision hereof, the same shall be settled by arbitration...".

[3] When the lease expired, there was a disagreement between the parties about whose responsibility it was under the lease to repair damage to the premises. Under the lease, the tenant was obliged to repair damage caused by its acts or omissions to the extent not covered by insurance. In addition, the lease required the landlord to maintain insurance and contained a waiver by the landlord of claims against the tenant. The landlord claimed that the tenant had caused damage by repeatedly bashing forklifts into the walls, ceilings and doors of the warehouse. This made holes in its interior skin which, in turn, fatally compromised the thermal and vapour integrity of the walls. The result, the landlord said, was that the premises could no longer be operated as a freezer without making over $300,000 worth of repairs which were not covered by insurance. The tenant denied that the damage was its responsibility and claimed that the cost of any needed repairs

should have been covered by insurance which the landlord ought to have maintained to comply with the lease.

[4] Reduced to the essentials, the disagreement between the landlord and tenant raised these questions: (a) whether the tenant had caused the damage; (b) if so, whether it was covered by the insurance which the landlord was supposed to have; and (c) whether the landlord had waived its right to recover against the tenant. If those issues were resolved in favour of the landlord, the question arose as to whether the arbitrator had the authority to order the tenant to pay the cost of making the repairs and consequential damages.

[5] It is convenient to set out the arbitration and repair clauses of the lease here:

> **Section 15:10 - Arbitration**
>
> In case of any disagreement between the Landlord and the Tenant in regard to any clause or provision hereof, the same shall be settled by arbitration as follows: Either party may notify the other of its desire for arbitration. Each party agrees that within fifteen (15) days of such notice it will appoint an Arbitrator. If only one party appoints an Arbitrator as aforesaid, his decision shall be final and binding on both parties. If, within twenty-one (21) days of the appointment of the last appointed Arbitrator, the two Arbitrators agree on a decision or settlement, the same shall be binding on both parties. If no such agreement is reached within the said 21 days, the two Arbitrators shall appoint a third Arbitrator, or failing agreement within such delay on the appointment of a third Arbitrator, the third Arbitrator shall be appointed by a Judge of the Supreme Court of Nova Scotia. The decision of the majority of the three Arbitrators shall be binding and final on both parties. The cost of each party's Arbitrator shall be borne by each party and all other costs of the arbitration shall be borne equally between the parties. If, instead of arbitration, both parties agree on the appointment of a single mediator, the decision of such mediator shall be binding on both parties.
>
> **Section 3.04 - Landlord's Repairs**
>
> The Landlord shall:
>
> (i) maintain the premises and carry out all repairs to the interior of the Demised Premises, the building and other improvements from time to time thereof, including without limiting the generality of the foregoing, all partitions, doors, fixtures, equipment including freezers and associated freezer equipment and appurtenances thereto;

(ii) maintain the exterior of the Premises in good structural condition and repair and make all structural repairs and replacements necessitated by any cause and shall make all repairs or replacements necessitated by any peril covered by a standard fire and extended coverage insurance policy.

Notwithstanding the foregoing, the Tenant will repair, to the extent not covered by insurance, any damage to the Demised Premises caused by the acts or omissions of the Tenant, its servants or agents. The Tenant shall permit the Landlord access to the Tenant's forklift and other equipment to inspect and repair and maintain the Demised Premises as required.

The Landlord hereby guarantees the building in which the leased premises are situate against all structural defects and guarantees that the said buildings shall be watertight during the term of this Lease or any renewal hereof. The Landlord further covenants and agrees that subject to Article VIII, it will repair damage or destruction to parts of the demised premises by perils insured against under policies of insurance effected by the Landlord pursuant to this Lease.

In addition to any and all other rights available to the Tenant, if as a result of repairs or maintenance required to be made by the Landlord pursuant to the terms of this Lease, or the failure of the Landlord to effect such repairs or maintenance, the Tenant is unable to carry on its business in its normal manner in the whole of the leased premises, then rent and all other payments shall abate for such period that it is so unable to carry on its business. (Emphasis added)

[6] Acting under the arbitration clause, the parties appointed Peter J. MacKeigan, Q.C. as sole arbitrator and a four day hearing was held. In brief summary, he made the following findings in his 35 page written award:

- he had jurisdiction under the arbitration clause to decide the issues raised including the issues of "causation, damages and consequential damages";
- the premises had been damaged repeated ("virtually daily") and over an extended period of time by the negligent acts and omissions of the tenant's employees;
- the landlord had not been aware of either the extent or the frequency of the damage until after the lease expired ;
- the cost to repair the damage was $318, 252.00;

- the damage had resulted in lost rental opportunity to the landlord in the amount of $59,130.34;
- the landlord had maintained the insurance coverage required by the lease but the damage caused by the tenant was not covered by insurance;

[7] The tenant applied in the Supreme Court to quash the arbitrator's award. The judge who heard the application, Hood, J., held in a 45 page reserved decision that:

- the arbitrator did not have jurisdiction to award damages for the cost of repairs;
- the award relating to damages should be set aside;
- the rest of the award (other than a part dealing with estoppel which is not relevant here) should stand.

