IN THE SUPREME COURT OF NEW ZEALAND SC 36/2012

[2012] NZSC Trans 14

BETWEEN **MANUKAU GOLF CLUB INCORPORATED**

Appellant

AND **SHOYE VENTURE LIMITED**

Respondent

Hearing:	4 October 2012
Court:	McGrath J William Young J Chambers J Glazebrook J
Appearances:	J Long and K Simcock for the Appellant No Appearance for the Respondent

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CIVIL APPEAL

MR LONG:

May it please the Court, counsel's name is Long. I appear with Ms Simcock for the Manukau Golf Club.

McGRATH J:

Thank you Mr Long, Ms Simcock. It is not a surprise to us that counsel for the respondent is not appearing. I should perhaps explain, Mr Long, that the Chief Justice was to sit and preside today but is indisposed. There is a procedure in our Act when this sort of thing happens that enables four Judges

to proceed and that's what we're minded to do but if you had concerns about that we could listen to them.

MR LONG:

No, not in the least. It is my luck, I think, in front of this Court because the last time I was before you in the other building you had a coram of four as well.

McGRATH J:

Was that a case about Westpac?

MR LONG:

It was a case called *Greenmount Manufacturing v Southbourne Industries*.

McGRATH J:

Okay.

MR LONG:

Such is my luck it seems.

McGRATH J:

We'll see about that. So if you'd like to proceed with the appeal, thank you Mr Long.

MR LONG:

In a sense it's a little bit of a pity that her Honour the Chief Justice isn't with us today because she wrote the Court of Appeal's decision in a case called *Lewis v Wilson & Horton Limited* [2000] 3 NZLR 546 which was a case decided 12 years ago where the issue that I apprehend is of most significance to you, the second of the two questions before you, was before the Court for a second time following a decision in 1982 called *R v Awatere* [1982] 1 NZLR 644. *Awatere* is the presently leading case in New Zealand that stands for the proposition that it is not part of the general duty of a Court to give reasons for its decision. In *Lewis*, which was a judicial review case following a District Court decision involving some drug charges, the Court of Appeal

indicated that following the Bill of Rights Act they would be keen to review and look at *Awatere* again but that *Lewis* was not that case. And so in *Lewis*, her Honour the Chief Justice said, and this is at paragraph 42 of my written submissions, "Whether it is time to say that as a general rule Judges must give reasons is a matter this Court would wish to consider at an early opportunity."

Standing back from this, perhaps the fact that it hasn't come before this Court for 12-odd years indicates that there's probably not a significant problem with the law as it stands because practically professional Judges, and by that term I mean judicial decision makers as opposed to administrative decision makers, do almost invariably give reasons for their decisions.

CHAMBERS J:

They don't necessarily though Mr Long if on a costs decision if it is orthodox, by which I mean it follows the first principle set out in both the Court of Appeal and the High Court Costs Rules, namely that costs follow the event and particularly in the High Court if it's a standard 2B. Would you agree with that?

MR LONG:

I would agree with that.

CHAMBERS J:

Yes.

MR LONG:

And if that had happened, if paragraph 38 of the Court of Appeal decision had said "Manukau Golf Club are entitled to their costs" as per the schedule that I'm required to file as part of those submissions, we wouldn't be here today. I wouldn't have needed any reasons for that because it would have been obvious.

CHAMBERS J:

Would have been obvious, yes.

MR LONG:

So in that –

CHAMBERS J:

It's only unorthodox decisions that need perhaps a brief explanation as to why the orthodox course has not been followed.

MR LONG:

Yes, and perhaps you might look at the orthodox decision as being a case where the reasons don't need to be written because they're actually obvious. An ellipsis perhaps.

McGRATH J:

They're implicit.

MR LONG:

For the usual reasons. Costs follow the event and Manukau Golf Club is entitled to its costs in this appeal. The reason I started on the second point is I think, as I prepared for, prepared the written submissions, I looked at the first issue and thought, or hoped that all of you as ex-Judges of the Court of Appeal would look at paragraph 38 and be as confused by it as I was when I received that judgment. Broadly, if you look at all of paragraphs 1 through 37, they are saying, Manukau Golf Club was right to appeal. It won its appeal on substantive and procedural grounds. It has its entitlement to take this point it wanted to take to trial. The appeal was contested by the respondent, who was seeking to take advantage of the defendant's summary judgment that they successfully persuaded Associate Judge Bell to grant. It wasn't a case, for example, where an appellant knows they've – sorry, a respondent might know they've got a little bit lucky, but decides that they will abide the event and not actively contest the appeal. We had argument in the Court of Appeal on the issue of costs.

