IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-7
[2013] NZHC 1272

UNDER	the Arbitration Act 1996
IN THE MATTER	of an originating application pursuant to Article 34 of the First Schedule of the Arbitration Act in relation to awards in an arbitration
BETWEEN	KIWI EMPIRE CONFECTIONERY LIMITED Applicant
AND	PARAMJIT KAUR SINGH, HARDIAL SINGH and UDAY MADHUSUDAN GOGTAY Respondents

Hearing: 13 May 2013

Counsel: M B Wigley for the Applicant
G J Judd QC for the Respondents

Judgment: 31 May 2013

JUDGMENT OF WOODHOUSE J

This judgment was delivered by me on 31 May 2013 at 3:00 p.m.
pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Solicitors / Counsel:
Mr M B Wigley, Wigley & Company, Solicitors, Wellington
Mr G J Judd QC, Barrister, Auckland
Mr G Skeates (respondents' instructing solicitor), Skeates Law, Solicitors, Auckland

[1] The applicant has applied to set aside an arbitrator's award. The award was made in respect of claims relating to a lease of a factory by the applicant (the tenant) from the respondent (the landlord).

The background and issues in outline

[2] After the lease came to an end the tenant brought a claim that it had suffered losses in the operation of its business as a result of flooding of the premises on a number of occasions. The tenant claimed that the flooding occurred because of failure by the landlord to comply with the landlord's obligation under the lease to keep and maintain the building and building services in good order and repair. The landlord accepted that flooding had occurred, but contended that this arose as a result of failure by the tenant to meet its obligation under the lease to keep and maintain the storm water drainage system clear and unobstructed. The arbitrator found in favour of the landlord.[1]

[3] The tenant contended that there were two errors by the arbitrator as a consequence of which the award should be set aside. The first was said to arise from the fact that the parties had agreed that the arbitration would proceed in two "phases". Phase 1 would deal only with liability. Mr Wigley, for the tenant, submitted in essence that the first phase enquiry was further limited by the way in which the claim was advanced for the tenant. Mr Wigley submitted that the arbitrator should have confined his determination in phase 1 to the question whether there had been breach by the landlord of its obligation to keep and maintain the building services. Mr Wigley submitted that the arbitrator erred in that he in fact determined that flooding occurred as a result of failure by the tenant to meet its obligation under the lease to keep the waste water system clear and unobstructed. It was submitted that in proceeding in this way three grounds prescribed in the Arbitration Act 1996 (the Act) for setting aside an award were made out, with particular emphasis on breach of natural justice. These grounds are noted below.

[1] This was a conclusion in a partial award. Some further issues, and in particular relating to costs, were dealt with in a final award. The final award is not relevant. For convenience I will refer to the partial award as the award. There was a counterclaim by the landlord for outstanding rent and other expenses. There was an award in favour of the landlord on these claims. This part of the award does not require consideration on the tenant's application to set aside the award, which application is directed only to that part of the award dealing with the tenant's claim.

[4] The second error was said to arise from the way the arbitrator dealt with a question whether the tenant had given notice to the landlord which was sufficiently explicit to trigger the landlord's obligation to keep and maintain the building services. The essence of the tenant's complaint was that the arbitrator found against the tenant on this point but failed to provide any, or any adequate, reasons. It was submitted that the failure to provide reasons is a breach of natural justice and that this also provides grounds to set aside the award.

Grounds for setting aside

[5] The grounds on which an arbitral award may be set aside are set out in the Act in article 34 of Schedule 1. The tenant relied on three grounds as follows:

(a) Article 34(2)(a)(ii): "The party making the application [to set aside the award] … was … unable to present that party's case;"

(b) Article 34(2)(a)(iii): "The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration …"

(c) Articles 34(2)(b)(ii) and 34(6)(b): "The award is in conflict with the public policy of New Zealand" because there was "a breach of the rules of natural justice [which] occurred … during the arbitral proceedings or in connection with the making of the award". Article 34(6)(b) provides that a breach of the rules of natural justice which occurs during the arbitral proceedings or in connection with the making of the award will be in conflict with the public policy of New Zealand, being the ground specified in article 34(2)(b)(ii).

