embarrassing the person against whom they are brought;

"2. they are vexations if they are brought for collateral purposes, and not for the purpose of having the Court adjudicate on the issues to which they give rise;

"3. they are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless." The tribunal found that the case brought by the first two appellants clearly fell within the third test in *Attorney-General v Wentworth.*

The decision in *Norman v Mathews* was not referred to in *Attorney-General v Wentworth.* The statement of Roden J is consistent with the statement of Lush J and, in a sense, the circumstances which Lush J appears to be referring to as lacking bone fides.

CLYDE CROFT

APPEAL FROM ARBITRATORS AWARD ON QUESTIONS OF LAW

Queensland Supreme Court, White J.

J.W. Armstrong Constructions Pty Ltd (Claimant) and the Council of the Shire of Cook (Respondent)

This was an appeal before His Honour Mr Justice White of the Queensland Supreme Court against the interim award of the Arbitrator in which he had answered certain agreed questions of law posed to the Arbitrator on an agreed statement of facts.

The appeal and cross-appeal were brought by consent of the parties pursuant to Section 38(2) and (4)(b) of the *Commercial Arbitration Act 1990 (Queensland).*

J.W. Armstrong Constructions Pty Ltd ("Armstrong") was the Claimant and the Council of the Shire of Cook ("the Council") was the Council. Armstrong had agreed to construct for the Respondent a mass concrete gravity weir, an intake tower and a steel-truss access bridge with associated pipe work for the Council on the Annan River in North Queensland. The Contract was an AS2124 of 1986.

The decision is of importance in relation to interpretation of AS2124 of 1986 but that is not the subject of this case note. It is a decision which is also relevant to the general law relating to Arbitration.

It was *held* by His Honour Mr Justice White as follows:-

The Arbitrator in one part of his decision had relied upon his "experience" of the role of superintendents on site. Mr Justice White held that "in a matter dependent upon an Agreed Statement of Facts there is no scope for reference to what the Arbitrator's own experience might reveal to him by way of "extra" facts, and there is no agreed fact that the

superintendent was generally on site, knew what was going on or had full details. It may well be that an Arbitrator's experience will equip him to understand the agreed facts better than the lay person but it cannot, as it were, provide the source of supplementary facts."

The Arbitrator was held to have been correct in his construction of clause 12.3 and 12.4 of the Contract. As the clause was one which provides entitlements to a contractor as a variation to the Contract the Arbitrator was correct in not approaching it as an exemption clause or the like and therefore in not construing it as strictly as one would an exemption clause.

In order to answer the question of whether the latent conditions struck by Armstrong caused it to incur the costs associated with further neutral events of delay it was necessary to look at the Contract as a whole and in particular the provisions of clauses 12 and 42. The Arbitrator had not taken this approach but appeared to have relied upon his own experience. As a matter of general principle a reference to causation in a legal document will be taken to be a reference to the proximate cause.

Further His Honour held that when a clause had been deleted in a standard form Contract it may be referred to to resolve difficulties in construction.

His Honour also adopted with approval that words of His Honour Mr Justice Connolly in the unreported decision in *Pioneer Clough Pty Ltd -v- Council of the City of the Gold Coast* (unreported decision of the 5th of March of 1986) where His Honour Mr Justice Connolly said as follows:-

> "At the end of the day however, the basic principle is that difficulty in carrying out the works contracted for is no excuse for non performance and, in itself, provides no reason for additional payment...
>
> It is only to the extent that the Contract makes provision for variations in the case of unexpected problems that a claim in relation thereto can be made."

In the present case His Honour Mr Justice White found that there was no general principle of interpretation which would locate the risk away from where it fell and that on their proper construction clauses 12.3 and 42.2 specifically did not reallocate the risk of unforeseen difficulties in the work back to the principal. Accordingly the Arbitrator ought to have answered that the latent condition did not cause the costs or part thereof as referred to in the Agreed Statement of Facts such that they should be valued under clause 40.2. This lead to certain other consequential findings about the correctness of the Arbitrator's award and although the Arbitrator's award was upheld on one point the Court substituted its view in answer to the agreed questions on other points where the appeal was allowed.

PETER MEGENS