CHAMBERS J:

I think their thinking must have been the matter was derailed in the High Court by the High Court Judge going off on a frolic of his own and that that was not necessarily Shoye's fault, therefore no order as to costs in the Court of Appeal where matters had just been put right. I think that must have been their thinking. First of all, do you think that must have been their thinking, and if so, do you think that thinking was correct?

MR LONG:

I believe it was part of their thinking. I don't consider that if the argument had been put that way, because we didn't have an argument on those lines when we did discuss costs. Shoye's argument, as best I can recall it, to oppose the ordinary incidents of costs, was much more ephemeral than that. I can't actually recall –

CHAMBERS J:

Did they make oral submissions, did they?

MR LONG:

They did, yes.

CHAMBERS J:

Because in their written submissions they don't actually say anything contrary to your submissions if they lost.

MR LONG:

That's right. The way the Court of Appeal proceeding started was the Court of Appeal assembled and indicated to me that they'd prefer to hear from Shoye Venture's lawyer first. So against that backdrop they then appeared to be confused about the nature of the summary judgment application that had been brought, which is understandable because ordinarily a summary judgment is brought by a plaintiff. We have the rules that enable a defendant

to bring a summary judgment and in this case Shoye Venture had been the instigator of a summary judgment application. Once they'd got their minds around that, that I was the appellant and that Shoye was attempting to maintain its case on appeal, they indicated that principally on the natural justice ground that the Judge had gone off and made this finding without hearing submissions. But then also on the substantive grounds where we debated the presence, or the nature, of the implied term and whether that would fly anyway, we then moved on to costs.

McGRATH J:

Was there a discussion on the point as to whether the implied term should have been pleaded, there being an affirmative defence involved?

MR LONG:

Yes there was.

McGRATH J:

There was. Is that something that was part of your submissions or did that come up from the Court?

MR LONG:

I think it was part of our submissions. The way in which the summary judgment arose was curious because it was placed on a completely different basis than it was decided. The response by the Manukau Golf Club to the way it was run was to decide not to file any evidence because it was decided that no evidence was needed to be filed to address the point and that's because the point that was made was the entire thing was a sham which, of course, makes the obvious objection that there has to be a trial issue if you're alleging a fraud and that you can't have a one party sham. It's got to be something that both parties are alive to on the premise that the documents don't represent the reality of the arrangements. So it was opposed on that basis and that was the simple answer for the Associate Judge to reach, that this is a trial issue. It's going to go to trial anyway. That issue of sham as raised on the actual application in the High Court submissions is essentially

an allegation of fraud so it needs to go to trial. But then in the discussion, I wasn't counsel in the High Court, but in the discussion that then arose, the Judge got onto the interpretation argument, which on the face of the written document I was suing on there was no ambiguity there, and then merged into, is there an answer for this on the implied term theory that he came up with and it was that theory that wasn't put to anyone.

CHAMBERS J:

So what then happened when you got on to discussing costs in oral submissions?

MR LONG:

I submitted that the usual rule should apply and that it was – it was the appeal I had to bring, I had succeeded in. It was an appeal that had been opposed and contested and that costs should follow the event.

CHAMBERS J:

And what did Mr Colthart say in answer to that?

MR LONG:

Without wishing to be rude to him, he did not have an answer to that. He made some submissions about it but they didn't address the heart of that issue, certainly not in a way Your Honour has put it, that this was the fault of the Court, not the fault of the litigant.

CHAMBERS J:

And did the Court raise with you the possibility that, notwithstanding your possible victory, which must have been staring everybody in the face by this stage, that there should be no order for costs in your favour?

MR LONG:

No Sir.

CHAMBERS J:

There's a slight irony, perhaps, in that, in that they accused the Associate Judge of a breach of natural justice but still, anyway.

MR LONG:

And I suppose they at least heard me on the point –

CHAMBERS J:

Yes.

MR LONG:

– so they're one step up from where Associate Judge Bell was.

CHAMBERS J:

Yes.

MR LONG:

I – I mean in a really common sense view, and I don't wish to be too colloquial about it, but this is the classic case where you send the judgment off to the client and they ring you and say – because I've explained to them how costs work, like most lawyers would – "why didn't we get costs?" and my answer to them was, I honestly don't know.

CHAMBERS J:

Well what is – I still haven't really understood from you what it is you think may have motivated the Court of Appeal, looking at it as fairly as you can because we've only got you here today to help us, what do you think motivated the Court of Appeal, apart from my suggestion that perhaps they thought this had gone wrong because of the Associate Judge, not because of the actions of either party in the High Court?