[6] The tenant also relied on articles 18 and 31(2) of Schedule 1 to the Act, which provide as follows:

(a) Article 18: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting that party's case."

(b) Article 31(2) requires an award to state the reasons upon which it is based. There are two exceptions to this, neither of which applies.

It was submitted for the tenant that breach of these articles, which are mandatory "constitute (or inform) breaches of natural justice under article 34".

Conclusion in summary

[7] The applicant has not established grounds to set aside the award.

[8] I am satisfied there was no error by the arbitrator as to the scope of the hearing in phase 1. My reasons, in summary, are as follows:

(a) As a matter of fact, although the tenant submitted to the arbitrator that phase 1 should be confined to determining a single issue as to whether there had been breach by the landlord, the landlord made plain that it did not agree and that phase 1 also required a determination whether there had been breach by the tenant.

(b) Evidence and submissions for the tenant were not confined to arguments solely in support of the positive contention that there had been breach by the landlord.

(c) The underpinning of the application to set aside is a contention that there was breach of natural justice. The tenant had clear notice that the landlord did not agree that the phase 1 enquiry should be confined to the limited enquiry contended for by the tenant. As a result of such notice the tenant had adequate opportunity to respond. There was no breach of natural justice.

(d) Given the terms of the lease, the tenant's claim, and the evidence, particularly the expert evidence, the arbitrator was bound to make the enquiry and determinations that he did make.

(e) Included in the matters the arbitrator was bound to determine as the first step in analysis of the tenant's own claim was whether the flooding had been caused by the tenant's breach of the tenant's obligation to clear.

(f) The finding that flooding had been caused by the tenant's breach was not a determination of causation in relation to loss.

(g) It is doubtful that a failure by an arbitrator to provide reasons is a breach of natural justice under the Act, as opposed to an error of law. In any event sufficient reasons were provided on all material matters.

[9] Given the preceding conclusion it is not strictly necessary to decide whether there was any error by the arbitrator as to the adequacy of the tenant's notices to the landlord. But I am satisfied that there was no error. Adequate reasons were provided for the decision.

The lease

[10] The relevant obligation of the landlord is in clause 11.1. The material part of this is as follows:

> The Landlord shall keep and maintain the building [and] all building services … but the Landlord shall not be liable for any … repair or maintenance which the Tenant is responsible to undertake.

[11] The relevant obligation of the tenant was in clause 8.2. The material part of this is as follows:

> Where the Tenant is leasing all of the property, the Tenant shall … keep and maintain the storm or waste water drainage system including downpipes and guttering clear and unobstructed.

[12] I will refer to the clause 11.1 obligation as the "landlord's maintenance obligation" and to the clause 8.2 obligation as the "tenant's obligation to clear".

The arbitration agreement

[13] In the arbitration agreement the parties agreed that they would be bound by the findings of the arbitrator "subject only to such rights as the parties may have under articles 33 and 34 of the first Schedule to [the Act] and clauses 5(1)(b) & (c) of the second Schedule to the Act". Article 33 has no relevance in this case. Clauses 4 and 5 of Schedule 2 deal, respectively, with determinations of preliminary points of law by the High Court and appeals on questions of law to the High Court. The parties agreed to exclude those provisions save for appeals on questions of law with the consent of all parties or with the leave of the High Court. There has been no appeal by consent and no application for leave to appeal on a question of law.

Two "phases" to the arbitration: what was covered by phase 1 – the tenant's points of claim and the landlord's points of defence

[14] A separation of the proceeding into two phases was agreed in communications between counsel. This is not in issue. In the hearing before me Mr Wigley and Mr Judd QC confirmed that it was an agreement in broad terms to the effect that liability would be determined in phase 1 and quantum would be left for phase 2 (if required). It was further accepted by both counsel that there was no further definition of matters to be dealt with in one phase or the other arising from an agreement between counsel. The argument for the tenant as to a more limited scope of phase 1 was based upon the way in which the case for the tenant was presented in its points of claim and submissions and the way in which the landlord responded.