[8] The landlord appeals Hood, J.'s decision that the arbitrator did not have jurisdiction to award damages. The tenant cross-appeals, arguing that the judge ought to have quashed the whole award because the arbitrator acted outside his authority under the arbitration clause and interpreted and applied certain provisions of the lease in a patently unreasonable way.

[9] I should mention, for the sake of completeness, a few details that are not relevant to the issues before us. First, through amalgamations, Bolands became The Oshawa Group Limited. Second, the lease was amended and extended for a further year. Third, the lease was assigned by the tenant to Loblaws Properties Limited. For convenience, I will simply refer to the appellant (respondent by cross-appeal) as "Smith", the "appellant" or the "landlord" and to the respondent (appellant by cross-appeal) as "Bolands", the "respondent" or the "tenant."

III. Issues:

[10] The appeal by the landlord raises one main issue: Did the judge err when she decided that the arbitrator could not award damages for repairs and consequential losses in this case? The tenant's cross-appeal raises two other issues relating to the scope of the arbitrator's authority and four issues concerning the question of whether his interpretation and application of the lease was patently unreasonable. All of the tenant's issues relate to the question of whether it was liable to make the repairs. The landlord's issue, on the other hand, relates to remedy and therefore arises only if the liability of the tenant is confirmed. The tenant's issues therefore

logically should be addressed first. Combining and reordering the questions raised by the appeal and cross-appeal, the issues are these:

1. Liability:

Does the arbitration clause confer authority on the arbitrator in this case:

1.1 to consider the issue of insurance coverage?
1.2 to apply the doctrine of rectification?

Did the arbitrator commit reviewable error in relation to:

1.3 rectification?
1.4 the landlord's duty to insure and the obligation of the tenant to notify the landlord of damage to the premises?
1.5 the waiver provision in the lease?

2. Remedy:

2.1 If the tenant was required to make repairs, did the arbitration clause authorize the arbitrator to award damages in the amount of the cost of those repairs and consequential losses arising from the damage?

IV. Analysis:

[11] The judge held that the standard of judicial review of the arbitrator's conclusions concerning the scope of the arbitration clause is correctness and that the standard applicable to the other issues is patent unreasonableness. These conclusions are not challenged on appeal. It is common ground that the standard of review of the Chambers judge's decision on appeal to this Court is correctness.

1. Liability:

1.1 The insurance issue:

[12] On the cross- appeal, the tenant submits that the arbitrator exceeded his jurisdiction by considering insurance coverage as he was only entitled under the arbitration clause to interpret the lease. The Chambers judge did not accept this view, holding as follows:

> I conclude that the issues of responsibility for repairs, whether the loss was covered by insurance and whether notification or a claim was required are issues within the jurisdiction of the arbitrator. They involve a dispute about clauses in the lease dealing with the obligations of the parties with respect to damage to or the condition of the leased premises, insurance requirements and the duties of each party with respect to that insurance. These disputes are with respect to clauses 3.04 and 4.02 of the lease.

[13] As noted earlier, the tenant's obligation under the lease to repair turns, in part, on whether the damage was covered by insurance. In order to settle the disagreement between the parties about who had the obligation to repair under the repair clause, the arbitrator had to determine whether the damage was covered by insurance. In my view, the Chambers judge was right to find that the insurance issue was properly before the arbitrator as part of his task to settle the disagreement concerning who had the duty to repair in this case.

1.2 Could the arbitrator apply the doctrine of rectification?

[14] One of the issues before the arbitrator was whether the landlord had complied with its duty to insure under the lease. The most relevant Section, 4.02, reads as follows:

> **Section 4.02 - Fire Insurance**
>
> The Landlord covenants and agrees that throughout the term of this Lease and any renewals thereof it will carry fire insurance with normal extended coverage endorsements in respect of the demised premises in an amount equal to the full replacement value thereof. All policies of insurance affecting any part of the demised premises, whether carried pursuant to this Section 4.02 or otherwise, shall be in the name of and for the mutual benefit of the Landlord and the Tenant and all such policies shall be endorsed with an acknowledgement that notice is received and accepted that the Landlord has waived any right of recovery from the Tenant, and the Landlord doth hereby waive any such right of recovery. In addition, all such policies shall provide that the insurers thereof shall give the Tenant thirty (30) days' notice prior to any cancellation or failure to renew. The

> Landlord further agrees to provide the Tenant with certificates of all insurance policies required to be undertaken by the Landlord pursuant to the terms of this Lease. In the event the Landlord does not take out such insurance as is provided for in this Section 4.02, or in the event the Landlord does not comply with all of the provisions of this Section 4.02, the Tenant shall, but shall not be obliged to, take out such insurance and/or comply with the provisions of this Section 4.02 and any costs incurred by the Tenant in so complying with the provisions of this Section 4.02 may be deducted by the Tenant from the next payment of rent due hereunder. (Emphasis added)

[15] As noted, the Section states that the insurance was to be "... in the name of and for the mutual benefit of the Landlord and the Tenant." (emphasis mine) The policy showed the insured as being the landlord whereas Section 4.02, at least at first reading, appears to require the policy to be in the name of both the landlord and the tenant. The question arose whether the Section reflected the agreement between the parties and if it did not, whether the lease should be rectified to do so.