MR LONG:

I think your inference is the only possible one, although it wasn't raised in that way by the Court, at all.

CHAMBERS J:

And if that were the reason, what do you think about its logic, so far as it being a reason for not giving you costs on the appeal?

MR LONG:

I think it unfairly places the burden on the successful litigant who has suffered at the hands of, I don't mean this pejoratively, the bad Court process that happened to start with, but that bad Court process was instigated by an application by, in this case, the respondent.

CHAMBERS J:

Well it seems to me the crucial thing is the respondent chose to support the Associate Judge.

MR LONG:

Yes they did.

CHAMBERS J:

After all, every successful appellant, in one sense, has suffered from, "a bad Court process" in the Court below because the wrong decision was got to.

MR LONG:

Yes, yes.

CHAMBERS J:

Yes.

MR LONG:

And that, maybe, is at the heart of it. That the appeal was actively contested. There were steps the respondent could have taken if they had recognised the unfairness or the inevitability of the appeal succeeding, which would have involved them, I suppose you can consent to it, the judgment being set aside. That that might be asking a bit much of a respondent in that tactical sense.

CHAMBERS J:

Or you can do what the respondent –

MR LONG:

Has done today.

CHAMBERS J:

– has done in this case which is chose

MR LONG:

To abide.

CHAMBERS J:

– not to defend.

MR LONG:

But if that's happened, I can see why that might disentitle, or might be a reason not to award the actual, the costs component, but it's another question altogether as to where the burden for disbursement should fall then and here we've got – I mean, it's a $17,000 overall award that we're talking about here, that should have been made. $12,000 in costs on the scale in the Court of Appeal Rules and $5,000 for the disbursements. It's what my application for leave indicated, it's not an inexpensive exercise to do this. The decision that the Court of Appeal has reached is placing the economic burden of that entirely on the appellants in this case, to have things put right. Now that's either a fault of a combination of two things. The Court system, and maybe in that case it's for the appellant to bear. I've never yet heard of a Court volunteering to pay the disbursements to the litigants that are aggrieved, but I suppose that could be possible, or the respondent in this case and I suppose the respondent's approach to the appeal was what, to use the wrong word, "condemns" it to an order of costs in this situation should I be successful.

McGRATH J:

The implied term issue is one that was fully argued at the hearing. This is not a case where in any respect the Court of Appeal was deciding the matter on its own point which hadn't been raised by counsel.

MR LONG:

No, no. The – well Associate Judge Bell created the implied term theory and that came out in his judgment and wasn't the subject of any written or oral submissions. It arose, I think, out of submissions that touched on the –

McGRATH J:

That was the High Court –

MR LONG:

That's the High Court, yes.

McGRATH J:

The Judge in the High Court?

MR LONG:

Yes.

McGRATH J:

So it was an essential issue in the Court of Appeal?

MR LONG:

Yes it was. My approach in the Court of Appeal wasn't simply to rely on the natural justice point because, of course, I might be met with the objection, "well you can have your argument now, Mr Long", and that's absolutely right, I can and did. The only prejudice I would then suffer is of course I don't have that second appeal right because to go one step further from the Court of Appeal I've got to come to this Court and apply for leave, which is why all of – I mean just generally all of the issues should come out at the

High Court level so that a party can then decide and have rights to being challenged.

McGRATH J:

Yes, I understand that.

MR LONG:

And that's how Shoye approached it on appeal. I'm inferring you've asked for and have seen their submissions –

McGRATH J:

Yes.

MR LONG:

– they certainly weren't in the bundle, but the approach was, well no harm no foul, we can argue the implied term point today and try to say –

CHAMBERS J:

Well they went a bit further than that actually. They did try to persuade the Court of Appeal that effectively they had been arguing in the High Court what Judge Bell found.

MR LONG:

Yes and I think that was – it's not a view we agree –

CHAMBERS J:

It might have been sleight of hand but that's what –

MR LONG:

Well it – as I say, Ms Simcock was counsel at the High Court with Mr Hikaka from my firm. The closest it got to was a discussion about how the contract might be interpreted.

CHAMBERS J:

I don't think it particularly matters though for our purposes, does it –

MR LONG:

No, no.

CHAMBERS J:

– because we're not concerned with what the Judge – what the Court of Appeal decided so far as High Court costs are concerned.