[15] Mr Wigley referred me to the tenant's points of claim and numbers of submissions in writing presented to the arbitrator both before and after the hearing. The points of claim and written submissions do record, expressly or implicitly, a contention for the tenant to the essential effect that the only question for the arbitrator in phase 1 was whether there had been a failure by the landlord to comply with the landlord's maintenance obligation in relation to drains. It is unnecessary to set out the detail. Mr Wigley submitted that the position taken for the tenant in the tenant's points of claim and submissions was not challenged in the responses for the landlord. Mr Wigley submitted that the arbitrator was in consequence bound to confine his decision to a determination whether the landlord had breached the

landlord's maintenance obligation on at least one of the pleaded occasions of flooding. It was submitted to the arbitrator (as it was to me) that a finding of breach by the landlord on only one occasion would have been sufficient for the tenant's claim to proceed to the phase 2 hearing including, but not limited to, questions of causation as well as quantum.

[16] This approach on the part of the tenant was made explicit in a lengthy submission for the tenant which was presented before the arbitral hearing.[2] Mr Wigley also referred me to his written submissions for the tenant presented after the hearing.

[17] For the landlord Mr Judd QC also referred me to parts of the pleadings and numbers of submissions, including submissions for the tenant as well as submissions for the landlord, indicating a much broader approach. Again, it is unnecessary to refer to the detail, save to reproduce three paragraphs in a submission made at the commencement of the hearing. Mr Judd submitted:

> 1. The Tenant must prove that the Landlord suffered loss as a result of the Landlord's breach of covenant. Suffering loss is a necessary ingredient of establishing liability. Breach of the Landlord's covenant is a necessary ingredient of establishing liability. A causal connection between the breach of the Landlord's covenant and loss is a necessary ingredient of establishing liability. Quantification of any loss caused by breach of the Landlord's covenant is for the second phase of the arbitration if we get that far. But some loss caused by breach must be proved to establish liability.
>
> 2. More specifically, the Tenant must prove that the Landlord failed to keep and maintain the building (which for present purposes means the drainage system) in good order and repair and that such failure caused the Tenant to suffer loss arising from want of repair or defect in respect of which the Landlord did not within a reasonable time after receiving notice in writing thereof from the Tenant take appropriate steps to remedy.
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> 3. The Landlord is not liable for repair or maintenance which the Tenant is responsible to undertake and the tenant is required to keep and maintain the storm water drainage system including downpipes and guttering clear and unobstructed.

[2] The undated "submissions in reply on behalf of tenant as to tenant's claim", BOD volume 1, p 63 ff at para 4.1

The arbitral process

[18] The arbitrator has included in his award a reasonably full summary of the arbitral process through to his receipt of final written submissions for the parties following the hearing. Matters of relevance in respect of the process are as follows:

(a) There were three pre-hearing case management conferences. Two which took place after presentation of all of the pre-hearing submissions for both the landlord and the tenant. There is no record of an issue being raised for the tenant or for the landlord arising out of the fact that the extent of the matters being argued on one side or the other were different. The arbitrator recorded the scope of phase 1 as follows:

> [15] It was also agreed before the *via voce* hearing started that any and all issues as to the quantum of losses suffered by [the tenant] as a result of flooding would be left to be dealt with at a second stage of the arbitral process. My task in relation to [the tenant's] claims at this first stage is only to decide whether [the landlord] is liable for the kind of losses claimed by [the tenant].

(b) Evidence relating to the landlord's counterclaim was heard first, followed by evidence from witnesses of fact relating to the tenant's claim. This evidence had been completed by the end of the second day. It was then agreed that there should be an adjournment for one day to allow expert witnesses to undertake some further investigations and to confer. These were experts on the causes of the flooding, two for the tenant and one for the landlord. The following day the hearing resumed for the experts to give their evidence. They gave their evidence together with a full exchange of opinions and cross-examination of them. The arbitrator said that he found this very helpful to his understanding of the drainage issues. He noted that, in the end, the experts agreed on all but two points. He discussed this more fully later in the award, as noted below.

(c) The arbitrator said that at the end of the hearing Mr Judd presented his submissions for the landlord in response to the tenant's claim. These may have been entirely oral; I have not been given a copy of a written submission presented at that stage of the proceeding. Although the arbitrator did not, when recording the process, summarise the content of these submissions, I am satisfied that it may safely be inferred that they were consistent with the way in which the landlord's response to the tenant's claim had been argued from the outset, and continued to be argued in subsequent written submissions.

