

**IN THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT**

**BELL CJ
AND THE JUDGES OF
THE SUPREME COURT**

WEDNESDAY 6 APRIL 2022

**SWEARING-IN CEREMONY OF THE HONOURABLE JUSTICE
ELISABETH MARY PEDEN AS A JUDGE OF THE SUPREME COURT
OF NEW SOUTH WALES**

- 1 **BELL CJ:** Justice Peden, on my own behalf, and on behalf of the judges of the Court, I congratulate you on your appointment. I warmly welcome you to the Court. You are someone who has, as we are no doubt about to hear, excelled in many different areas and I have every confidence that you will continue to excel and contribute greatly to the work of this Court. Congratulations.

- 2 **THE HONOURABLE MARK SPEAKMAN SC MP, ATTORNEY GENERAL OF NEW SOUTH WALES:** May it please the Court. Your Excellency. I acknowledge the traditional custodians of the land on which we gather, the Gadigal People of the Eora Nation, and I pay my respects to Elders past, present and emerging, and I acknowledge and pay my respects to Aboriginal people who join us today.

- 3 Your Honour, Justice Peden, on behalf of the Bar and our State, it is my great pleasure to congratulate you on your appointment to this Court. We are joined today by your husband, Professor Greg Tolhurst; your children, Joshua, Sam, Ben and Michael; your sister, Anna; your brother, Rob; and their partners. I also acknowledge your Honour's late parents, John and Jean. While they are no longer with us to witness this great accomplishment, I am sure they would be delighted.

- 4 Your Honour was born in Wahroonga and grew up in Lindfield, the middle child of an older sister and a younger brother. From a young age, you chased goals and worked determinedly until you not only achieved them, but excelled at them.

- 5 Isaac Newton famously said, "If I have seen further, it is through standing on the shoulders of giants". You are the great granddaughter of Sir John Peden KC, the distinguished academic, jurist, and politician. Your grandmother was Margaret Peden, the first Australian women's cricket test captain. Your father was Professor John R Peden, instrumental in founding Macquarie University Law School. Your mother, Jean, a solicitor, undertook her legal studies with the then Solicitors Admission Board, while starting a family. You attended Abbotsleigh as your grandmother had done, and you followed further in her footsteps by excelling in tennis and cricket. Senior High School was at Barker College. Here, you were enticed by the wide range of sports and cadets and captained the First XI cricket team. You learnt piano, violin and flute, and performed in musicals and bands. You became a percussionist completely by chance: it was after slipping in to watch a boy who you were rather keen on perform in the band. The music teacher took one look at you and sized you up as a percussionist: in other words, someone who sets the tempo and keeps all other instruments playing at the same rate.

- 6 After concluding your HSC, you enrolled in Arts/Law at Sydney University. During these studies, you went to Germany as a Rotary exchange student and lived with four different families. You studied for six months at the University of Freiburg. You graduated with Honours in German, coming first, and you are still fluent in German.

- 7 Your Honour was an exceptional student. One of your law professors described you as a student who taught herself. You won the University Medal in Law, which provided a scholarship, and were also awarded the coveted TAP scholarship. Your graduation was noted in the Law School's annual student publication, Blackacre, which I will paraphrase here:

"Elisabeth's biggest challenge during her law degree has been staying out of Europe long enough to finish it. She even sat her contracts and administrative law exams in the rubble of the Berlin Wall. Lise is probably the only student in the Law School's history to write a law text in her student years and then to sit exams in two subjects in which her book was the prescribed text."

That text was Helmore's Commercial Law & Personal Property in NSW, 10th edition, which you co-authored whilst still a student.

