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SUPREME COURT OF VICTORIA — FULL COURT

SUN ALLIANCE INSURANCE LIMITED v MASSOUD

Fullagar, Gray and Tadgell JJ

3-5, 26 May 1988 — [1989] VicRp 2; [1989] VR 8

PRACTICE – JUDGMENT – STATEMENT OF REASONS FOR – DUTY OF PRESIDING JUDICIAL OFFICER.

As a general rule, a Court from which an appeal lies is obliged to state adequate reasons for its decision.

GRAY J: [with whom Fullagar and Tadgell, JJ agreed] *[dealt with the facts and the decision of the trial judge and continued]* ... **[21]** In my opinion, the decided cases show that the law has developed in a way which obliges a Court from which an appeal lies to state adequate reasons for its decision. The adequacy of the reasons will depend upon the circumstances of the case. But the reasons will, in my opinion, be inadequate if:-

(a) the appeal Court is unable to ascertain the reasoning upon which the decision is based; or

(b) justice is not seen to have been done.

The two above stated criteria of inadequacy will frequently overlap. If the primary judge does not sufficiently disclose his or her reasoning, the appeal court is denied the opportunity to detect error and the **[22]** losing party is denied knowledge of why his or her case was rejected.

In applying the above criteria to the circumstances of this case, it can, I think be said that the learned trial judge's reasoning remains obscure. This Court is not able to identify with any conviction the considerations which moved His Honour to reach his conclusion. His Honour's judgment may have miscarried because irrelevant matters were considered. In this connection, it appears that His Honour placed weight on at least one irrelevant fact, namely that the plaintiff was not charged with a criminal offence. It further appears that His Honour believed that the plaintiff's case was supported by the evidence of his wife, which was not the case.

But the important fact is that the paucity of His Honour's reasons is such that his reasoning process is not revealed to this Court to enable a judgment to be made as to whether His Honour fell into error. This is particularly true of the difficulty one feels in understanding how His Honour got over the strong points of the defendant's case, to which I have earlier referred.

Turning to consider whether justice was seen to have been done, I cannot but feel that it was not. The defendant, having led a weighty body of incriminating evidence was entitled to have the evidence weighed by the Court and, if rejected, the grounds of its rejection expressed in reasoned terms. To have a strong body of evidence put aside without explanation is likely to give **[23]** rise to a feeling of injustice in the mind of the most reasonable litigant.

In relation to the duty of a primary judge to give adequate reasons for decision I have stated the law, so far as it is relevant for present purposes, as it has developed during the course of the present century. In *Swinburne v David Syme & Co* [1909] VicLawRp 92; (1909) VLR 550; 15 ALR 579; 31 ALT 81, Madden CJ felt able to say that although a judge should give his reasons "he is not bound to do so". But as time passed there were a number of decisions asserting the existence of such an obligation. Most of them are collected in the judgment of Monahan J in *De Iacovo v Lacanale* [1957] VicRp 78; (1957) VR 553. In *Pettitt v Dunkley* 38 FLR 199; [1971] 1 NSWLR 376; 5 Fam LR 137, the New South Wales Court of Appeal laid it down that a judicial tribunal had a duty to state reasons if there is a right of appeal from a decision. See also *Carlson v King* (1947) 64 WN (NSW) 65, per Jordan CJ at p66. The view that the obligation only existed where there was a right of appeal has more recently been rejected. In *Housing Commission of NSW v Tatmar Pastoral Company Pty Ltd* (1984) 54 ALR 155; [1983] 3 NSWLR 378 at p386; (1983) 53 LGRA 325; (1984)

58 ALJR 553 Mahoney JA said that the giving of reasons was "an incident of the judicial process". This view was confirmed by the High Court in *Public Service Board (NSW) v Osmond* [1986] HCA 7; (1986) 159 CLR 656; 63 ALR 559; (1986) 60 ALJR 209 at p213, where Gibbs CJ said that a judge must give reasons when it is necessary to enable the matter to be properly considered on appeal.

Most of the foregoing authorities were considered recently by the Court of Appeal in New South Wales in **[24]** *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247. At pp279-280, McHugh AJ said that without the articulation of reasons a judicial decision could not be distinguished from an arbitrary decision. His Honour went on to say that the giving of reasons for a judicial decision serves at least three purposes. First to enable the parties to see the extent to which their arguments had been understood and accepted as well as the basis of a judge's decision. Second, to further judicial accountability and, third, to enable interested persons to ascertain the basis upon which like cases will probably be decided in the future.

In my opinion the cases to which I have referred amply justify the statement of the two minimum criteria with which I commenced this discussion. That does not mean that on every occasion a judge will be in error if he fails to state reasons. The simplicity of the context of the case or the state of the evidence may be such that a mere statement of the judge's conclusion will sufficiently indicate the basis of a decision. Some examples of such situations were given by Cussen ACJ in *Brittingham v Williams* [1932] VicLawRp 35; (1932) VLR 237 at p239; 38 ALR 176. In such cases, the foundation for the judge's conclusion will be indicated as a matter of necessary inference. But for the reasons I have endeavoured to express, the present is not such a case.

I conclude this discussion of authority with a further reference to *Pettitt v Dunkley*, *supra*. At pp387-8, Moffitt JA made some observations with which I respectfully agree. His Honour said:-

> **[25]** "The giving of reasons in an appropriate case was referred to as being the 'duty' of the Court of first instance. What is an appropriate case is a question of some difficulty, which will need consideration later, but it follows there is as much a duty or judicial obligation or an obligation imposed by law to give reasons in an appropriate case as there is otherwise a duty to act judicially, such as to hear arguments of counsel and hear evidence and admit relevant evidence of a witness. The reason why the judicial obligation to give reasons in an appropriate case exists, is that, where an appeal is provided, the trial at first instance does not exhaust the rights which parties may have."
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> Later on the same page His Honour continued:-
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> "If it can be established that a judge failed or declined to give any reasons for his decision in circumstances where there was a judicial duty express or otherwise to do so, then, as with other areas in the judicial process, I think he has erred in law."

In all circumstances of the present case I consider that the learned trial judge failed to adequately express his reasons and that such failure amounts to an error of law which necessitates an order for a new trial...
