Date: 20011126
Docket: S.H. 166852

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Bolands Ltd. v. Ivan Smith Holdings Ltd., 2001 NSSC 171]

BETWEEN:

BOLANDS LIMITED, a body corporate, LOBLAWS PROPERTIES LIMITED, a body corporate, and the OSHAWA GROUP LIMITED, a body corporate

Appellants

- and -

IVAN SMITH HOLDINGS LIMITED, a body corporate

Respondent

D E C I S I O N

HEARD BEFORE:	The Honourable Justice Suzanne M. Hood, In Chambers
PLACE HEARD:	Halifax, Nova Scotia
DATE HEARD:	July 16, 2001
DECISION:	November 26 2001
COUNSEL:	**David P.S. Farrar, Q.C. and Kendrick Douglas,** for the Appellants **A. Douglas Tupper, Q.C., Douglas Skinner** and **L. Davies**, for the Respondent

HOOD, J.:

[1] The lease between a Landlord and Tenant contained an arbitration clause. The Tenant seeks to have the award of the arbitrator made pursuant to that clause quashed.

ISSUES

[2] The issues are:

1. Did the arbitrator correctly decide his jurisdiction?
2. Is the decision of a consensual arbitrator, protected by a privative clause, immune from judicial review, even if patently unreasonable?
3. If not, was the arbitrator's decision patently unreasonable in this case?

FACTS

[3] Ivan Smith Holdings Limited as Landlord and Bolands Limited as Tenant entered into a two-year commercial lease. Bolands was later amalgamated with Oshawa Holdings Limited which in turn was amalgamated with the Oshawa Group Limited. The lease was amended and then assigned to Loblaws Properties Limited. On the expiry of the lease, the Tenant vacated.

[4] A dispute arose between the Landlord and the Tenant about damage to the premises and whose responsibility it was to repair the damage. A dispute also arose about insurance coverage and whether insurance should have covered the damage.

[5] Peter J. MacKeigan was appointed sole arbitrator pursuant to clause 15.10 of the lease. The relevant portion of s. 15.10 is as follows:

> 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 ... his decision shall be final and binding on both parties.

[6] The arbitrator set out the issues before him at pp. 4 and 5 of his decision as follows:

> 1. Responsibility for Repairs
>
> (a) Did the loss occur as a result of the acts or omissions of the Tenant or its servants and agents?

(b) Is the loss one which is covered by insurance, within the meaning of the Lease?

(c) Did the Landlord cause or contribute to the loss?

2. Requirement for Notice:

(a) If the loss is covered by insurance, is the Tenant required to notify the Landlord of the loss and does a claim need to be made?

(b) Do the principles of waiver and estoppel apply as against the Tenant in these circumstances?

3. Is the Landlord entitled to rectify the Lease?

4. Does the arbitrator have jurisdiction to award damages?

(a) If yes, did the Landlord mitigate its damages?

[7] The arbitrator found the Tenant liable to the Landlord in the sums of $318,252.00 for repairs and $59,130.34 for loss of rental opportunity.

[8] The Tenant seeks to quash the decision of the arbitrator pursuant to s. 15 of the *Arbitration Act*, R.S.N.S. 1989, c. 19 as follows:

> 15(2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set aside the award.

JURISDICTION OF ARBITRATOR

[9] Both parties agree that the standard of review is correctness with respect to the issue of jurisdiction of the arbitrator. They disagree, however, about whether the arbitrator exceeded his jurisdiction.

[10] The Supreme Court of Canada cautions against finding excess of jurisdiction too readily. In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation* (1979), 97 D.L.R. (3d) 417, Dickson, J. (as he then was) said at p. 422:

> The Courts, in my view, should be alert not to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.

[11] Lamer, J. (as he then was) also said, in *Blanchard v. Control Data Canada Limited*, [1984] 2 S.C.R. 476 at p. 489:

> They [the courts] should only intervene if they find a genuine excess of jurisdiction by the arbitrator, not simply where they disagree with his findings.

[12] The appellants say that the arbitrator only has authority to interpret clauses or provisions of the lease, that is to interpret their meaning. They therefore say that the arbitrator had jurisdiction to determine who had the duty to repair under the lease but that he did not have jurisdiction to rectify the lease, nor accept parol evidence about the meaning of the lease, nor deal with the issue of estoppel.

[13] The respondent says it was within the arbitrator's jurisdiction to determine not only who was responsible for repairs, but also to rectify the lease and to use other canons of construction including estoppel. The respondent says this is so since the jurisdiction of arbitrators should be interpreted broadly.

[14] Both parties cite *Ontario v. Abilities Frontier Co-operative Homes Inc.* (1996), 5 C.P.C. (4th) 81 (Ont. Gen. Div.) as establishing the test for determining whether an arbitrator has jurisdiction. In that decision, Sharpe J. said at para. 11:

> The authorities establish that a two-step test is to be applied where a party seeks a stay or similar relief on the ground that the arbitration agreement does not apply to the dispute raised by the proposed arbitration. First, the court should ascertain the precise nature of the dispute which has arisen. Second, the court should determine whether the dispute is one which falls within the terms of the arbitration clause ... .

[15] The respondent says that in order for the arbitrator to settle disputes between the Landlord and the Tenant under the lease, the arbitrator had authority to rectify the lease, apply the principles of waiver and estoppel against the Tenant and award damages.

[16] I conclude that the disputes between the Landlord and Tenant were:

a) Who is responsible for repairs;
b) Whether the loss was covered by insurance and, if so, was notification by the Tenant required or did a claim need to be made;
c) The amount of the damages; and
d) Whether estoppel should be applied against the Tenant.

[17] The second step is to determine whether these disputes fall within the terms of the arbitration clause. The appellant argues for a very narrow interpretation of the arbitration clause, and the respondent argues for a very broad interpretation. I do not agree entirely with either position.