(d) A timetable was put in place for presentation of written submissions for the landlord in support of its claim (and which would enable response to Mr Judd's oral submissions at the end of the hearing), and for a reply for the landlord. Copies of these further written submissions are included in the bundle of documents on this application. Both counsel referred me to parts of them and this has been taken into account.

The award on the tenant's claim

[19] At the commencement of his discussion of the tenant's claim the arbitrator noted some categories of evidence that he was not going to describe in any detail but which he had taken into account. There is then a heading: "The central issue". Clauses 8.2(c) (the tenant's obligation to clear) and clause 11.1(d) (the landlord's maintenance obligation) are set out with the central issue then stated as follows:

> [101] At the risk of some over-simplification, the most important question I have to decide under this heading is whether the cause of the flooding during [the tenant's] occupancy of the factory was:
>
> [a] Failure by [the landlord] to keep and maintain the storm water drainage system in good order and repair,[3] or
>
> [b] Failure by [the tenant] to keep it clear and unobstructed.

[3] [This is a footnote to the award.] "There is of course an ancillary issue if I find that [the landlord] was responsible, since its liability is contingent on receipt of notice under cl.11.1(d) of the lease, and there is a dispute as to whether any such notice was given."

[20] The arbitrator's definition of the issues in this way is central to the application now made for the tenant to set the award aside. Mr Wigley submitted, in essence, that the arbitrator should have confined his decision to an answer to question [a].

[21] The evidence of the experts was pivotal to the dismissal of the tenant's claim. Given the nature of the challenge now made for the tenant, it will assist to reproduce some parts of the award as well as to summarise others.

[22] The issues changed as a consequence of the evidence given by the experts. The arbitrator said:

> [110] As noted above, before the hearing started it seemed likely that there would be significant argument about the extent of [the landlord's] obligations, including whether and to what extent a landlord has any obligation to improve leased premises after demise in order to prevent the kind of flooding that was experienced by [the tenant] at the factory. However this debate has in my view been completely overtaken by the evidence that was given at the hearing.
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> …
>
> [112] It is fair to say that all three of the experts had spent most time investigating the drainage system at the factory and dealing with their findings in the few days just before the hearing started.[4] …

[23] The arbitrator then recorded, over approximately two pages, seven propositions relating to the drainage system which appeared to the arbitrator to have been understood only at a relatively late stage before the hearing. He said that by the time the experts gave their evidence all three of them agreed with the seven propositions which, in broad terms, related to the capacity of the drainage system.

[24] The arbitrator said there were only two matters of disagreement between the two experts for the tenant and the one expert for the landlord. It is unnecessary to describe these matters. The essence of the arbitrator's conclusions was that these points of difference did not bear in a relevant way on the answer to the tenant's claim.

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[4] [This is a footnote in the award.] "This is not a criticism; I mention it only to explain that there was some movement in the statements that were filed in advance of the hearing reflecting the fact that the experts' understanding of the drainage system, and what had been done to it over time, was still developing as the hearing approached."

[25] The arbitrator also referred to some other evidence, from witnesses of fact. He held that it was not possible to draw any precise conclusions from this evidence.

[26] The arbitrator then recorded his conclusions on the facts. These conclusions, and the preceding discussion, led to a detailed discussion under the heading: "Whose responsibility?". It is a comprehensive discussion. It is founded on a preceding finding of fact that there was a blockage either in one or two pipes, or at a chamber, or in all three.

[27] The arbitrator commenced this discussion as follows:

> [120] Whether the blockage was in the pipes or at the chamber (or in all three), I regard it as clear that responsibility for clearing any obstruction from the storm drainage system lay with [the tenant] under cl.8.2(c) of the lease.

[28] He then referred to a submission from Mr Wigley which was to the effect that the tenant's obligation to clear did not apply to the blockages identified by the arbitrator. The arbitrator referred to a contrary argument for the landlord. He then explained why he preferred the landlord's argument.

[29] Over the following two or so pages the arbitrator discussed a range of further submissions for the tenant, the responses for the landlord, and his reasons for not accepting the arguments for the tenant.