[16] The evidence before the arbitrator indicated that the issue of the landlord and tenant being co-insureds had arisen during the negotiation of the lease. The original draft lease advanced by the tenant provided, in relevant part, that all insurance "... shall be in the name of and for the mutual benefit of the Landlord and the Tenant naming the Landlord and Tenant as co-insureds ." The text up to the underlined portion (that is, up to the words "naming the landlord and tenant as co-insureds") is the same as that of the lease as signed, but the underlined text was deleted from the draft at the request of the landlord's solicitor and does not appear in the lease as signed. However, even though that reference to the landlord and tenant being co-insureds was deleted, the requirement earlier in the same Section that the insurance "be in the name of ... the landlord and the tenant ... " was not modified, apparently through oversight, between the draft and the final version which was signed. There was evidence from the landlord's solicitor that the intent of both parties had been that the insurance would be for the mutual benefit of the landlord and the tenant but that only the landlord would be a named insured.

[17] The arbitrator decided that, if it were necessary to do so, he could rectify the Section by deleting the words "in the name of and" so that it would reflect the actual agreement between the parties. However, he said that he did not "... see this as an issue of rectification but one of interpretation of the intent of the parties." There is no dispute he was entitled to interpret the lease in the course of settling disagreements between the parties in regard to its provisions.

[18] In light of the arbitrator's conclusion that the issue was one of interpretation rather than rectification, I have reservations as to whether it is necessary to address the rectification issue. However, as the matter was fully argued both here and before Hood, J., I would say that the judge was right to conclude that the arbitrator had authority to rectify a provision of the lease as part of his mandate from the parties to settle "... any disagreement between [them] in regard to any clause or provision ... " of the lease. A dispute about whether one of the Sections of the lease reflects the true agreement of the parties seems to me to be such a disagreement. I rely on the decisions in **Onex v. Ball Corp**., [1994] O.J. No. 98 (Q.L.) (Ont. Ct. Gen. Div.), **Canadian National Railway Co. v. Lovat Tunnel Equipment Inc**. (1999), 174 D.L.R. (4th) 385; O.J. No 2498 (Q.L.)(Ont. C.A.) and **P.S.A.C. v. NAV Canada** (2002), 212 D.L.R. (4th) 68; O.J. No. 1435 (Q.L.) (Ont. C.A.) In **Onex**, for example, it was held that the issue of rectification fell within the terms of an arbitration clause providing for arbitral resolution of disputes "in relation to the construction" of the document in issue there: at para 25.

[19] I would conclude that the judge was correct to find that the arbitrator could consider the insurance issues and apply the doctrine of rectification.

[20] The next set of issues relating to liability concerns whether the arbitrator committed reviewable errors by interpreting the lease or applying it to the facts in a patently unreasonable manner.

1.3 Rectification:

[21] The issue here is whether the arbitrator applied the doctrine of rectification in a patently unreasonable manner. It is not argued that he applied wrong legal principles. I have already expressed the view that he had the authority to apply the doctrine of rectification if the circumstances warranted. The submission by the tenant is that the arbitrator reached a patently unreasonable conclusion on the evidence concerning the parties' intention and that he ignored Section 15.04 of the lease which provides that the document contains the entire agreement between the parties.

[22] Hood, J. found that the arbitrator's conclusion was reasonably open to him on the record. I agree with that conclusion. In light of the evidence, particularly that of the landlord's solicitor and the correspondence relating to this point, the

arbitrator reasonably concluded that the parties intended that the insurance would be for the mutual benefit of both parties but that the tenant would not be a named insured.

1.4 The landlord's duty to insure and the tenant's obligation to notify the landlord of damage to the premises:

[23] As noted earlier, the tenant's duty to repair under Section 3.04 of the lease is triggered by two circumstances: first, that the damage to the premises was caused by the acts or omissions of the tenant, its servants or agents and, second, that the cost of repair was not covered by insurance.