[18] The lease says in s. 15.10 that "any disagreement ... in regard to any clause or provision" of the lease "shall be settled by arbitration ..." The appellant asks me to interpret that provision as if the words "the interpretation of" any clause or provision of the lease appear in s. 15.10. They are not. I therefore conclude that it was the intent of the parties as expressed in the words of s. 15.10 that if a dispute arose with respect to any clause or provision of the lease, the arbitrator was not limited simply to interpreting the words of the lease but could deal more broadly with the clauses and provisions of the lease. This would include such things as rectifying the lease to incorporate the intent of the parties. To do so it would be necessary for the arbitrator to consider parol evidence.

[19] The respondent, on the other hand, would have me interpret s. 15.10 as if the words "in regard to any clause or provision" of the lease did not appear in s. 15.10. In my view, since they are there, they must be given some meaning.

[20] In giving a broad interpretation to arbitration provisions, I cannot ignore the wording the parties themselves chose.

[21] In *Bridgepoint International (Canada) Inc. v. Ericsson Canada Inc.*, [2001] Q.J. No. 2470 (Que. S.C.) Pierrette Rayle J. quoted in para. 6 from the dispute resolution clause which said in part:

> 13.1 The Parties will use their best efforts to resolve any disputes.

[22] In para. 9 Pierrette Rayle, J. said:

> 9. These agreements should not therefore be perceived as limiting the rights of the parties. They simply identify, <u>when clearly drafted</u>, a preferred way by which these rights may be exercised. (Emphasis added.)

[23] In *Cityscape Richmond Corp. v. Vanbots Construction Corp.*, [2001] O.J. No. 638 (Ont. S.C.J.) Trafford, J. says in para. 21:

> 21. What, then, is the proper interpretation of the arbitration clause under this contract? Is it properly characterized as one of limited arbitration? Alternatively, is it properly characterized as a universal arbitration clause? Giving it a large, liberal and remedial interpretation, I am satisfied that it is of sufficient scope to cover all of the disputes between Cityscape and Vanbots ... .

The clause which Trafford, J. interpreted was:

> 20. ...
>
> > Differences between the parties to the contract as to the interpretation, application or administration of the contract or any failure to agree where agreement between the parties is called for, herein collectively called disputes, which are not resolved in the first instance by findings of the consultant ... shall be settled in accordance with the requirements of part 8 of the general conditions - dispute resolution.

[24] In *Automatic Systems Inc. v. E.S. Fox Ltd.* (1995), 19 C.L.R. (2d) 35 (Ont. C.J.) Adams J. interpreted an arbitration clause in a subcontract. The clause provided in part:

> Contractor and Subcontractor shall work in good faith to settle all Claims.

In the contract, "claim" was defined as follows:

> 'Claim' means any demand or assertion by Contractor or Subcontractor against the other that seeks an interpretation of the Subcontract, and adjustment in the Subcontract Price or Subcontract Schedule or any other relief under the terms of this Subcontract.

[25] The arbitration clauses in both *Cityscape* and *Automatic Systems* are, in my view, far broader than that in this lease. I conclude that the arbitration clause under the lease is a limited arbitration clause. It does not provide that **all** disputes between the parties are to be settled by arbitration, but only disputes with regard to clauses or provisions of the lease. However, I interpret that wording broadly so as to carry out the intent of the parties. I conclude that it means more than simply interpreting the words in those clauses or provisions. It also means determining the intent of the parties. The parties did not provide that claims be settled by arbitration nor did they provide that all disputes arising out of the Landlord/Tenant relationship be settled by arbitration, but only those disputes involving the clauses of the lease itself.

[26] 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.

[27] I conclude that the awarding of damages is not the sort of doubtful case to which Dickson, J. referred to in *C.U.P.E.*, *supra.* I therefore conclude that this is a clear case of the arbitrator exceeding his jurisdiction.

[28] The arbitrator was not correct in concluding that he had authority to award damages. That is beyond the scope of the arbitration clause because it is not a dispute about the clauses or provisions of the lease. There is no jurisdiction to resolve a claim such as this which arises from the Landlord/Tenant relationship itself and not the clauses and provisions of the lease.

[29] I also conclude for the same reason that the arbitrator was incorrect in assuming jurisdiction to apply the principle of estoppel against the Tenants. In the decision at p. 29 (p. 35 Appeal Book, Volume 1), the arbitrator dealt with the issue of estoppel. After quoting from Waddams, *The Law of Contracts* and Fridman, *The Law of Contract*, he concludes:

> In such a situation it would be inequitable for strict rights to be upheld where the party now setting up the estoppel has relied upon the actions and statements to his detriment.

[30] The respondent says that applying the principle of estoppel is a canon of construction which the arbitrator was free to use, just as he was free to rectify the lease. I disagree. The principle of estoppel is an equitable principle and not a canon of construction. It does not assist in interpretation. Instead, it may allow a party to avoid the result of an interpretation where it would be inequitable to do otherwise.

[31] In applying the principle of estoppel, the arbitrator was not dealing with a dispute about a clause or provision of the lease. He was dealing instead with the conduct of the parties and the effect of that conduct. He said at pp. 29-30 of his decision:

> The Tenant by appropriate personnel who normally communicate with the Landlord had represented they would remedy the damages which they felt were not caused by faulty design of the curbs. This communication was relied upon by Ivan Smith Holdings.

[32] The arbitrator applied the equitable principle of estoppel. In doing so, he exceeded his jurisdiction under the arbitration clause of the lease. He was therefore acting outside his jurisdiction.

[33] Accordingly, the decisions of the arbitrator dealing with damages and estoppel are set aside. With respect to the rest of his decision, I conclude that it was within his jurisdiction to deal with those issues.