- 8 After graduation, you became an associate to Justice Lockhart AO in the Federal Court, and the following year in the High Court to Justice McHugh AO QC, who sends his apologies today: he is in COVID close contact isolation. At Cambridge, you studied for three years at Conville and Caius College. You were awarded your PhD for your thesis in implied terms in contract law.
- 9 Returning to Australia, you started your career as an academic barrister at Sydney University. Academia came naturally. You swiftly achieved professorship and also served as Pro Dean in the Faculty of Law. You were still teaching as Professor of Law until March last year. As a lecturer and a professor, you were known for being informed, inspiring, innovative and fun. Your Honour has practised as a barrister since 2007.
- 10 In that time while teaching and practising law, you have written, co-authored or edited 17 books and published articles in 44 journals including The Commercial Law Quarterly, The Journal of Contract Law, and The Journal of Equity. You have also contributed chapters to eight books, including LexisNexis Student Guides to Legal Examination Techniques. You are the editor of The Commercial Law Quarterly and sit on the editorial board of the Journal of Contract Law. You edit the New South Wales Law Reports, which requires you to read every decision of this Court. You have advised New South Wales government departments and the New Zealand government on drafting, planning and strategy and litigation. You provide legal training to law firms and national corporations. You are an expert in contract, commercial, evidence to procedure, and medical evidence law. You took silk in 2019.

- 11 Your case load has been voluminous and if I were to note each case, there would not be time to swear you in. So, I will make a note of two cases in which you were successful with your clients, one at the start of your career and one at the end of your career at the bar. One of your earliest matters involved representing a family sued by a large amusement park in the Local Court. Their teenage son had hired the venue for a party. He planned to recoup costs by selling tickets, but a group of cool kids organised a rival party at another venue. The boy was left with only a handful of tickets and the venue suing him for \$30,000, which the family had no means to pay. The Court found in favour of the family.
- 12 You appeared recently in the Court of Appeal in *Trentelman v The Owners Strata Plan 76700*. Strata owners had purchased strata lots on the understanding that they would have access to a swimming pool. However, the conveyance when it occurred made no provision for an easement permitting the lot owners to use the pool. The Court of Appeal dismissed the appeal by Ms Trentelman against two decisions of the primary judge, who awarded that Ms Trentelman grant an easement in favour of the Owners Corporation allowing the lot owners the right to use the swimming pool.
- 13 The matter involved an issue of proprietary estoppel arising out of a factually complex situation. Your instructing solicitor reports that your style of cross examination was subtle, incisive and devastatingly effective. Witnesses responded easily and with assumed candour in response to your calm mode of questioning, not realising until they had left the witness stand how effective your questions were in uncovering the truth. Colleagues note your skills in dealing with clients and witnesses. Your communication skills make you accessible to all people. The precision of your advice has been described as you being direct without being direct.
- 14 Your Honour, given the depth and breadth of your legal service, it seems unlikely that you could have the time for any kind of private life, but your friends and family tell a different story. You met your husband while you both worked

as research assistants for Emeritus Professor John Carter at Sydney University. Both of you have shared authorship of different law texts with Professor Carter. You married in Sydney in 1993 and both managed your legal careers, and continue to do this, while raising four sons.

- 15 On the day your appointment was announced, you were delivering a lecture as part of the Legal Professional Development Program to a legal office in Nowra. After the lecture, you headed home to Sydney, played two soccer games with your beloved Turramurra United, scored a goal, and organised the champagne afterwards. You cook regularly and enthusiastically, and you are known to make amazing meringues for your sister. You are a keen sportswoman. Besides soccer, you enjoy running, working out at the gym, sprint training, tennis and bushwalking. You have run in the City to Surf several times with a time around 70 minutes. You care for Wolfie, a former rescued kitten, and keep dogs Finn and Rocky in shape with long, early morning walks. You find time for quieter activities. During recent lockdowns, you went back to the easel and found great satisfaction in painting still life subjects again. Ever the maestro of multitasking, you often listen to books while you walk or train. You enjoy a wide range of historical fiction.
- 16 Your colleagues and family note your achievements and work commitments with wonder, all of them saying, "I do not know how she does it". You claim your secret is to keep to the diary, but that belies your great efficiency, immense legal skills and commitment to finishing a task once you have started it. You start your days early and, despite a busy and varied schedule, you have always had time for your sons in the evening. You are always home for dinner and will work at night at home. You are as present in your home life as you are in your working life. You strive to do your best in both fields.
- 17 Your Honour, the English novelist John Robert Fowles said, "A thousand violins cloy very rapidly without percussion". When, as a high school student, you slipped into band practice, your music teacher saw something of your aura. Throughout your life and career, in practice and in teaching, you have been

setting the tempo and keeping the instruments playing at the same rate, and that is a wonderful skill to bring to the bench.