[30] The arbitrator said the following at the end of this extended discussion:

> [131] In fairness to Mr Wigley, I should say that these conclusions are made very clear by the evidence that emerged as a result of the efforts of the experts in the few days before the hearing began, and during the discussion between them at the hearing. This would have been a more difficult case to decide if the evidence had established (for example) that the real problem was a broken pipe, or a design flaw in respect of the soak pit. Responsibility for fixing a broken pipe, or ensuring that the soak pit provided an adequate solution to the drainage issues at the factory, might well have been the responsibility of [the landlord] rather than [the tenant].[5] I can also see that before the chamber was discovered and its significance

[5] [This is a footnote in the award.] "To be clear: for reasons already given, even if the soak pit was inadequate and/or silted up, it makes no difference in this case. If the pipes from the right hand sump and the grate at the chamber had been clear the flooding problems would not have been suffered as they were."

realised, the problem might well have looked to counsel like one relating to inadequacy of the system rather than a simple blockage.

[132] However the evidence has now made it clear that the cause of the flooding was blocked drains not broken drains or an inadequate soak pit.

[133] My conclusion that [the tenant] was responsible to keep the drainage system clear and free of the obstructions that caused the flooding at the factory means that it is not necessary for me to decide whether the complaints made by [the tenant] complied with cl.11.1(d) of the lease. If it were necessary to do so, again I would have found in favour of [the landlord]. I have not been persuaded that the communications that I was shown specify the defect or want of repair that [the landlord] was being required to remedy in sufficient detail. An example will illustrate: say [the tenant] had investigated the low pipe from the right sump to the chamber, and found it not to be blocked but broken. In my view the scheme of the lease would then have entitled [the tenant] to give notice to [the landlord] telling [the landlord] that the pipe was broken, and requiring [the landlord] to repair it. At that point [the landlord] would have been required to repair the pipe, and liable to [the tenant] for any damages suffered if it failed to do so within a reasonable time.

[134] General complaints by [the tenant] about flooding do not seem to me to meet the requirements of cl.11.1(d). Certainly I do not think it was sufficient for [the tenant] to make demands that [the landlord] must come and fix the drainage system on the basis of an assertion that *'… the drain is not able to handle the rains..'* when it ([the tenant]) had not first established that the system was broken or inadequate (as opposed to just being blocked up).

Discussion

[31] The primary issue is whether the arbitrator should have confined his award in phase 1 to a determination whether there had been breach of the landlord's maintenance obligation. Contained within this, and arising from Mr Wigley's submissions, is an issue whether the arbitrator should not have made a determination that the flooding occurred because of breach of the tenant's clearing obligation.

[32] As I have earlier recorded, documents presented for the tenant in support of its claim do record, and sometimes explicitly, a proposition that phase 1 should deal only with the question whether there had been breach by the landlord of the landlord's maintenance obligation. I accept Mr Wigley's submission that there was no written submission for the landlord with an explicit statement that phase 1 was not limited in the manner contended for by the tenant. I also accept Mr Wigley's

submissions that, in principle, the way in which a case is presented for one party and responded to by the other may give rise to an effective acceptance on both sides of the specific issues to be addressed with the effect of this meaning, in the circumstances, that determination of other issues by an arbitrator (or judge), or failure by the arbitrator (or judge) to address the identified issues, could result in a breach of natural justice, or breach of one of the other grounds in article 34 relied on by the tenant. Mr Wigley also submitted that the question in this case as to what issues were to be determined in phase 1 cannot be decided simply by reference to the acknowledged agreement to deal with liability in phase 1 and quantum in phase 2. In that regard I again accept that, as a matter of principle, an initial agreement to deal with all questions of liability in phase 1 could be narrowed at some point before the arbitral award is issued. Obviously that can occur by further agreement and, as a matter of principle, it could also occur because of the way in which the parties present their cases. Generally the cut-off point for a narrowing of issues would be in submissions at the conclusion of a hearing but, again in principle, that does not necessarily follow.

[33] Mr Wigley cited cases in support of some of the general principles. It is unnecessary to refer to these cases. The general principles are all straightforward. But the general principles do not assist the tenant. There are a number of reasons. And, with due respect to Mr Wigley, these too are straightforward.