IMMUNITY FROM REVIEW

[34] The respondent urges upon the court that the decision of Hallett, J.A., in *Canada Post Corp. v. Canadian Postmasters and Assistants Association* (1993), 121 N.S.R. (2d) 112 (N.S.C.A.) stands for the proposition that, under certain circumstances, the decision of a consensual arbitrator protected by a privative clause is immune from judicial review even if wrong or patently unreasonable.

[35] The respondent refers the court to para. 39 of the Hallett decision:

> 39. The test for judicial review of an award of a consensual arbitrator protected by a privative clause is whether he exceeded or declined to exercise his jurisdiction, which question turns on the determination of the issue before him and whether he dealt with that question. If the issue before him involves the interpretation of clauses of the collective agreement the arbitrator must give to those clauses an interpretation the language will reasonably bear (**Volvo**). Finally, in exercising his jurisdiction, an arbitrator must comply with the recognized tenets of procedural fairness. If the arbitrator complies with these duties, his award is immune from judicial review even if it appears to be wrong or even patently unreasonable.

[36] The respondent says that greater deference is to be shown to a consensual arbitrator than to a statutory tribunal because a consensual arbitrator is one chosen by the parties and not imposed upon them. The respondent says that commercial parties negotiated an agreement which included provision for a consensual arbitrator whose decision would be final and binding. He says that it is important in the commercial context that a decision be made and that it be done expeditiously.

[37] The respondent submits that the effect of the *Canada Post* decision is that decisions of consensual arbitrators are immune from judicial review as long as the arbitrator correctly assumed jurisdiction and gave procedural fairness.

[38] The respondent submits this to be the case even if the interpretation given by a consensual arbitrator is patently unreasonable. The respondent says this flows from the greater degree of judicial deference given to decisions of consensual arbitrators.

The appellant says the respondent gives paragraph 39 the wrong interpretation and ignores the distinction between the second sentence and the last. The second sentence refers to giving the clauses of the collective agreement “an interpretation the language will reasonably bear”. The appellant says that when Hallett, J.A.

referred to immunity from judicial review he was referring only to "the award" and not the interpretation of clauses of a collective agreement, which interpretation must not be patently unreasonable.

[39] To resolve this issue, one must look carefully at the decision. In para. 11, Hallett, J.A. says:

> 11. The first issue to be addressed in this case is to determine the scope of judicial review from the decision of a consensual arbitrator. Counsel for the respondent submits, in his factum, that 'the accepted test for the review of an award of a consensual arbitrator is the same a that for a statutory tribunal, namely: is the award patently unreasonable?"

He continues in para. 11:

> I am not satisfied that the cases support such a definitive statement as that made by the respondent's counsel.

[40] Counsel for the respondent in the *Canada Post* case, cited *Shalansky and Saskatchewan Union of Nurses v. Regina Pasqua Hospital*, [1983] 1 S.C.R. 303; 47 N.R. 76; 25 Sask. R. 153 as one of the authorities for his submission. Hallett, J.A. says in para. 12:

> 12. The issue in the *Shalansky* case was to determine the scope of review by a court from an award in a grievance proceeding involving the <u>interpretation</u> of the collective agreement by a consensual arbitrator; not whether the award itself was patently unreasonable. It does not necessarily follow that if the interpretation of a collective agreement is reasonable that the award itself is reasonable. (Emphasis in original)

[41] Hallett, J.A. then refers to the *Volvo* decision in para. 16 (International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), Local 720 v. Volvo Canada Ltd.) He says:

> 16 ... The essence of that decision, which was followed in *Shalansky*, is that a court, in reviewing a decision of a consensual arbitrator involving the interpretation of the collective agreement, is to determine if the interpretation of the agreement by the arbitrator was patently unreasonable not whether it was the correct interpretation. These cases are not authority for the proposition that awards of consensual arbitrators ought to be set aside if the award is patently unreasonable.

[42] In para. 19, Hallett, J.A. said of the *Volvo* decision:

> 19 ... it signalled a trend of curial deference to decisions of consensual arbitrators where the issue was the interpretation of the collective agreement.

[43] Beginning in para. 21, Hallett, J.A. refers to decisions of the Supreme Court of Canada which "involved judicial review of decisions of statutory tribunals." He says that "... the Supreme Court ... has decided that the courts cannot defer to decisions which are patently unreasonable."

[44] Hallett, J.A. then goes on to say that he is not aware of decisions which give that expanded scope of judicial review to the judicial review of decisions of consensual arbitrators. He says in para. 23:

> 23. I am not aware of any decision of the Supreme Court of Canada that states this expanded scope of judicial review of decisions of statutory tribunals as developed in *Lester* and the other cases referred to ought to be applied to the judicial review of decisions of consensual arbitrators dealing with a grievance filed under a collective agreement and protected by a no review clause. Although not argued on the appeal, the issue is relevant in this case because the award of the learned arbitrator, depending on one's shock threshold, could be considered patently unreasonable but the interpretation of the relevant provisions of the collective agreement by the learned arbitrator is not.

[45] Beginning in para. 24, Hallett, J.A. refers to the *Lester* decision in some detail. Hallett, J.A. said of the *Lester* decision:

> 24 .... The decision of the tribunal in *Lester* was protected by a similar privative proviso. Awards of consensual arbitrators protected by a privative clause can be set aside for jurisdictional error which include the consensual arbitrator interpreting the agreement in a manner that the language of the agreement will not reasonably bear, acting in a biased or fraudulent manner or committing breaches of natural justice. These are recognized grounds for a court to interfere with the award. The question arises whether there should be added to this list of jurisdictional errors, the making, by the consensual arbitrator of a patently unreasonable award.

[46] Hallett, J.A. then summarizes the result of the *Lester* decision. He says in paras. 27 and 28:

> 27. In summary, the *Lester* decision confirmed that, at least in the face of a strong privative clause, curial deference ought to be extended both to the determination of facts and the interpretation of the legislation a statutory tribunal is empowered to administer. The court should interfere only if the evidence viewed reasonably is incapable of supporting a tribunal's finding of fact or where the interpretation of the statute it administers is patently unreasonable. Stated in another way the court should interfere if there has been a patently unreasonable error in the performance of the tribunal's function; that goes to findings of fact and interpretation of its governing statute by the tribunal. The test has been described by the Court as 'stringent' but it has expanded the scope of review of decisions of statutory tribunals.