18 Congratulations on your Honour's appointment and best wishes for your career on the bench. May it please the Court.

19 **MS JENNIFER BALL, TREASURER OF THE LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court. I too acknowledge the Gadigal People of the Eora Nation, the traditional owners on the land on which this Court stands, and pay my respects to their Elders past, present and emerging.

20 I come before the Court on behalf of the solicitors of our State to offer congratulations and wish your Honour well in your appointment to the Supreme Court of New South Wales. Mindful of the important role family has played in your Honour's life, I would like to acknowledge your family and friends joining us here today.

21 Your Honour's legal career is as extraordinary as it is unique. The Attorney General has already alluded to your travels to Europe as recorded in the 1993 edition of Blackacre, the yearbook for the graduating class at Sydney University Law School. Your former colleagues have noted that your Honour is remarkably well travelled, with a gift for public speaking and cross-cultural communication. Your Honour was a brilliant student, but if anyone asked your Honour what you planned to do with your law degree, you would reply that your only career aspiration was to grow tomatoes. At the risk of offending the primary producers of Australia, we are glad this never happened.

22 Your Honour seamlessly made the transition from student to academic, and then later from an academic barrister to fulltime barrister. When your Honour first approached 12 Wentworth Selborne Chambers, the then chairman of the floor, and now a Justice of the Land and Environment Court, was sceptical. 12th Floor is proud of its tradition of welcoming barristers who have practised

extensively as solicitors, but in your Honour's case they were compelled to make an exception and, in no time at all, the risk paid off.

23 Your Honour quickly became everyone's "phone a friend" for anything contract related and would leverage the initial impetus to kick start a thriving general commercial practice. In fact, I have it on good authority that your four sons have now taken to resolving family disputes like contract disputes and that they know when their negotiations are either a variation, which requires consideration, or a waiver, which does not. Your colleagues at this time remember your Honour's calmness and intellect, matched only by your sense of humour and good fun. In the words of one silk, your Honour brought joy to adversarial litigation, two things that do not often go together.

24 Throughout your storied career at the bar, your Honour has combined intellect with compassion, legal nous with common sense. In your first appearance before the Supreme Court, your Honour was briefed by Legal Aid. Your Honour's intervention saved the family home of an elderly couple at Fairfield and leveraged your deft understanding of the *Contracts Review Act* and advocacy skills. Later on, your Honour would act for the families of some of the Australians killed in MH370 and MH17 tragedies. These cases were brought in the Federal Court and involved complex issues of international law. The principal solicitor that instructed your Honour praised your patience with clients, as well as your calmness and your compassion. He particularly wanted to acknowledge the way in which you listened to the families, explained to them what could and could not be done, and guided the litigation to a resolution.

25 But not all of your Honour's achievements are on the public record. In the words of one barrister, "to see your Honour at her best, you have to see what most do not". His response is worth quoting in full:

"Elisabeth is at her best doing a difficult, thankless task that is important but doesn't attract attention. It is probably done late at night or very early in the morning. It might be setting the bar exams or editing the New South Wales Law Reports or drafting submissions. Whatever it is, it will be done well, quickly and without fuss."

Your Honour richly deserves the spotlight of today's ceremony, having spent a good part of your legal career avoiding it.

26 I would like to conclude today by noting that the energy and intensity that you have brought to the law is the same energy and intensity you bring to life. Anything outdoors to do with sport, on a horse, involving dancing, or overseas is wholly welcomed by your Honour. Your Honour's zest for life includes everything you do and has inspired many of your colleagues, as has your sense of humour.