[24] As also noted, the lease contains Sections dealing with the obligation to obtain and maintain insurance. Under section 4.01 of the lease, the landlord is to obtain public liability insurance and, under section 4.02, fire insurance with normal extended coverage endorsements. For convenience, I will set out those Sections here in full:

> **Section 4.01 - Public Liability Insurance**
>
> The Tenant covenants and agrees at all times during the term hereof to cause and to be kept in force adequate public liability insurance with respect to the demised premises in which the limits of public liability shall be not less than ONE MILLION DOLLARS ($1,000,000.00) per person and FIVE MILLION DOLLARS ($5,000,000.00) per occurrence. The Tenant further covenants and agrees to deliver to the Landlord, certificates of the said insurance and renewals thereof from time to time during the term of this Lease.
>
> **Section 4.02 - Fire Insurance**
>
> The Landlord covenants and agrees that throughout the term of this Lease and any renewals thereof it will carry fire insurance with normal extended coverage endorsements in respect of the demised premises in an amount equal to the full replacement value thereof. All policies of insurance affecting any part of the demised premises, whether carried pursuant to this Section 4.02 or otherwise, shall be in the name of and for the mutual benefit of the Landlord and the Tenant and all such policies shall be endorsed with an acknowledgement that notice is received and accepted that the Landlord has waived any right of recovery from the Tenant, and the Landlord doth hereby waive any such right of recovery. In

> addition, all such policies shall provide that the insurers thereof shall give the Tenant thirty (30) days' notice prior to any cancellation or failure to renew. The Landlord further agrees to provide the Tenant with certificates of all insurance policies required to be undertaken by the Landlord pursuant to the terms of this Lease. In the event the Landlord does not take out such insurance as is provided for in this Section 4.02, or in the event the Landlord does not comply with all of the provisions of this Section 4.02, the Tenant shall, but shall not be obliged to, take out such insurance and/or comply with the provisions of this Section 4.02 and any costs incurred by the Tenant in so complying with the provisions of this Section 4.02 may be deducted by the Tenant from the next payment of rent due hereunder. (Emphasis added)

[25] The arbitrator found that the landlord had obtained the insurance coverage required under the lease. Speaking of Section 4.02, the arbitrator said this:

> ... The Section requires the Landlord to carry insurance with normal extended coverage endorsements in respect to the Demised Premises in an amount equal to the full replacement value. I find that the Landlord has complied with the requirement of Section 4.02 by carrying the required fire insurance. The Offer to Lease dated June 20, 1996 provides for the Landlord to ensure there is fire insurance in place. This requirement has also been complied with by the Landlord.

[26] Having concluded that the landlord had maintained the insurance coverage required by the lease, the arbitrator turned his attention to the issue of whether the damage was covered by insurance. He decided it was not for two reasons.

[27] First, he concluded that the policy did not cover cumulative damage such as that in issue in this case. Before the arbitrator, various letters from the insurers' adjusters were in evidence. Their view was that the policy did not cover "accumulative damages [that is constant and continual losses causing damages which are considered to be cumulative or accumulative losses] occurring over a period of time. The Insurers' position is prejudiced by such losses not being reported initially, as they are not given the opportunity to take a number of steps to eliminate or minimize such ongoing losses or damages." The arbitrator concluded that the insurance was not intended to cover " .. day-to-day damage of the same kind on an ongoing basis by correctable operations of the tenant." He said as follows:

> The position of the Halifax Insurance Company and The Economical Insurance Company being the named insurance companies in the existing policy, is reflected

> in various correspondence from G.E. Morgan Adjusters Ltd. They state that the policy does not cover cumulative damage in its coverage or peril. This means repeated incidents of damage on an ongoing basis as opposed to isolated acts or incidents to which the insurance company would respond. **...**
>
> Of the two issues respecting insurance, the first is the repeated damage a peril and secondly the lack of notice of the damages. The insurance companies said the damage was not a peril covered in the insurance. On that basis as the damages are not covered by insurance, under section 34.02 (sic) the Tenant has the responsibility for repair. However going a legal step further for purposes of having that matter resolved, the Landlord or the Tenant would have been required to pursue litigation against the insurance company over an extended period of time. In such circumstances, and based upon the evidence before me, it is my view that the perils defined in the insurance policy as providing coverage, would be found not to extend to the nature of the damage which occurred. The essence of the policy is that it implies that a peril is an event. It is an action which results in damage to the premises, which the cost to remedy can ultimately be quantified for repair purposes. It is not intended to be a policy which would continue to cover day-to-day damage of the same kind on an ongoing basis by correctable operations of the Tenant. This cumulative damage was of such an ongoing basis that it raises a legitimate interest of concern such that I find it is not a peril covered in the policies of insurance.

[28] As to the second issue concerning whether there was insurance coverage, the arbitrator held that the tenant's failure to advise the landlord of the damage in a timely way had precluded the filing within the required time of the necessary proof of loss. This, in turn, prevented the landlord from availing itself of the benefits of any insurance coverage that might otherwise have responded to the damage. In his view, the tenant should not, as a result of its own failure to report the damage, be in any better position:

> As to the second issue of completing the necessary proof of claim forms, Mr. Farrar has argued the Lease does not require the Tenant to notify the Landlord of any damages. He further argues the Landlord may enter the Demised premises to do an inspection and that during the relevant time Ivan Smith knew there was damage early in the lease. However it is first necessary to know there is damage and to what extent so a claim can be made. In the evidence of Blaine Caldwell, he indicated that in the Thornhill Drive facility there were occasionally incident reports prepared which would have been done by Mike Spicer. He indicated he doubted they would have been filled out each time and he indicated they were not shared with Mr. Smith. When asked how Mr. Smith would become aware of the