MR LONG:

No, because they – now that's an interesting question. They decided to follow the *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 line of authority which is that if you bring an application for summary judgment and you fail then costs aren't set at that point in time, they await the eventual outcome at trial and there was an argument in the Court of Appeal because I decided I wouldn't argue that point. But if you reflect on the *Philpott* decision, which is focused on the plaintiff's summary judgment, so you have a plaintiff think they have an unarguable case, they bring an application for summary judgment, they fail for some reason, the *Philpott* rule recognises that a lot of the work and costs that have been done there will actually be used for the eventual trial, and that if the matter does go to trial you can wrap up in any eventual costs awarded what might have happened in the summary judgment context. So –

CHAMBERS J:

We shouldn't comment on that though –

MR LONG:

No.

CHAMBERS J:

– because you can no doubt argue about that at the trial proper. Have you had the trial yet?

MR LONG:

We have.

CHAMBERS J:

You have had the trial.

MR LONG:

And Shoye Venture amended to try to plead the implied term and opened on that basis and then in closings withdrew that argument when it, when they reflected further on it. But the trial was –

CHAMBERS J:

There's no judgment?

MR LONG:

No judgment yet, no Sir.

McGRATH J:

The trial took place as scheduled in June I think?

MR LONG:

Yes it did. Yes Sir.

McGRATH J:

All right. Now, where are we at now?

MR LONG:

As I said, I always looked at this in terms of the reasons point being the logical starting point and, I'll make no bones about it, my case is I should prevail on either the *Awatere* formulation of the rule or the rule as you might decide it needs to become in New Zealand and the interesting, and publically important aspect that arises on this point is, I suppose, the invitation in *Lewis* or the indication in *Lewis* that the Court of Appeal would like to consider that rule again and to make a determination as to whether it is a core function of a

Court to give reasons for its decision and then there have been, it's fair to say, certain movements in other jurisdictions you would look to, to inform you as to whether you want to do that and there are, of course, a whole bunch of relatively similar policy concerns that arise on that very question. I've given you in the bundle the leading authorities.

Of most interest is the fact that in Canada they have, the Supreme Court in Canada in a case called *Baker v Canada* [1999] 2 SCR 817, have taken a step, and I don't say it's the whole step, and *Baker* is a case that is an administrative tribunal case. In this area when you look at reasons you tend to find the jurisprudence in either administrative law cases, where the Court is examining an inferior tribunal and an expert tribunal and its administrative decisions, so a Parole Board decision or an Immigration decision, and occasionally you find Courts looking at other Courts like as in this situation. So in Canada they were there looking at an Immigration officer's decision and the critical part of the judgment in *Baker*, it's at paragraph 40 of the judgment of, I'm going to pronounce the name wrong, L'Heureux-Dube, where the Court says, "Others have expressed concerns about the desirability of written reasons requirement of common law." They refer to the *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 case, which is the Australian High Court decision, and the comments there. It says, "In my view, however, these concerns can be accommodated by ensuring that any reasons requirement under the duty of fairness leaves sufficient flexibility to decision makers by accepting various types of written explanations for the decision as sufficient."

At 41 they then summarise the English case law, and some of the debate that's happened there. Then they refer to the decision of Lord Mustill saying, at page 219, "Lord Mustill speaking for all the law lords on the case held that although there was no general duty to give reasons at common law, in those circumstances", and they're talking about where there's a right, or the circumstances there which involved a term of imprisonment and human rights related issues, in those circumstances, "a failure to give reasons was unfair.

Other English cases have held that reasons are required at common law when there is a statutory right of appeal."

At 42 they discuss some of the Canadian authority and at 43 they say, "In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary."

So while purporting – this is a decision on the facts of this case, which is an administrative judicial review where, in fact, handwritten notes were accepted as the proxy for reasons, and you'll see when you look at *Baker* and look at the other cases in the other jurisdictions, the variety of reasons that are generally put forward for the desirability, and they're obvious, can be summarised as either a function of due process and therefore of justice, fairness so that the litigant would know why they won or lost the case, fairness to enable someone to know if they have appeal rights. You'll find a rationale that says it concentrates the mind of the Judge. Indeed in the *Lewis* case the Court of Appeal expressed the view that if the Judge had sat down and actually purported to write down what they were deciding, it's unlikely that decision would have come out in the way that it did.

Other comments say that it's an incident of natural justice. Some of the decisions, some of the Australian decisions, and some of the English decisions, seem to support the requirement for reasons by looking at trends in legislative requirements on administrative tribunals, and you'll be aware that there are a number of – the Commerce Act 1986 is an example – where an administrative tribunal is required by statute to give reasons for its decision. There's the typical judicial review explanation that focuses on the legitimate

expectation of people, so where there's a course of conduct of giving explanations and then, or reasons for a decision, and then those reasons are not given. Other characterise it as an attribute of judicial process. An incident of the necessities of appellate review. Part of the process of deciding a matter judicially, so it's a definition or function of a Judge's job, I suppose, to give reasons and the reason that justice needs to be done and is seen to be done so that's my one page summary of all of the rationales that you would see if you looked at the English cases, the Australian cases and the Canadian cases.