> 28. In my opinion, the more specialized the tribunal the less inclined the courts should be to interfere with its awards. The split in the Supreme Court of Canada in *Lester* is evidence in itself of the mixed results that flow from the application of the expanded test of patent unreasonableness.

[47] Then Hallett, J.A. poses the central question in the *Canada Post* case in para. 29:

> 29. However, the question remains whether this expanded scope of judicial review of decisions of statutory tribunals applies to awards of consensual arbitrators; in my opinion it does not. First, there is o *(sic)* indication in either *Lester, Paccar or Corn Growers* that the Supreme Court of Canada intended the widened scope of review would apply to awards of consensual arbitrators. Secondly, the decision of the Supreme Court of Canada in British Columbia Telephone Co. v. Telecommunications Workers Union, [1988] 2 S.C.R. 564; 88 N.R. 260, indicates that the Court favours a restricted review of awards of consensual arbitrators in keeping with its decisions in *Volvo* and *Shalansky.*

[48] In *BC Telephone* the majority of the court adopted the reasons of Lambert, J.A. of the British Columbia Court of Appeal. Justice L'Heureux-Dubé dissented and in her dissent thoroughly reviewed Justice Lambert's dissenting reasons at the British Columbia Court of Appeal.

[49] Hallett, J.A. set out the entire majority decision and substantial portions of Justice L'Heureux-Dubé's dissent which, in turn, quoted extensively from the decision of Lambert, J.A.

[50] Justice L'Heureux-Dubé referred to the decision of Dickson, J. in *C.U.P.E. v. New Brunswick Liquor Commission*. Hallett, J.A. said of the passage quoted from the C.U.P.E. decision:

> 33. I would note that Dickson, J., was addressing his attention to the <u>interpretation</u> of a provision in the *Act* administered by the tribunal not whether the award was patently unreasonable and he was dealing with a decision of a statutory tribunal. (Emphasis in original)
>
> 34. Justice L'Heureux-Dubé concluded that the error in interpretation of an employee's status during a strike made by the learned arbitrator was jurisdictional and that the Court had a duty to intervene., She relied on decisions of the Supreme Court of Canada in cases involving the judicial review of decisions of statutory tribunals rather than consensual arbitrators. She then considered the non-interventionist policy adopted by the courts and specifically how far the courts should be disinclined to interfere with awards of consensual arbitrators.

Hallett, J.A. then said at para. 36:

36. Justice L'Heureux-Dubé in her reasoning then directed her attention to the decision of Lambert, J.A., and that of the majority in the Supreme Court of Canada. She stated at p. 587:

> Lambert, J.A., and the majority of this court by implication, place a great deal of weight on the fact that this was a consensual arbitration. In the words of Lambert, J.A., at p. 152:
>
> > A statutory tribunal should follow its own previous decisions and, for that reason, ought to be required to be right in its interpretation of general public enactments and general legal principles, and ought to arrive at its decisions, even on matters particularly within its special expertise and function, on the basis of a demonstrably rational process. Those requirements do not have quite the same force in the case of a consensual arbitrator. The significant fact about a consensual arbitrator is that the parties have picked the arbitration process, and they have picked the arbitrator, because they want that process and that arbitrator in preference to any other process or any other decision-maker. *And they want the arbitrator to do what they ask him to do in the way they ask him to do it and not to do something else in some other way.*
>
> > In short, the **Anisminic** principles apply to a consensual arbitrator, but there is a maximum scope for curial deference, and for judicial restraint, in the determination of whether the arbitrator contravened his terms of reference, and so made a 'jurisdictional' error. (Emphasis added by Hallett, J.A.)

With deference, I do not see how this elaboration of distinction between the two types of arbitrations establishes a need for a particularly restricted scope for judicial review in the case of consensual arbitrations. Without putting too fine a point on it, judicial review is judicial review. Where there is an error going to jurisdiction, judicial review is the proper remedy. There is no different standard for review in consensual arbitrations.

[51] Justice Hallett's reasons for quoting so extensively from the dissent of Justice L'Heureux-Dubé are explained in para. 38 as follows:

38. I have quoted extensively from her reasons to put those reasons in juxtaposition with those of the majority. The decision of the majority adopted the reasons of Lambert, J.A., that the error in law, assuming there was one, was within the learned arbitrator's jurisdiction, therefore, the award would withstand a judicial review. Insofar as Justice L'Heureux-Dubé rejected the reasoning of Lambert, J.A., it is reasonable to infer that the majority, having adopted his reasoning, rejected that of Justice L'Heureux-Dubé that the error in law was

> jurisdictional in nature. Based on the majority decision, I conclude that greater deference should be shown to awards of consensual arbitrators protected by a privative clause then to judicial review of decisions of statutory tribunals protected by a similar clause. There is no jurisprudence that specifically extends the scope of review of consensual arbitrators' awards so as to permit a court to set aside an award that is patently unreasonable although made within his jurisdiction. Therefore, I disagree with the submission of the respondent's counsel that the test for review of awards of a consensual arbitrator is the same as that for a statutory tribunal. I find that Mr. Justice Boudreau erred in law in applying the 'patently unreasonable award' test as developed in *Lester, Corn Growers* and *Paccar*. In face of the decision of the majority in *BC Telephone*, I would not presume that the Supreme Court of Canada in *Lester* intended the scope of the review of decisions of statutory tribunals would apply to consensual arbitrators without having expressly so stated. It would appear to me that the Supreme Court of Canada, in adopting the reasons of Lambert, J.A. has clearly indicated that awards of consensual arbitrators are entitled to be shown greater deference than the decisions of statutory tribunals for the reasons given by Lambert, J.A., which I have set out.