> damage, he suggested that he would be aware because he visited the premises from time to time and has an office in the same building.
>
> It is apparent that Mr. Smith could not report to the insurance company what he did not know. ...
>
> I find that the [sic] if the Tenant wants to avail it self of the benefits of the lease it must make known [sic] the damages in a timely manner. The Tenant knows when there is damage. ...
>
> The Tenant failed to notify the Landlord of the nature of the injury and damage. The Tenant further failed to put in place proper procedures to prevent and minimize injury from occurring on a continual and a cumulative basis. The Tenant further did not make any inquiries as to the extent or nature of the damage which had occurred and which would have been required by Mr. Smith for purposes of making a claim on the insurance if the insurance hd been available to him. Indeed, it was only over the few months that the hearing was conducted that all the parties became aware of the extent of the damage when there was an opportunity to look at the back of the Isowall panels and it was found that the damage had broken the integrity of the seal. The efforts of the Tenant to repair the Isowall panels had been totally ineffective in this regard.
>
> ...
>
> I accept the argument of the Tenant that when something is for the mutual benefit of both parties, there must be some corresponding responsibility on the Tenant to notify the Landlord of the damages so the landlord can make a timely claim. The Tenant cannot claim the mutual benefit under the insurance and then say that through there omission in notifying the Landlord they can leave the Landlord prejudiced. They can't have it both ways.
>
> I am therefore, not satisfied that there was insurance for purposes of covering the damage. ... (emphasis added)

[29] The tenant submits, as it did before Hood, J., that the arbitrator's conclusion with respect to these insurance issues cannot be rationally supported by the provisions of the lease. It is submitted that there is no basis for the conclusion that Section 4.02 of the lease requiring fire insurance "with normal extended coverage endorsements" referred to anything other than all-risk insurance. Nor, says the tenant, is there any basis for the arbitrator's conclusion that the damage is removed from the scope of the peril covered by the policy because it was "cumulative

damage". Finally, the tenant submits that there is no requirement in the lease requiring the tenant to give notice to the landlord of damage and that in finding there to be such a requirement, the arbitrator, in effect, added a provision to the lease for which there is no rational basis in its text.

[30] Hood, J. rejected these arguments. She held that the arbitrator's conclusions that the insurance obtained by the landlord met its obligations under the lease, that the damage caused by the tenant was not covered and that the tenant had to give notice of the damage to the landlord in order to take advantage of the insurance obtained for their mutual benefit, were all rationally supported by the terms of the lease and the evidence.

[31] I am of the same view. While his may not be the only rational conclusions one could reach, they are not clearly unreasonable in light of the record before the arbitrator.

[32] The arbitrator's conclusion that the insurance obtained by the landlord complied with the lease is a reasonable one on the record before him. As he noted, "[t]he evidence and the exhibits would indicate that the insurance policy that the Landlord has carried was acceptable to both parties."

[33] Similarly, his conclusion that the coverage did not extend to the type of ongoing damage inflicted by the tenant in this case is reasonably supported by the record.

[34] With respect to the requirement to give notice of the damage, the arbitrator concluded that, where the lease provided that insurance was for the mutual benefit of the parties, it was necessary for the tenant to advise the landlord about damages of the type in issue here. Otherwise, the mutual benefit of the insurance as provided for in the lease would be lost. To hold otherwise, he said, would result in the landlord losing its right, through the passage of time, to make an insurance claim and yet the tenant could validly refuse to pay for the repairs on the basis that the damage was covered by insurance. Simply put, the arbitrator concluded that such a result made no sense and interpreted the lease so as to avoid an absurd result. The arbitrator's construction of the lease may strike many as both sensible and just. It is certainly not clearly irrational.

[35] I would conclude therefore that the judge did not err in her conclusion that the arbitrator's interpretation and application of the lease in relation to the insurance coverage and notice issues were not patently unreasonable and that the award in relation to those issues should stand.

1.5 The waiver provision:

[36] The lease contained a waiver provision as part of Section 4.02. After providing that all policies of insurance would be for the mutual benefit of the landlord and the Tenant, the Section goes on to stipulate that "... all such policies shall be endorsed with an acknowledgement that notice is received and accepted that the Landlord has waived any right of recovery from the Tenant, and the Landlord doth hereby waive any such right of recovery."

[37] The arbitrator interpreted this Section, in the context of the lease as a whole, to mean that the landlord's waiver of any right of recovery from the tenant applies only where the policy of insurance is enforceable to allow the landlord recovery against the insurance company. The judge concluded that this was not a clearly irrational interpretation. (Of course, this interpretation is premised on the landlord obtaining the insurance required by the lease.)

