**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 36/2012**
**[2012] NZSC 109**

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| | BETWEEN | MANUKAU GOLF CLUB INC<br>Appellant |
| | AND | SHOYE VENTURE LTD<br>Respondent |

Hearing: 4 October 2012

Court: McGrath, William Young, Chambers and Glazebrook JJ

Counsel: J Long and K L J Simcock for Appellant
No appearance for Respondent

Judgment: 4 December 2012

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**JUDGMENT OF THE COURT**

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**A The appeal is allowed.**

**B The respondent must pay to the appellant, with respect to costs in the Court of Appeal, costs of $12,220, plus disbursements of $5,051.73.**

**C By agreement, no order as to costs in this Court.**

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**REASONS**

(Given by Chambers J)

**Costs in the Court of Appeal**

[1] In October 2007 Manukau Golf Club Inc, the appellant, and Shoye Venture Ltd, the respondent, entered into an agreement which the Courts below have called "the venue agreement". In 2010, the Club sued Shoye alleging it had breached the

venue agreement. Shoye counterclaimed. Sometime later it applied for summary judgment with respect to the Club's claim. It asserted that none of the causes of action in the Club's statement of claim could succeed.[1]

[2] Associate Judge Bell ruled in favour of Shoye and granted it summary judgment, plus costs.[2] The Club appealed. The Court of Appeal allowed the appeal.[3] The Court of Appeal set aside the summary judgment in Shoye's favour and quashed the order for costs. The Court made "no order for costs" with respect to the appeal.

[3] The Club's claim and Shoye's counterclaim proceeded on the normal trial route. Indeed, we were told the substantive trial has now taken place, with the decision reserved.

[4] The Club was not happy, however, about not receiving costs in the Court of Appeal. As required by r 41(1)(c) of the Court of Appeal (Civil) Rules 2005, the Club in its written submissions set out in detail its claim for costs should it win. It calculated costs on the basis that the appeal would be classified as a "standard appeal"[4] and that each step should have a band A time calculation.[5] The claim came to $12,220. Disbursements were also set out; they totalled $5,051.73.

[5] Shoye also dealt with costs in its submissions in response. It did not dispute the Club's claim in the event of the appeal succeeding. It did submit, however, that it wanted indemnity costs in the event the appeal failed.

[6] Notwithstanding the Club's success on the appeal and the parties' stated positions, the Court did not award costs in the Club's favour. It gave no reasons. The Club sought leave to appeal against the failure to award costs. This Court granted leave.[6]

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1 High Court Rules, r 12.2(2).
2 *Manukau Golf Club Inc v Shoye Venture Ltd* HC Auckland CIV-2010-404-4422, 17 October 2011.
3 *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZCA 154 [*Manukau* (CA)].
4 Court of Appeal (Civil) Rules 2005, r 53B(1).
5 Rule 53D(2)(a): "a normal amount of time for the particular step". See also sch 2.
6 *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 55.

**Did the Court of Appeal err in refusing the Club costs?**

[7] Although r 53 of the Court of Appeal (Civil) Rules, like r 14.1 of the High Court Rules, renders costs decisions discretionary, the discretion has never been unfettered and must be exercised judicially.[7] Particularly since detailed costs regimes were introduced in the High Court (in 2000) and the Court of Appeal (in 2008), the general discretion has been held to be qualified by the specific rules.[8] As the Court of Appeal said in *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt Ltd*), the overall structure of the costs regimes now means "there is a strong implication that a Court is to apply the regime in the absence of some reason to the contrary".[9]

[8] A fundamental principle applying to the determination of costs in all the general courts in New Zealand is that costs follow the event. Because we are dealing with a Court of Appeal costs decision, we cite the principle as set out in r 53A(a) of the Court of Appeal (Civil) Rules, but the same principle underlies costs in the District Court,[10] the High Court[11] and this Court:[12]

> The party who fails with respect to an appeal should pay costs to the party who succeeds.

[9] The Court of Appeal did not follow that principle on the present appeal. Nor did it explain why it was not following that principle.

[10] Mr Long, for the Club, submitted the Court of Appeal must have either taken into account irrelevant considerations or failed to take into account relevant ones. The Court of Appeal obviously knew the Club had won and the panel clearly would have known the general principle of costs following the event. Why then was the Club denied its entitlement to costs? Mr Long surmised it must have been because the Court considered something had gone wrong with the process in the High Court

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7 *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 (CA) at [9], citing *Cates v Glass* [1920] NZLR 37 (CA).