[52] It is in this context that the passage to which the respondent refers, para. 39 of Justice Hallett's decision, should be considered. I repeat it here for ease of reference.

> 39. The test for judicial review of an award of a consensual arbitrator protected by a privative clause is whether he exceeded or declined to exercise his jurisdiction, which question turns on the determination of the issue before him and whether he dealt with that question. If the issue before him involves the interpretation of clauses of the collective agreement the arbitrator must give to those clauses an interpretation the language will reasonably bear **(Volvo)**. Finally, in exercising his jurisdiction, an arbitrator must comply with the recognized tenets of procedural fairness. If the arbitrator complies with these duties, his award is immune from judicial review even if it appears to be wrong or even patently unreasonable.

[53] The following paragraphs of Justice Hallett's decision show how he applied his conclusions and the test that he set out in para. 39. In para.42, he says:

> 42. ... Therefore, it cannot be said that the learned arbitrator interpreted the Collective Agreement in a manner that the language of the Agreement would not reasonably bear.

He continues in that same paragraph:

> 42 ... In my opinion, this was a decision made within his jurisdiction as conferred on him by the submission made to him by the parties. I would have come to a different conclusion as it does not seem to me to make any sense to require Canada Post to complete a competition for a non-existent position.

> However, I would defer to the judgment of the experienced labour relations arbitrator who was asked by the parties to decide the issue. Simply because a court may find the award patently unreasonable in its result is insufficient reason to brand the award one of jurisdiction error that would justify setting it aside. (emphasis added)

[54] He concludes in para. 43:

> 43. The issue before the learned arbitrator was whether or not Canada Post had to complete the competition it had started. Based on the provisions of the Collective Agreement he decided that it did. He acted within his jurisdiction and his interpretation of the Collective Agreement is reasonable.

He summarizes in para. 59:

> 59. In summary I am satisfied that the learned arbitrator did not interpret the provisions of the Collective Agreement re staffing in a manner which the language would not reasonably bear notwithstanding that I do not agree with his result. (my emphasis)

[55] In my view, Justice Hallett's conclusions in paras. 42, 43 and 59 make it clear what he meant in para. 39, especially in light of his review of the *BC Telephone* decision. The test set out by Justice Hallett in para. 39 includes a determination of whether the arbitrator gave the clauses of the collective agreement an interpretation the language would reasonably bear. If the arbitrator does that and complies with the other duties to which Hallett, J.A. refers in para. 39 then his "award" is in fact immune from judicial review even if it appears to be wrong or even patently unreasonable. In other words, even if the result may be wrong or even patently unreasonable, it cannot be interfered with if the interpretation he gives to clauses to arrive at that result is one the language of those clauses will reasonably bear.

[56] The respondent also submits that the *Volvo* decision stands for more than what the appellant says it does. However, for the purpose of applying Justice Hallett's test for judicial review of an award of a consensual arbitrator, it must be recognized that he cited it for the conclusion that the arbitrator must give clauses of a collective agreement an interpretation the language will reasonably bear. Hallett, J.A. referred to the *Volvo* decision in para. 19 and, in the passage which I have quoted above, referred to the essence of that decision. He said that, when a court is reviewing the decision of a consensual arbitrator involving the interpretation of a collective agreement, the court is to determine if the interpretation by the arbitrator was patently unreasonable. In my view, it is for that proposition that Justice Hallett refers to *Volvo* in para. 39.

[57] Counsel referred me to a number of decisions in addition to the *Canada Post* decision. *U.M.W. District No. 26 v. Cape Breton Development Corp.* (1994), 130 N.S.R. (2d) 321 (C.A.) was a judicial review of a decision of a statutory tribunal. *C.U.P.E. Local 963 v. New Brunswick Liquor Corporations, supra,* was a judicial review of the decision of the Public Service Labour Relations Board, a statutory tribunal. *Atlantic Communications & Technical Workers Union v. Maritime Telegraph and Telephone Co.* (1991), 108 N.S.R. (2d) 30 is a Nova Scotia Supreme Court decision predating *Canada Post.*

[58] In *Sinanan v. Harbour Cities Veterinary Associates* (1997), 160 N.S.R. (2d) 57 (S.C.), MacAdam, J. referred to the *Canada Post* decision. He quotes from the decision in paras. 29, 30 and 31 including the test for judicial review set out by Hallett, J.A. However, the result in the *Sinanan* decision was with respect to the arbitrator having declined to exercise jurisdiction.

[59] In *Nova Scotia Teachers Union v. Nova Scotia (Min. of Education)* (1998), 170 N.S.R. (2d) 284 (S.C.), Nathanson, J. dealt with an application for judicial review of the decision of an arbitrator. Although he did not refer to the *Canada Post* decision, he did refer to the Supreme Court of Canada decision in *Paccar of Canada Ltd. v Canadian Association of Industrial, Mechanical and Allied Workers, Local 14,* [1989] 2 S.C.R. 983; 102 N.R. 1; 62 D.L.R. (4th) 437 and its decision in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941; 150 N.R. 161; 101 D.L.R. (4th) 673. He began his discussion of the issue of the appropriate standard of review by saying (para. 20):

> 20. Counsel do not seriously contest this first issue.

He then went on to say in para. 23:

> 23. It is also common ground that the test for judicial review of an award of a consensual arbitrator protected by a privative clause is whether he exceeded or declined to exercise his jurisdiction and, if the issue before him involves the interpretation of clauses of a collective agreement, the arbitrator must give to those clauses an interpretation the language will reasonably bear.

[60] Nathanson, J. said in para. 23 that both counsel cited *Paccar*:

> "as authority for a requirement that the courts must focus their inquiry on the existence of a rational basis for the decision and not on their agreement with it; the emphasis should be not so much on what result was arrived at, but on how the result was reached."