You'll be aware, if you look at the New Zealand decision of *Singh v Chief Executive Officer of the Department of Labour* [1999] NZAR 258, that there are six core reasons defined there which are similar themes. There's a discipline on the decision maker, an assurance to those affected that the evidence and arguments have been looked at and considered properly, assistance to the person in deciding if they want to challenge it, the establishment of a body of precedent and ensuring legitimacy, openness and accessibility to the exercise of judicial power. The six reasons in *Singh* are refined further to three reasons in the *Lewis* case. Openness, lawfulness and discipline for the Judge. So I suppose the big picture, highest Court consideration here is that there isn't anything significantly wrong with the existing system because Judges practically do give reasons all the time or where they don't there's a reason because they're implicit. But occasionally you get a decision like this that then gives you the opportunity to actually change from the *Awatere*, the older common law way, to something that is foreshadowed by the developments in the other jurisdictions which would say it's part of the core requirements of a judicial process and a Judge to give reasons for a decision. And if you then read the decisions, when Courts have gone that far, there's a lot of anxiousness that they are not trying to tell a Judge how to do it, and they're not trying to rule off the case, well actually in some situations you don't need to give a decision because the decision is implicit and, of course, a Court at this level, if it was going to go that far and say, well it is part of the Court's job to give decisions, does it need to comment

on or dictate the quality or nature of that decision because the decision and the reasons will stand in for them in the appeal process.

If you wanted to go so far as to review *Awatere* and take the step that the Court wanted to look at in *Lewis*, it would simply be to, if you like, change the default rule. The default rule at the moment is no requirement for reasons but a whole of bunch of reasons, a whole bunch of situations where you might expect them, and generally those expectations are met by Judges because they're aware of the situation. If you change the default rule to the other way, to say it's a function of a Judge and a judicial body to give reasons for its decision, then you're simply turning the switch on.

McGRATH J:

Right. Well Mr Long that's all very helpful and you've certainly given us some good references to look at. I suppose one other aspect is that it maybe the Court will go the way you are suggesting. It maybe the Court will look at the issue rather simply in terms of whether the Court of Appeal's decision on costs was simply plainly wrong –

MR LONG:

Yes.

McGRATH J:

– and decide it on that basis. We don't have the case fully argued, and we don't have much of a factual matrix, if I can put it that way, in all the matter so that's just something I think we – I don't – that's something we'll just have to think about later. But was there anything further you'd like to say to develop the argument? We've read your written submissions –

MR LONG:

No, not at all.

McGRATH J:

– and you've very helpfully elaborated on those.

MR LONG:

That was part of my challenge, to understand which part of it actually interested you.

McGRATH J:

Yes.

MR LONG:

I'm happy to answer any questions you might have?

McGRATH J:

Well I think it all interests us and you've been very helpful with the factual context in which the issues came to be decided by the Court of Appeal.

MR LONG:

Perhaps two things to observe. There is a New Zealand Bill of Rights Act 1990 aspect to this. That was foreshadowed in *Lewis*, of course. That case came out shortly after the Bill of Rights Act had been enacted and I think sections 14 and 27 are relevant.

McGRATH J:

Right.

MR LONG:

The application of the Bill of Rights Act to administrative tribunals and to Courts is obvious. The other thing I would, and I only say this because it interested me, and it's not in the bundle, although it will be. I gave the registrar a CD rom full of all the other materials and there's some writing by Philip Joseph in his constitutional law book where he, it surprised me how trenchant his views were about this rule.

McGRATH J:

Yes.

MR LONG:

And if you're minded you should look at what he says. He goes so far as to say, *Lewis* was a missed opportunity and doesn't see it as a matter of fairness. He goes so far as to say that the present rule distorts the focus of the law. So he's at this end of a spectrum I'm nowhere near because as a practitioner I'm actually reasonably relaxed because I see it actually doesn't fail us all the time. This happens so infrequently and it may well be that that's a reason to say, well the rules are working fine as they are, but things are moving and things are trending in other jurisdictions and this is your opportunity to do it simply because of paragraph 38.

McGRATH J:

Thank you very much for your help. If there's nothing further you want to say we will reserve our decision.

COURT ADJOURNS: 10.30 AM