Consent Order that resolved the appeal. The fact that both the first respondent and the second respondents to the appeal gave their consent to the setting aside of the costs orders can give rise to a presumption of their view of the strength of the decision at first instance. Nevertheless, that decision was unfortunately not tested before the Full Court.

Conclusion

As noted previously, the effect of the decision of first instance as a precedent is not removed by the resolution of the appeal by consent in this particular case.

There are, therefore, considerable dangers for arbitrators created by Justice Scott's decision. An arbitrator whose award is set aside for misconduct under the (uniform) *Commercial Arbitration Acts* arising from his/her prior knowledge of one of the parties may be required to:

1. refund fees paid to him/her for the conduct of the arbitration;
2. pay the costs of the arbitration of any party to that arbitration who had no knowledge of the arbitrator's prior involvement;
3. potentially, pay the total costs of all other parties of any application to set aside the award.

These potentially onerous results illustrate the magnitude of danger for an arbitrator who continues in that role if he/she has any feeling that they may have had some prior involvement with one of the parties to the arbitration. If an arbitrator forms such a view, he/she should immediately inform the parties and their representatives and, if necessary, undertake enquiries to ascertain the exact nature of his/her prior involvement with the relevant party.

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AS2124 - Latent Conditions - Notice Requirements - Delay and Disruption

J.W. Armstrong Constructions Pty Ltd v Cook Shire Council,
unreported, Supreme Court of Queensland, White J, 25 February 1994.

In a recent decision of the Supreme Court in Queensland, the judge has found that, on reading clause 12 of AS2124-1986 as a whole, the obligation to give notice "forthwith" is a condition precedent to any entitlement to claim and not, as is widely believed in the industry, simply a limit on the amount recoverable.

Subclause 12.2 requires that if the Contractor becomes aware of a latent condition the Contractor shall forthwith, and where possible before the physical conditions are disturbed, give written notice thereof to the Superintendent. Clause 12.3 then provides for compensation to be paid to the Contractor.

Clause 12.4 provides that in making a valuation in accordance with clause 12.3, regard shall not be had to extra work carried out, plant used or costs incurred more than 28 days before the date on which the Contractor gives the written notice required by the first paragraph of clause 12.2.

The judge was asked, on appeal from the decision of the arbitrator in a dispute between J W Armstrong Constructions Pty Ltd and the Council of the Shire of Cook, to consider the effect of the time bar in clause 12.4.

In clause 12.4 the time bar is expressed to operate from the giving of a notice under clause 12.2. The Court found that the notice must be **given forthwith** and must not merely be a notice that latent conditions exist.

The expression "forthwith" was considered to mean "as soon as reasonably possible".

The effect of this decision is that unless notice of the latent condition is given **as soon as reasonably possible** after the Contractor **becomes aware** of the condition he will **not** be entitled to any recovery whatsoever in respect of the latent condition.

This decision is now the subject of an appeal.

However, the decision serves as a timely warning to contractors to observe strict adherence to time limits expressed in their contracts, and to be particularly vigilant to give notice where time limits are expressed in vague or inexact terms.

A further warning

Armstrong's notice of latent conditions referred to specific locations on the site. However, it transpired that the latent condition also affected the works in other locations.

The judge found that, by referring to specific locations, Armstrong had confined the notice of latent conditions to those locations only. This meant that Armstrong could not rely upon the notice to recover for the effects of the same latent condition elsewhere on the site.

The judge did, however, state that she did not conclude that in order to satisfy the requirements of clause 12.2

identification of the location of the latent condition is necessary.

If this part of the decision is upheld on appeal, the obvious lesson is that a Contractor should not be too specific about where the latent condition occurs, lest his diligence in that regard be rewarded by being denied recovery for the full impact of the latent condition on his works.

AS2124 - flow on effects are not legally caused

The *Armstrong* decision also considered the word "causes" in clause 12.3 of AS2124-1986.

Part of Armstrong's claim was that the encountering of latent conditions delayed its progress to such an extent that it was forced to work in a wet season, thereby suffering delays in the construction work which it would not have incurred if it had not encountered the latent condition.

Accordingly, Armstrong claimed that the delays resulting from its being pushed into a wet weather window were caused by the latent condition and ought to be recoverable under clause 12.3 of AS2124-1986.

Clause 12.3 provides:

> "...if a Latent Condition causes the Contractor to ... incur extra costs (including but not limited to the cost of delay or disruption) which the Contractor could not reasonably have anticipated at the time of tendering a valuation shall be made under clause 40.2."

The Court accepted an argument that the word "causes" means **proximate** or **immediate** causes so that the encountering of a latent condition by Armstrong was merely an event in the history of the work. What **caused** the later delays was wet weather and not the latent condition.

Armstrong would be entitled to compensation for delay and disruption immediately arising from the encountering of the latent condition, but would not be entitled to compensation for the delay and disruption which it later suffered as a "flow on effect" of the encountering of latent conditions.

Again, this decision is the subject of an appeal, but if it is sustained it will have far reaching consequences for everyone in the industry who has considered a delay or disruption claim asserting the logic the Court rejected in *Armstrong's* case.

AS2124 - variations do not include costs of delay or disruptions

Another issue in Armstrong's case concerns a further finding that where a variation is directed under clause 40.1, its valuation under clause 40.2 should **not** include additional costs incurred by the Contractor for delay or disruption.

Armstrong's claim for recovery of costs incurred as a result of encountering a latent condition was pleaded, in the alternative, as a variation claim to be valued under clause 40.2. The claim included delay and disruption costs.

Clause 40.2(f) provides:

> "if the valuation relates to additional costs incurred by the Contractor for delay or disruption the valuation shall include a reasonable amount for overheads but shall not include profit or loss of profit."

The Court accepted that for subparagraph (f) to be invoked the provision in the contract which refers a matter to clause 40.2 for valuation must either expressly or impliedly require the costs of delay or disruption to be included in the valuation.

There is only one **express** requirement to value delay and disruption in AS2124 - clause 12.3. The Court gave no indication as to how an **implied** requirement might arise, but said that an implied requirement to value delay and disruption could be found in clauses 14.2 (Statutory Requirements), 27.5 (Minerals, Fossils and Relics), 30.3 (Defective Materials or Work), 33.1 (Rate of Progress) and 34.4 (Cost of Suspension). The Court found there was no implied requirement to value delay and disruption in clause 40.1.

This decision is also subject to appeal, but points to the need for contractors, before entering contracts, to seriously consider their need for compensation for delay or disruption, especially where no other provision in the contract is likely to offer them such compensation.

- Bill Blake, Minter Ellison Morris Fletcher. Reprinted with permission from Minter Ellison Morris Fletcher's On Site.