> He then, in para. 24, referred to the "rational basis" test in the *P.S.A.C.* decision as meaning that "the decision must not be clearly irrational."

[61] The only decision to which counsel for the respondent could refer me which he submits supports his interpretation of Justice Hallett's words is *Grey Goose Bus Lines v. Canadian Brotherhood of Railway Transport and General Workers*, [1994] M.J. No. 644 (Man. Q.B.). However, *Canada Post* was cited in that decision at para. 41 as authority for the arbitration having been concluded to be consensual and not statutory. Morse, J. then said in para. 42:

> 42. There is a less stringent standard of judicial review for an award of a statutory tribunal than for the award of a consensual tribunal. With respect to the consensual tribunal the court should adopt a 'hands off' policy and interfere only where there is bias, fraud, want of natural justice or want of jurisdiction in the strict sense.

[62] This, in my view, does not support the submission of the respondent. Furthermore, in *Grey Goose*, Morse, J. concluded that the tribunal in question was statutory not consensual. Accordingly, his comments about the "hands-off" policy of the courts towards a consensual arbitrator are *obiter*.

[63] I conclude that there is no absolute immunity for the decisions of consensual arbitrators as a result of the application of the test set out by Hallett, J.A. in *Canada Post*. It is true that greater judicial deference is shown to the decisions of consensual arbitrators than to those of statutory arbitrators. However, I cannot conclude that the decision of a consensual arbitrator cannot be quashed if the arbitrator fails to give an interpretation that the language of clauses of a collective or other agreement can reasonably bear. Nonetheless, if the arbitrator does not fail to give such an interpretation and meets the other requirements set out by Hallett, J.A. in *Canada Post* then, and only then, is the "award" immune from judicial review. This is so even if that award, which results from the interpretation, appears to be wrong or patently unreasonable.

[64] In this regard, one must bear in mind the factual situation in the *Canada Post* case. Those facts are (as cited in the case summary) as follows:

> Canada Post closed a rural post office before completing the competition process for the vacant postmaster's position, which no longer existed. A consensual arbitrator ruled that Canada Post was required to complete the competition.

[65] As previously quoted, Hallett, J. A. said at para 42:

> I would have come to a different conclusion as it does not seem to me to make any sense to require Canada Post to complete a competition for a nonexistent position.

[66] It was in this context that Hallett, J.A. made the distinction between the interpretation of the collective agreement made by the consensual arbitrator and the award, in terms of patent unreasonableness. He said in para 42:

> Therefore, it cannot be said that the learned arbitrator interpreted the Collective agreement in a manner that the language of the Agreement would not reasonably bear.

[67] That is the test for patent unreasonableness. Accordingly, Hallett, J.A. concluded (as previously quoted) at para. 42:

> Simply because a court may find the award patently unreasonable in its result is insufficient reason to brand the award one of jurisdictional error that would justify setting it aside.

[68] He stated it otherwise earlier in the decision at para. 23 (also already referred to) as follows:

> ... the award of the learned arbitrator, depending on one's shock threshold, could be considered patently unreasonable but the interpretation of the relevant provisions of the collective agreement by the learned arbitrator is not.

[69] Therefore, I turn now to the issue of whether, in resolving the dispute about the clauses or provisions of the lease, the arbitrator's conclusions about those clauses was patently unreasonable.

PATENT UNREASONABLENESS

[70] The appellants say that the award of the arbitrator should be set aside because he gave to the lease an interpretation the language could not reasonably bear or that he amended the lease, added to it or overlooked material provisions of it.

[71] In *U.M.W. District No. 26 v. Cape Breton Development Corp*. (1994), 130 N.S.R. (2d) 321 (N.S.C.A.), Chipman, J.A. quoted at para. 12 from *United Brotherhood of Carpenters and Joiners of America, Local 759 v. Bradco Construction Ltd.* (1993), 93 C.L.L.C. 12, 213 at p. 12,222:

> ... was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

Chipman, J.A. also quoted at para. 14 from *Nova Scotia Liquor Commission v. Nova Scotia Government Employees' Union, Local 470* (1990), 97 N.S.R. (2d) 55 at p. 57:

> Thus, in applying the test it is, in the last analysis, for the court to make a judgment call on the reasonableness of the decision under review. In doing so, it must exercise restraint and the jurisdiction to set aside such a decision will be sparingly used. Where, however, the court's evaluation of the decision leads to the conclusion that rather than having interpreted the agreement, the arbitrator has amended it, added to it or overlooked material provisions in it, the threshold is breached. Conscious of these restraints, it is necessary to review the merits of the arbitrator's award.

[72] In *Nova Scotia Teachers' Union, supra,* Nathanson, J. referred to the test as set out in *Paccar, supra*:

> ... that the courts must focus their inquiry on the existence of a rational basis for the decision and not on their agreement with it; the emphasis should be not so much on what result was arrived at, but how the result was reached.
>
> The 'rational basis' test was explained in the later case of Canada (Attorney General) v. P.S.A.C. ... to mean that the decision must not be clearly irrational.

[73] I have concluded above that the arbitrator's jurisdiction was broader than simply interpreting the words of the lease. However, that is an important part of what he was to do.

[74] In reviewing his decision then I am to determine if his conclusions were 'clearly irrational'. If not, they are not patently unreasonable and are not to be interfered with.

[75] The arbitrator found as a fact that the damage was caused by the Tenant. That is not in issue before me. What is in issue is insurance:

1) Whether it was to be in the names of both Landlord and Tenant as co-insureds;
2) Whether the Landlord obtained the required insurance;
3) Whether the Landlord waived any right of recovery against the Tenant;
4) Whether the insurance covered repeated damage; and
5) Whether notice had to be given by the Tenant of damage.

[76] Section 4.02 of the lease deals with fire insurance and provides 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 insurer 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.