[34] A full reading of the arguments advanced for the landlord makes clear that the landlord did not accept that phase 1 was confined as contended for by the tenant. This is clear from, amongst other things, the submissions for the landlord when the arbitral hearing commenced.[6] There is no reasonable basis for the tenant now to contend that the landlord failed to challenge the tenant's wish to confine the argument in the way the tenant sought to confine it. Ambiguity in the landlord's response might have provided the tenant with a foundation for its present contention. But there was no ambiguity.

[35] In addition, submissions for the tenant were not confined to arguments in support of the tenant's claim that there had been breach of the landlord's

[6] See above at [17].

maintenance obligation. Mr Wigley made a submission to the effect that submissions for the tenant which may have addressed additional matters did not mean that the tenant accepted that additional matters were to be determined at phase 1. However, the fact that additional matters were addressed by the tenant points to further problems with the argument for the tenant about the scope of phase 1. It is clear that the tenant had more than adequate notice of the range of arguments being advanced for the landlord and the fact that those arguments went well beyond what the tenant now says the arguments should have been confined to.

[36] This point in considerable measure disposes of the natural justice argument on the first issue and what are essentially supplementary arguments in reliance on the other grounds in article 34. This is because adequate notice of an issue to be addressed is one of the important requirements of natural justice and one of particular relevance in this case. The tenant did have adequate notice. Having received adequate notice the tenant then had adequate opportunity to respond in whatever manner the tenant considered appropriate. That is another requirement of natural justice of relevance to this case.

[37] Another reason why I am satisfied that there was no error by the arbitrator is that the tenant's claim that the landlord had breached the maintenance obligation could not have been determined in the narrow way the tenant says it should have been. And this in turn explains why the landlord's argument (and the tenant's response) was much wider, as just discussed. The arbitrator's summary of the central issue was not only logical but also inevitable given the expert evidence: did the flooding occur because there was breach of the landlord's maintenance obligation or breach of the tenant's obligation to clear?[7]

[38] The logic arises initially not from the arguments advanced by one party or the other, but from the terms of the lease provision relied on by the tenant and which the arbitrator was bound to apply. Clause 11.1 stated that the landlord's maintenance obligation did not extend to repair or maintenance which was the tenant's responsibility. It was not in issue that the latter included the tenant's obligation to keep drains clear. If the flooding had occurred because the tenant had not complied

[7] See [101] of the award recorded above at [19].

with its obligation to keep the drains clear there was no breach by the landlord. Clause 11.1 required consideration of clause 8.2 if there was evidence giving rise to a clause 8.2 issue – whether the tenant had met the tenant's obligation to clear. The evidence was there in abundance as the earlier summary makes clear. Those, of course, are findings of fact by the arbitrator and findings of fact are not open to challenge.

[39] Mr Wigley submitted that breach by the tenant would not of itself mean that there had been no breach by the landlord. I agree. But that is to state a general proposition divorced from the facts. The arbitrator held on the facts that there was no breach by the landlord. As I understood it, Mr Wigley submitted that the arbitrator had not made a finding on the tenant's contention; that is, that the arbitrator had not concluded that there was no breach by the landlord. It is clear that the arbitrator did come to that conclusion; a conclusion about the very issue on which the tenant's entire claim turned. The arbitrator reached that conclusion because he found on the facts that the flooding occurred because of a failure by the tenant to meet its obligation to clear.

[40] Mr Wigley further submitted that the arbitrator's findings included findings on causation, rather than whether there had been breach of the landlord's maintenance obligation, and issues of causation, it was submitted, were to be left for phase 2. This does not provide support for the tenant's application to set aside. The arbitrator did not make any findings on causation in a legal sense. On the tenant's claim, issues of causation would only have arisen if there had firstly been a finding that the landlord had breached its maintenance obligation. The question then would have been whether the breach by the landlord was causative of loss to the tenant. But whether that issue would have appropriately been dealt with at the first hearing or the second is not a question that arises because of the arbitrator's conclusion on the facts that there had been no breach by the landlord.

[41] The arbitrator did find that breach by the tenant of its obligation to clear caused the flooding. But that was not a causation finding in the legal sense that the word is used. More importantly, it is a finding that had to be made to decide whether the tenant had made out its claim of breach by the landlord. It was an essential part

of the primary question as to whether there had been breach by the landlord or the tenant; a question as to what caused the flooding was inseparable from the question of breach. This was recognised in the case put forward for the tenant. It was a central part of the enquiry by the expert witnesses, two of whom were called for the tenant.