[38] The tenant submits that Section 4.02 is an unqualified waiver and that there is no language anywhere in the lease capable of supporting the arbitrator's interpretation.

[39] In my view, this submission has no merit. In light of the arbitrator's conclusion that the clear intention of the parties was that the tenant was not to be a named insured and of the connection in Section 3.04 between the tenant's duty to repair and the extent of insurance coverage, the arbitrator gave Section 4.02 an interpretation that it will reasonably bear.

[40] I conclude, therefore, that the judge was right to uphold the arbitrator's conclusion that the tenant was obliged under the lease to repair the damage it had caused to the premises.

2. Remedy:

2.1 The damages issue:

[41] The tenant argued before the arbitrator that he did not have jurisdiction to order the tenant to pay for the cost of repairs or consequential damages resulting from the damage to the premises. It was submitted on behalf of the tenant that the arbitrator's jurisdiction is limited to ruling as to the interpretation of the various clauses in the lease and determining who is responsible for the repairs. In essence, the tenant's position has been that the arbitrator's role under the arbitration clause is purely interpretative; his task is simply, and only, to tell the parties what the lease means when they do not agree about its meaning.

[42] The arbitrator rejected the tenant's argument. He decided that in order to determine if awarding damages was within his jurisdiction, he must apply a two part test. The first part of the test requires definition of the dispute and the second whether that dispute falls within the terms of the arbitration clause. Applying that test, he was satisfied that he had authority under the arbitration clause to award damages representing the cost of repairs and consequential losses flowing from any breach of the obligations to repair set out in the lease.

[43] Hood, J. quashed this part of the arbitrator's award. She concluded that the arbitration clause in the lease was a limited one. It did not, in her view, extend to empowering the arbitrator to award damages because the question of damages "... is not a dispute about the clauses or provisions of the lease."

[44] The landlord, on appeal, submits that the judge erred in reaching this conclusion and that the arbitrator was correct to find that he had jurisdiction to award damages in this case. The argument is that once it is determined that the dispute between the parties concerning responsibility for repair falls within the arbitration clause, the jurisdiction conferred by the clause to settle the dispute impliedly includes the authority to award a remedy in damages absent a clear intention to the contrary.

[45] The tenant, in response, says that the judge was right, that the clause is limited as the judge found and that the arbitration provision in the lease permits the arbitrator simply to determine whether or not the tenant is obligated under the lease to repair the premises. The parties disagreed about who had the duty to repair under the lease and that disagreement about the interpretation of the lease, it argued, is all the arbitrator should have addressed. The tenant submits that there could be no breach of any provision of the lease to remedy until the dispute about

who had the obligation to repair was settled by arbitration. A breach could occur, in the tenant's submission, only once the party found to have the obligation by the arbitrator thereafter refused to carry it out.

[46] In my respectful view, the landlord's submission is correct. For the reasons that I will develop, I conclude that the judge erred in finding that the arbitrator had no jurisdiction under the arbitration clause to award damages for breach of the obligation to repair under the lease.

[47] The question of the arbitrator's jurisdiction under an arbitration clause is resolved through interpretation of the particular clause in its context within the agreement as a whole and the commercial legal relationship between the parties: see, for example, **Onex**, **supra** at para. 23 and **Huras v. Primerica Financial Services Ltd.** (2001), 55 O.R. (2d) 449 (Ont. C.A.) at para. 12. Because the words of each clause must be interpreted in context, care must be taken in simply comparing the results of cases dealing with certain specific words in an arbitration clause without having regard to that broader context: see **Onex** at para. 23. Moreover, the courts in recent years have supported parties' decisions to resort to arbitration by construing the jurisdiction of arbitrators liberally. One example of this approach is that where the language of an arbitration clause is reasonably capable of bearing two interpretations, one of which provides for arbitration of the disagreement between the parties, the courts generally give effect to that interpretation: see **Canadian National Railways Co. v. Lovat Tunnel Equipment Inc.**, **supra**.

[48] The first question is whether the disagreement between the parties falls within the terms of the arbitration clause. That involves consideration of the nature of the dispute and the interpretation of the clause. Here, it is common ground that the parties had, as set out in the arbitration clause, a "... disagreement ... in regard to [a] clause or provision..." of the lease , namely the repair clause, section 3.04, and the other clauses related to it.

[49] The second question is whether the direction in the arbitration clause that such disagreements "... shall be settled by arbitration..." should be taken to include the authority of the arbitrator to award damages to cover the cost of making the required repairs and consequential losses.

[50] In answering this question, the underlying principle is that when the parties have given the arbitrator a broad, general authority to settle certain types of disagreements and the disagreement submitted to arbitration falls within the arbitrator's authority, the power of the arbitrator to award a damages remedy in order to settle the disagreement is implied as a necessary adjunct of his authority to settle the disagreement unless a contrary intention appears.