Co-insured/Mutual Benefit

[77] The first issue with respect to the fire insurance clause is the portion of s. 4.02 which says:

... All policies of insurance ... shall be in the name of and for the mutual benefit of the Landlord and the Tenant ...

[78] The arbitrator deals with this issue at pages 17 through 22 of his decision (pages 23 through 28 of the Appeal Book, Part I, Tab CC). The arbitrator says at the top of p. 22:

I find that it was the intent that although the Tenant was not to be a named co-insured, the policies of insurance were for the mutual benefit of each of the parties. ...

Although the meaning of 'mutual benefit' as compared to the former wording requiring the policies to name both parties as co-insured is somewhat ambiguous, it is clear that the tenant was to have the benefit of the insurance policies in accordance with their specific terms. However obviously the parties intended the wording change to reflect a new meaning of paragraph 4.02, otherwise why make a change.

[79] In dealing with this portion of s. 4.02, the arbitrator refers to the law with respect to the remedy of rectification. The appellants say that the arbitrator correctly stated the law with respect to rectification but applied it incorrectly in the case at hand. The appellants say that the law of rectification cannot be applied by the arbitrator in a case such as this. However, I have concluded above that to have done so is not an excess of the arbitrator's jurisdiction. The question then remains whether the arbitrator's conclusion is patently unreasonable.

[80] The evidence with respect to this issue is contained at Tab GG of the Appeal Book, Part I, Volume I beginning at p. 195. At p. 201 (Tab 3), the words "naming the Landlord and Tenant as co-insureds" are struck out in the draft of s. 4.02. At p. 203 (Tab 4), a letter from Bolands to Ivan Smith Holdings Limited dated November 13, 1996 refers to the insurance coverage. It says ,"This coverage is to be in the name of and for the mutual benefit of the Landlord and the Tenant". The policy requested in that letter is at p. 205 (Tab 5). It gives the insured's name as "Ivan Smith Holdings Ltd. and Nova Cold Consolidated Ltd." Bolands is not named. At p. 209 (Tab 6), there is another letter from Bolands dated approximately four months after the letter at Tab 4. It says, "... Bolands Limited is to be named as an additional named insured" and asks that the policy be amended. The reply from Ivan Smith Holdings' lawyer, David J. Cook, at p. 211 (Tab 7) says:

> When Mr. Gurnham submitted the first draft of clause 402 *[sic]* it required the naming of the Tenant and Landlord as co-insured on the policy. My client *[sic]* insurance agent advised against this and the co-insured provision was deleted from 4.02. The intent was that Bolands would not be named on the policy, but Ivan Smith Holdings acknowledged that the policy would be for the mutual benefit of the five parties.

[81] In his decision at p. 18, the arbitrator referred to the May 5, 1997 letter. He also referred to David Cook's testimony before him. He says on pp. 18-19:

> ... he suggested some of the additional wording in Section 4.02 should have been deleted. In his view, he understood Ivan Smith Holdings was to be the sole policy holder although he understood the policy was being held for the mutual benefit of both parties.
>
> Respecting the difference between parties named as a co-insured and the reference to mutual benefit, Mr. Cooke *[sic]* stated that in his mind 'there was no magic to the wording'.

[82] I conclude that the arbitrator did not give to this provision of the lease a meaning the language could not reasonably bear. His interpretation was therefore not patently unreasonably. He reviewed the wording of s. 4.02,

heard the testimony of David Cook and reviewed the documentary evidence. In my view, there was a rational basis for his conclusion.

Requirement to Obtain Insurance

[83] In s. 4.02 quoted above, the Landlord agreed to carry "fire insurance with normal extended coverage endorsements ... ." On p. 22 of his decision, the arbitrator said:

> 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.

[84] One of the questions which was before the arbitrator was "Is the loss one which is covered by insurance, within the meaning of the Lease?"

[85] The appellants' position is that the Landlord's requirement to have insurance included an obligation to have "all risk insurance". The arbitrator concluded that was not the case and that the insurance which the Landlord obtained complied with the requirements of s. 4.02 of the lease.

[86] The appellants' alternate argument is that the lease sets out a scheme of insurance in s. 4.02 and s. 3.04.

[87] The arbitrator said at p. 22 under the heading Section 3.04 - Landlord's Repairs:

> Section 3.04 has quite a different purpose than Section 4.02 and speaks of the division of responsibility between the Landlord and the Tenant for repairs where there is insurance coverage and when there is not insurance coverage.

He concluded on p. 23:

> If the damages are not covered by the insurance then the Tenant is responsible.

[88] The arbitrator came to this conclusion after reviewing the Landlord's obligations to repair under s. 3.04. He quoted the section of the lease and underlined two passages from the section. He said what was at issue was the underlined portions of those paragraphs.

[89] The evidence before the arbitrator included the offer to lease dated June 20, 1996 from Bolands (Tab D) p. 107. The offer to lease lists as one of the Landlord's responsibilities, item 4 (d) "fire insurance".

[90] The arbitrator said in his decision at p. 18:

> The evidence and the exhibits would indicate that the insurance policy that the Landlord has carried was acceptable to both parties. A copy of the policy was

> requested by the Landlord from the Tenant and Peter Malloy, Controller for Bolands, by letter of March 20, 1997 confirmed he had a copy of the policy. The only issue respecting the policy at that time was whether the parties were to be named as co-insured or not and the "mutual benefit" wording.

[91] At Tab 4 of section GG of the Appeal Book, Part I is a letter from Bolands Limited requesting a copy of the insurance coverage and referring to s. 4.02 of the lease and the Landlord's obligation to carry fire insurance. At Tab 5 is a copy of the Declaration Page of the insurance. Following that is the March 20, 1997 letter to which the arbitrator refers in which Peter Malloy thanks the Landlord for providing a copy of the insurance policy and asks about Bolands Limited being an additional named insured. The correspondence which follows deals with the "named insured/mutual benefit provision". There is no other correspondence in the exhibits from 1997 raising any issue with the insurance coverage.