[42] The submissions about causation illustrate a general feature of the tenant's approach. This was an attempt to advance parts of the tenant's claim in an artificial way. Or an attempt to define the issues in a way seen to best suit the tenant, coupled with a proposition that the landlord could not then argue something different, irrespective of the terms of the lease or the evidence or, more broadly, irrespective of the actual claim being advanced against the landlord. To accede to arguments of this nature would in fact affirm an approach to adjudication contrary to principles of natural justice.

[43] Another submission for the tenant was that the arbitrator failed to provide reasons. This submission was directed to the arbitrator's conclusion on the adequacy of the tenant's notices as well as his conclusion on the primary issue as to whether there had been breach by the landlord. I am satisfied there was no error.

[44] There are adequate reasons for all conclusions of consequence. On the question whether there had been breach by the landlord the reasons are extensive and clear. On the adequacy of the notices the reasons are relatively succinct. The reasons for this were stated by the arbitrator and there can be no reasonable challenge to his reasons for being brief. In any event, notwithstanding the brevity, the reasons are more than sufficient.

[45] Mr Wigley also submitted that there was a failure to give reasons for determining issues which the tenant submitted should not have been determined; that is to say, the arbitrator did not address Mr Wigley's submissions to him that the only question to be determined was whether there had been breach by the landlord. A decision maker required to provide reasons does not have to answer every contention made by one party or the other. If there was some basis for examining the adequacy of reasons, I would conclude on this point, as I have concluded on the other points

relating to reasons, that there was no error. The reasons why the decision covered the matters it did cover are made quite clear by the reasons that were articulated by the arbitrator.

[46] Mr Wigley submitted that a failure to provide reasons is a breach of natural justice. It is on this basis that he sought to argue that the award could be set aside for failure to provide reasons. There is a question whether a failure to provide reasons is a breach of natural justice. Because I have already concluded that there were adequate reasons it is unnecessary to consider the question of law. But if there was a failure to provide reasons on a material matter, it does not follow that this would have provided grounds for setting aside the award. One view in relation to decisions of a judicial nature is that a failure to provide reasons is a breach of natural justice. There are contrary views. It is open to question whether a failure to provide reasons for any decision of a judicial nature could be characterised as a breach of natural justice. But uncertainty in that regard appears to be removed in the case of an arbitrator's award under the Act. A failure to provide reasons would be a breach by the arbitrator of article 31(2). That would be an error of law. It is not open to the tenant on this application to advance errors of law.

[47] It is for these reasons that I am satisfied the application should be dismissed.

Landlord's applications for security for costs and for payment of the award into Court

[48] The landlord applied for security for costs on the tenant's application and for an order pursuant to article 34(5) of Schedule 1 of the Act that the sum awarded to the landlord on the landlord's counterclaim be brought into Court or otherwise secured pending determination of the originating application.

[49] Neither of those applications had been dealt with before the hearing commenced. I understood from Mr Judd that it had not been anticipated that a fixture would be made for the substantive application as early as it was made. At the hearing of the tenant's application to set aside Mr Judd did not pursue the application for security for costs but sought the other order.

[50] Given the conclusion on the application to set aside it is not apparent that there will be much utility in making the order sought by the landlord. I understand that an application in the District Court by the landlord to enforce the award was stayed, or at least adjourned, pending the outcome of the tenant's application to set aside. There would not appear to be any reason why the application in the District Court should not now proceed. However, in case the landlord does wish to pursue the application under article 34(5) I will adjourn it. In relation to that application the landlord is to file a memorandum within one month of the date of this judgment advising whether the landlord wishes to proceed. If no memorandum is filed that interlocutory application will be dismissed.

Result

[51] The application to set aside the award is dismissed.

[52] The respondents are entitled to costs on the applicant's application and on the respondents' interlocutory applications for security and for securing the award. If the parties are unable to agree on costs a memorandum for the respondents should be filed within one month of the date of this judgment and a memorandum in reply for the applicant within a further two weeks.

Woodhouse J