[51] An influential example of this principle is found in the decision of the House of Lords in **Heyman v. Darwins Ltd.**, [1942] A.C. 356. The arbitration clause in issue there provided that "... if any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising here out the same shall be referred for arbitration in accordance with the provisions of the Arbitration Act, 1889." Viscount Simon, L.C. commented on the proper approach to such a clause and, in particular, on the implied remedial authority of the arbitrator in these terms:

> My Lords, it is of much practical importance that the law should be quite plain as to the scope of an arbitration clause in a contract where the clause is framed in wide and general terms such as this, ... By the law of England ... such an arbitration clause would ... confer authority to assess damages for breach, even though it does not confer on the arbitral body express power to do so.

[52] This principle, as expressed in **Heyman**, was affirmed in the context of collective agreement arbitration in the famous **Polymer** case: **Oil, Chemical & Atomic Workers and Polymer Corp. Ltd.** (1959), 10 L.A.C. 51 (B. Laskin, Q.C., C. L. Dubin Q.C. and M. O'Brien); application for *certiorari* dismissed 26 D.L.R.(2d) 609 (Ont. H. Ct.); aff'd 28 D.L.R. (2d) 81 (C.A.); affirmed [1962] S.C.R. 338.

[53] The collective agreement in issue in **Polymer** provided that "any dispute ... regarding the administration, interpretation, alleged violation or application of this Agreement ..." could be addressed through the grievance procedure (Section 6.01) and that "... any alleged misinterpretation or violation of the provisions of this agreement ... will be referred to a Board of Arbitration." (Section 7.01) The agreement was otherwise silent as to the remedial power of the Board of Arbitration. The union argued that the Board had no authority to assess damages against the union for an unlawful strike in breach of the "no-strike" provisions of the agreement. The Board rejected this argument in these terms at p. 57:

> The submission of counsel for the union invites this board to agree that a reference of an alleged collective agreement violation to arbitration cannot *ipso facto* include the assessment of damages to redress the violation if established. What this view suggests is that the assessment of damages is no less a substantive issue and no less a separate one than the determination of the existence of a violation. It is, of course, possible for these matters to be separated, but they are not ordinarily treated in this way in either civil contract litigation or in commercial arbitration. So far as the latter is concerned there is the high authority of the House of Lords in *Hayman (sic) v. Darwins Ltd.*, [1942] A.C. 356 (as expressed by Viscount Simon, L.C., at pp. 366-7) that where parties to a commercial contract have agreed to arbitration of differences or disputes thereunder, then "by the law of England (though not, as I understand, by the law of Scotland) such an arbitration clause would also confer authority to assess damages for breach, even though it does not confer upon the arbitral body express power to do so". The view of the House of Lords as to the law of England is not of course binding upon this board in the matter before it but it represents a point of view which is consonant with an appreciation of the desirability of completeness and finality in arbitration. ...

[54] An application to quash the award was dismissed by McRuer, C.J.H.C. (26 D.L.R.(2d) 609). The judge said this at p. 614:

> Article 6.05 is in the broadest terms. It covers in express language any dispute arising between the company and the Union regarding an alleged violation of the agreement. This clause, read with Article 7.01, makes it clear that if this were an ordinary commercial contract any dispute regarding the alleged violation of the agreement would be the proper subject of arbitration and unquestionably on the authority of the *Heyman* case the question as to whether a party who had broken a term of the contract should pay damages and in what amount, would be such a dispute. This agreement comes clearly within the language used by Viscount Simon, L.C., at p. 366.

[55] Both the Ontario Court of Appeal and the Supreme Court of Canada expressed themselves as being in "complete agreement" with the reasons given by McRuer, C.J.H.C.: see 28 D.L.R.(2d) 81 (Ont. C.A.) at 82 and [1962] S.C.R. 338 at 342.

[56] More recently, the same principle has been applied in the context of commercial arbitration in **Automatic Systems Inc. v. E. S. Fox Ltd.** (1995), 19 C.L.R. (2d) 35 (Ont. Ct. Gen. Div.). Adams, J. stated at para. 30:

> I am also satisfied the dispute at hand constitutes a claim within the meaning of the subcontract. Article 15 and its related provisions are to be given a large and liberal interpretation to effectuate the dispute resolution goals of the parties. The arbitration obligation survives the completion of the contract as well as its fundamental breach. See *Dayco (Canada) Ltd. v. C.A.W.*, (sub. nom. *Dayco (Canada) Ltd. v. CAW-Canada)* [1993] 2 S.C.R. 230, (sub nom. *Dayco (Canada) Ltd. v. C.A.W.-Canada*) 102 D.L.R. (4th) 609. Were it otherwise, arbitration could be easily avoided and its effectiveness would be seriously impaired. For similar reasons, it is to be assumed that the parties intended the arbitration process to have at its disposal a full range of remedies, including monetary relief, to resolve their claims. See *Imbleau v. Laskin* (1961), (sub nom. *Polymer Corp. v. O.C.A.W., Local 16-14*) 26 D.L.R. (2d) 609 (Ont. H.C.), affirmed (1961), (sub nom. *Polymer Corp. v. O.C.A.W., Local 16-14*) 28 D.L.R. (2d) 81 (Ont. C.A.), affirmed (1962), (sub nom. *Polymer Corp. v. O.C.A.W., Local 16-14*) 33 D.L.R. (2d) 124 (S.C.C.).(emphasis added)