[92] The arbitrator concluded that ss. 3.04 and 4.02 had different purposes. He referred to portions of s. 3.04 which dealt with the Tenant's obligation to repair "to the extent not covered by insurance" and with the Landlord's obligation to repair damage "from perils insured against". He then concluded that if there was no insurance for damage it was the Tenant's responsibility. He refers to the correspondence about insurance before the lease was executed and after its execution. In my view, based upon the evidence before him, he gave to these provisions of the lease an interpretation their language could reasonably bear. In my view, there was a rational basis for his conclusion. His interpretation was not patently unreasonable.

Waiver

[93] The appellants say that the Landlord waived its right of recovery against the Tenant. They say that is the meaning to be given to the words in s. 4.02:

> 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.

[94] The appellants say this is an unqualified waiver. They say that the arbitrator added to or amended the lease by "saying that the waiver only applied in certain circumstances" (quoting from para. 52, appellants' factum).

[95] The waiver clause is part of clause 4.02 which is entitled "Fire Insurance". The waiver provision is part of a long sentence which begins with the words

"All policies of insurance ...". It includes the words "... all such policies shall be endorsed ...". The words of waiver appear at the end of that sentence.

[96] The arbitrator's conclusion that the waiver applied only where there was insurance to cover the damage is an interpretation those words can reasonably bear. It is not clearly irrational. It is therefore not patently unreasonable.

Insurance Coverage for Repeated Damage

[97] At p. 25 of his decision, the arbitrator found as follows:

> I find it [cumulative damage] is not a peril covered in the policies of insurance.

[98] The appellants say there is no basis for this conclusion and, furthermore, that the arbitrator, in coming to this conclusion, was interpreting the insurance policy.

[99] Section 3.04 of the lease is the relevant section. It provides as follows:

> **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 ...
>
> (ii) maintain the exterior of the Premises in good structural condition and repair and make all structural repairs and replacement necessitated by any causse 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 building 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.

[100] In that section, two portions are noteworthy. The first is that, although the Landlord has the obligation to maintain the premises and carry out repairs, there is a "notwithstanding" clause. That clause provides: "... 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 second is the Landlord's covenant that "... 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."

[101] The arbitrator concluded that the damage was not covered by insurance. He found that the damage was caused by the Tenant. He said at p. 25:

> 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.

[102] The appellants and the respondent rely on separate letters from G.E. Morgan Adjusters Ltd. in support of their positions. The appellants rely on the letter at Tab 00, p. 616. In that letter, G.E. Morgan, C.L.A., says:

> > Under the Property Policy, was there coverage for accidental damage caused to the building as a result of impact by a motorized vehicle?
>
> In response to this, the answer is "yes", ...

[103] The respondents rely upon the letter from Mr. Morgan at Tab MM at pp. 612-13. In that letter, Mr. Morgan says at p. 612:

> What I basically meant is that the policy of insurance is not designed to cover constant and continual losses causing damages which are considered to be cumulative or accumulative losses.

[104] The appellants say that the arbitrator was not permitted to interpret the insurance policy but only the lease. I have already addressed the issue of the arbitrator's jurisdiction and the authority he had to do more than "interpret" the lease.

[105] The arbitrator had jurisdiction to resolve disputes about provisions of the lease. To do so, he could, in my view, look at evidence to assist him in resolving a dispute about the meaning of s. 3.02. He did not interpret the insurance policy. He reviewed the two Morgan letters. He may have chosen one meaning over the other if he considered the two letters inconsistent. Or he may have concluded there was coverage for a single incident but not for "cumulative damage". In either event, he concluded that the meaning of clause 3.02 was that there was no insurance for "perils insured against under policies of insurance effected by the Landlord ...".

[106] He therefore gave to clause 3.04 an interpretation which was not patently unreasonable. There is a rational basis to support his conclusion.

Lack of Notice

[107] The appellants say that the arbitrator concluded, with no evidence before him, that the Tenant had to notify the Landlord of damage.

[108] The arbitrator says on p. 26:

> I find that the [sic] if the Tenant wants to avail it self [sic] of the benefits of the lease it must make know [sic] the damages in a timely manner. The Tenant knows when there is damage. Although Mr. Smith knew there was damage early in the lease he did not know the extent nor did the Tenant advise him.

[109] The appellants say that the arbitrator therefore added an additional provision to the lease requiring the Tenant to give the Landlord notice of damage. They say the Landlord had a right to enter to do inspections and that right was unrestricted. They also say there was no refusal of entry to the Landlord by the Tenant.

[110] The arbitration was to arbitrate disputes about provisions of the lease. As I have said, this gives the arbitrator authority to do more than just interpret the meaning of the words of the lease. The dispute was over whether the Tenant had to give the Landlord notice to have the benefit of the Landlord's insurance coverage. This is a dispute about s. 4.02 of the lease which provides for insurance coverage for the "mutual benefit" of the Landlord and the Tenant. To resolve that dispute, the arbitrator concluded that for the Tenant to benefit it must give notice. To come to this conclusion, the arbitrator considered another disputed provision of the lease: s. 3.02, which provided for inspections by the Landlord.

This is a dispute about clauses or provisions of the lease which it was within the arbitrator's jurisdiction to adjudicate upon. In doing so, he did not make a patently unreasonable finding. There is a rational basis for this conclusion evident from his decision.

CONCLUSION

[111] In summary, I conclude that those portions of the arbitrator's decision where he accepted estimates of costs of repairs and loss of rental opportunity and awarded damages and where he applied the equitable principle of estoppel are to be quashed. The application is dismissed with respect to the rest of the arbitrator's decision.

COSTS

[112] There has been mixed success, but I will accept written submissions from the parties if they cannot agree on costs.

Hood, J.