8 *Body Corporate 97010 v Auckland City Council* (2001) 15 PRNZ 372 (CA) at [19].

9 *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd* (2002) 16 PRNZ 662 (CA) at [27]; followed in *Glaister*, above n 7, at [19].

10 District Courts Rules 2009, r 4.2(a).

11 High Court Rules, r 14.2(a).

12 *Prebble v Huata (No 2)* [2005] NZSC 18, [2005] 2 NZLR 467 at [3].

and it would therefore be unfair for Shoye to have to pay costs to the Club. We need to explain that suggestion in a little more detail.

[11] The Court of Appeal considered Shoye had won in the High Court on the basis of an implied term it had never pleaded.[13] The Court of Appeal considered it "was a breach of natural justice for an affirmative defence to be adopted when it was not pleaded and no notice had been given of it, and when the Golf Club had no opportunity to respond with evidence or submissions".[14] Further, in any event, the Court considered "an implied term of the type articulated by the Associate Judge was not a defence that was certain to succeed" with the consequence that the Judge had been wrong to enter summary judgment for Shoye.[15] Mr Long surmised that the Court of Appeal must have concluded that the process in the High Court went astray, not because of Shoye's fault but rather as a consequence of the Judge's fault. We consider Mr Long's surmise as to the Court's reasoning to be probably correct; we have not been able to think of any other plausible explanation as to why the Club should have been denied costs on its successful appeal.

[12] We asked Mr Long whether there had been discussion between Bench and Bar in the Court of Appeal on the topic of costs. Mr Long said there had been. He said that he had reiterated what was in his written submissions, namely that, should the appeal succeed, he should get costs. According to Mr Long, Shoye's counsel "did not have an answer to that".[16] According to Mr Long, the Court at no stage put to him the prospect of the Club being denied costs in the event of its success.

[13] If Mr Long's surmise was the Court of Appeal's reasoning, then the Court erred. In virtually every case where an appeal succeeds, the appellate court has formed the view that the Judge below went wrong in some way or other. For the purposes of costs *in the appellate court*, it does not matter why the Judge went wrong. The losing party on the appeal almost always has to pay costs to the winning party – and in that sense "pays for" the error (as found) of the judge below. That is

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13 *Manukau* (CA), above n 3, at [20].
14 At [33].
15 At [33].
16 We attempted to get a transcript of the oral hearing from the Court of Appeal but unfortunately, for technical reasons, it was not available.

the consequence of a respondent fighting to maintain its win and supporting the findings of the judge below. If the respondent accepts the judge below was wrong, then it should settle with the appellant or not seek to defend the appeal. In those circumstances, it would avoid liability for costs. Shoye did not adopt that stance in the Court of Appeal. We have seen its submissions. It sought to uphold what the Judge had found in its favour.

[14] All that mattered so far as costs in the Court of Appeal were concerned was how the appeal was conducted. Since Shoye chose to seek to uphold the judgment in its favour but was unsuccessful, it became liable to costs in accordance with the fundamental principle of costs that "the party who fails with respect to an appeal should pay costs to the party who succeeds". There was in this case no suggestion of any disentitling conduct on the part of the Club, justifying a refusal to award costs on the basis of r 53F.

**Result**

[15] We allow the appeal. We order Shoye to pay the Club, with respect to costs in the Court of Appeal, costs of $12,220, plus disbursements of $5,051.73. Those were the sums the Club had sought in its written submissions in the Court of Appeal.

[16] We wish to make clear a court does not have to give reasons for costs orders where it is simply applying the fundamental principle that costs follow the event and the costs awarded are within the normal range applicable to that court. So here, had the Court of Appeal awarded costs in the Club's favour on a standard appeal basis, no further explanation would have been required. It is only when something out of the ordinary is being done that some explanation, which may be brief, should be given.[17]

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[17] The Court of Appeal itself recognised this in *Mansfield Drycleaners*, above n 9, at [27]. It warned that if a court did not give reasons for a departure from the regime, "it will expose the award to close appellate scrutiny".

[17] We make no order as to costs in this Court. That is because the parties reached an agreement that, whatever the outcome of this appeal, no costs should be awarded.

Solicitors:
Lee Salmon Long, Auckland, for Appellant
Warren Simpson & Co, Auckland, for Respondent