[57] The arbitration clauses in these authorities were arguably broader than the one in the lease in the sense that they provided for a wider range of disputes that were to be submitted to arbitration. However, the relevant principle which I draw from these authorities is this. Where the disagreement between the parties falls within the scope of the arbitration clause and the arbitrator is given the general authority to reach a final and binding settlement of that disagreement, his power to award a damages remedy should be implied, absent a contrary indication, as part of his mandate to reach a final and binding settlement of the disagreement.

[58] This principle, in my view, applies here. In the present case, the disagreement between the parties to the lease falls within the definition of the sorts of disagreements which are to be submitted to arbitration; their disagreement is "...in regard to [a] clause or provision..." of the lease. The arbitration clause also gives the arbitrator the authority to reach a final and binding settlement of the disagreements submitted to arbitration. There is nothing to suggest any other intention. The arbitration clause is expansively, if succinctly, worded and is consistent only with an intent of the parties to settle, in a final and binding manner, all disagreements in regard to any clause or provision of the lease. It follows, therefore, that the arbitrator's power to award damages in the course of doing so

should be implied as a necessary element of the authority the parties conferred on the arbitrator.

[59] If there were any doubt about this, the inefficient, impractical and time-consuming process advocated by the tenant should resolve that doubt in favour of the landlord's position.

[60] The tenant says that what should have happened is this. The arbitrator should have determined only whether the tenant had an obligation to repair and issued a decision accordingly. It is suggested that there can be no breach of any obligation to repair until the arbitrator's decision on this aspect has been given. Following the arbitrator's award, the parties then would attempt to arrive at a settlement concerning the cost of the required repairs. Failing agreement, the matter would go to court with the arbitrator's decision as to the obligation to make repairs binding on the parties, but the extent and cost of the repairs for decision by the judge. In short, liability and damages should have been separated, with liability to repair settled at arbitration and damages assessed in court if necessary.

[61] I cannot accept that this process is consistent with the parties' intention in entering into this arbitration clause. The suggestion that there can be no breach of the obligation to repair until the arbitrator has reached a decision on whether the tenant was obliged to repair is, so far as I know, unsupported in law. Certainly no authority was advanced to support it. The parties contracted for a process of final and binding settlement by arbitration of their disagreements in regard to any clause or provision of the lease. On the respondent's approach, they would get instead a cumbersome, bifurcated process with part of the disagreement settled at arbitration and part of it settled in court, with great potential for wasteful overlap and duplication of evidence in the two phases of the process. This seems to me to stretch the interpretation of final and binding arbitration beyond any reasonable meaning of the words and any intention that reasonably could be imputed to the parties in using those words.

[62] The inconvenience of the approach advocated by the respondent is particularly apparent in light of the specific disagreement in this case. The tenant's duty to repair relates to "any damage caused by the acts or omissions of the tenant, its servants or agents..." but only "...to the extent not covered by insurance...". (Section 3.04) If the respondent's position were adopted, the arbitrator would have to determine the cause of the damage and the extent to which it is not covered by

insurance, but leave the assessment of the cost of repairs to the courts. In the context of this particular provision of the lease, this would be a difficult and perhaps even artificial division of labour.

[63] This seems to me to undermine the whole purpose of the final and binding arbitration clause to which the parties agreed. By including an arbitration clause of this nature, the parties must be taken to have decided to adopt a dispute resolution process that is less formal, more rapid and more economical than litigation in the courts. If one were to adopt the approach advanced by the respondent, the result would be exactly the opposite.

[64] I would therefore conclude, with respect, that the judge erred in finding that the arbitrator lacked jurisdiction to finally settle the disagreement between these parties concerning the obligation of the tenant to repair by ordering the tenant to pay damages based on the cost of repair and the value of consequential losses.

V. Disposition:

[65] I would allow the appeal, dismiss the cross-appeal and restore the damage award made by the arbitrator.

[66] The Chambers judge awarded no costs of the proceedings before her because the landlord, although successful on other issues, had not succeeded on the damages issue. In light of my proposed reversal of that part of the judge's decision, the landlord should have its costs of the proceedings before the Chambers judge as well as of the appeal. In light of its success on the cross-appeal, the landlord should also be entitled to costs of the cross-appeal. I would, therefore, award the landlord costs both here and in the Supreme Court. Having regard to the amount involved, the nature of the issues and the fact that there was both an appeal and a cross-appeal, I would fix the costs payable by the respondent to the appellant, both here and in the Supreme Court, in the total amount of $8,000 plus disbursements.

Cromwell, J.A.

Concurred in:
Glube, C.J.N.S.
Saunders, J.A.