determining whether leave to appeal should be granted is the relationship between the cost of the appeal and the significance of the questions of law to be determined. His Honour stated:

> "The Court may be satisfied that the determination could substantially affect such rights but yet conclude that, measuring the effect of the determination of such rights against the cost of determining them, leave should not be granted. It has long been accepted that it is in the interest, not merely of the parties. but also the State, that litigation should be brought to an end. As I have suggested, the cost of justice may be too great. To rectify error at too great a cost may produce not justice but injustice."

His Honour expressed concern that the amounts in issue when measured against the costs of the arbitration and the costs of court proceedings did not justify the award being the subject of an appeal by the Courts

The case re-emphasises the extremely limited circumstances in which leave to appeal will be granted by the Courts in consequence of the amendment to s.33 of the Act, and the clear intentions of Parliament that other than in the most restricted circumstances the parties should be held to their arbitral awards. Indeed, the case is an apt demonstration of the very "mischief" which Parliament has sought to overcome. A dispute over relatively small sums arising from a domestic building contract was the subject of an arbitration, an application for leave to appeal to the Supreme Court, the hearing of the appeal before the Judge at first instance, an application for leave to appeal to the Court of Appeal and finally the hearing and determination of the appeal by the Court of Appeal, resulting in delays, uncertainties and, not the least significant, onerous cost obligations to the parties.

GEORGE H. GOLVAN Q.C.

COSTS – FRIVOLOUS OR VEXATIOUS PROCEEDINGS

Supreme Court of Victoria – [1994] 1 VR 220
Gobbo J.

J. & C. Cabot v City of Keilor

Paragraphs (b) and (c) of sub-section 22(2) of the Victorian *Retail Tenancies Act* 1986 ("the Act") provide:

(b) The fees and expenses of the arbitrator are borne jointly by the parties to the dispute unless the arbitrator is of the opinion that a party has behaved in a frivolous or vexatious manner in which case the arbitrator may make such order as to those fees and expenses as the arbitrator things just;
(c) The parties to the dispute must bear their own costs unless the

arbitrator is of the opinion that a party has behaved in a frivolous or vexatious manner in which case the arbitrator may make such order as to costs as the arbitrator thinks just.

The meaning of the expression "frivolous or vexatious" has not been determined for the purposes of the Act although the issue may be one of considerable importance. The meaning of "frivolous and vexatious" was considered in the early case of *Norman v Mathews* (1916) 85 LJKB 857 at 859 by Lush J:

> In order to bring a case within the description [of frivolous and vexatious] it is not sufficient merely to say that the plaintiff has no cause of action. It must appear that his alleged cause of action is one which on the face of it is clearly one which no reasonable person could properly treat as *bona fide*, and contend that he had a grievance which he was entitled to bring before the Court.

The meaning of the expression in the context of section 150 of the *Planning and Environment Act* 1987 (Vic) was considered in this case. Briefly, the facts of the case were that the City of Keilor failed to reach a decision on an application for a planning permit to rebuild and alter existing premises within the prescribed statutory period. The applicant for the permit appealed to the Victorian Administrative Appeals Tribunal against the Council's failure to grant a permit within the relevant period. The Council confirmed, soon after the appeal was lodged, that the permit would be granted on stipulated conditions, conditions that were acceptable to the applicant. In spite of this Mr and Mrs Cabbot pressed their objection to the grant of the permit in the Tribunal. Section 150(4) of the *Planning and Environment Act provides*:

> (4) If any proceedings are brought before the Administrative Appeals Tribunal under this Act and the Tribunal is satisfied that –
>
> (a) the proceedings have been brought vexatiously or frivolously; and
>
> (b) any other person has suffered loss or damage as a result of the proceedings – the Tribunal may order the person who brought the proceedings to pay to that other person an amount assessed by the Tribunal as compensation for the loss or damage and an amount for costs.

The Tribunal found that the proceedings by the objectors were brought vexatiously or frivolously on the basis of its finding that the grounds of appeal were untenable or utterly hopeless. On appeal to the Supreme Court it was held that these findings were opened to it.

On appeal no challenge was made to the tests adopted by the Tribunal as to what constituted vexatious or frivolous conduct. With no suggestion that the test adopted was inappropriate Gobbo J said, at 223:

> The tribunal adopted the test for vexatiousness expressed by Roden J. in *Attorney-General (Vic.) J v. Wentworth* (1988) 14 N.S.W.L.R. 481, at p. 491: "It seems then that litigation may properly be regarded as vexatious for present purposes on either objective or subjective grounds. I believe that the test may be expressed in the following terms:
>
> "1. proceedings are vexatious if they are instituted with the intention of annoying or

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