27 As a barrister, your Honour once told a colleague that the downside of being a judge was that you had to make decisions. We are confident that not only will you make decisions from this bench, but that they will be well considered and compassionate.

28 Your Honour brings a wealth of personal integrity and knowledge to the Supreme Court of New South Wales, and the people of New South Wales are privileged to be served by you in this role, and solicitors have every confidence that you will make an exceptional judicial officer of the Supreme Court.

29 On behalf of the solicitors of New South Wales, warm congratulations to your Honour. As the Court pleases.

30 **PEDEN J:** Thank you, Chief Justice, your Excellency, Mr Wilson, Mr Attorney, Ms Solicitor, Judges and former Judges of this and other courts, colleagues, ladies and gentlemen. Thank you all for the honour that you do to the Court, and to me, by your presence here today. I acknowledge the traditional owners of the land on which we are meeting; I pay my respects to their Elders past and present, and the Aboriginal Elders of other communities who may be here today.

- 31 I am grateful for the kind words of Mr Attorney and Ms Solicitor. While hyperbole is expected at these occasions, I fear that most of what you have said should be rejected as unsupported by any credible evidence.
- 32 It might be said that the reason I am sitting here today is because I made the tactical decision to only buy chambers that had previously been owned by judges of this Court. However, I believe I owe a greater debt to many people who have helped shape me throughout my life.
- 33 I grew up with my parents' encouragement to go to university. In hindsight, perhaps my parents realised early on that, despite my enthusiasm, my cricketing prowess would never match my grandmother's and I would not be able to make a career in that sport or, indeed, any other. As a teenager, I never intended a career in law. I was 16 when my father passed away and I did not know much about what he did as a professor of law. I recall pages of book proofs scattered across the dining room table, a technique I have since replicated, much to the family's annoyance. I also remember when I helped add up student marks, I could not persuade him to bump up failing students. My advocacy skills evidently needed some work, but I doubt anyone could have swayed his sense of responsibility and justice. He always prioritised family and friends, despite his hard work. I recall happy hours spent with dad and my siblings, Anna and Rob, body surfing, playing cricket, tennis and cards.
- 34 I had also seen my mother set up her solicitor's practice in our home as her second career. In those ancient times, there was only one telephone line into the house and the need to keep that line open for work calls put a serious dampener on my ability to have long telephone calls with friends. Children today are spared such discomfort. Nevertheless, it was impossible not to notice how well mum treated her clients, helping them with their legal problems. At the same time, she was the most loving parent and friend, with an infectious laugh.

- 35 Growing up, what seemed my second home was that of the Late Justice Graham Hill. He was my father's best man. Ute, his wife, was my mother's dear friend, and their children were quasi siblings. I am honoured Katrine and Ute are here today.
- 36 While I was surrounded by law, and I was proud of my family's history and my parents' hard work and ethics, I planned to chart my own course and, rather than grow tomatoes, actually become a journalist. So, when I enrolled in Arts/Law, I planned to ditch law if it was boring. It was not. I loved learning about law and reading cases about how the law resolves an infinite variety of disputes.
- 37 At law school, I was incredibly privileged to have been taught by some truly inspiring legal minds. When finances allowed, I loved buying new legal texts. I unashamedly stalked authors Meagher, Gummow and Lehane after class to obtain their autographs on my prized copy of their book, much to their bemusement. Two teachers who became mentors and life long friends are Professors Barbara McDonald and John Carter. My boys also consider them, and Helen and Brian, their fairy godparents.
- 38 You have heard I had the great fortune of working for the Late Justice John Lockhart and Justice McHugh who, unfortunately, cannot be here today. Both taught by example. The former loved sharing chocolate biscuits at morning tea during long hearings, and the latter maintained that judgment writing was improved by listening to classical music. Perhaps I should adopt both techniques. Both of them taught me that there was always something more to learn about the law, that hard work was essential, and that the best judgments were honed and as short as possible. I will certainly keep that in mind. My two years as an Associate provided an opportunity to watch the great advocates demonstrate their flair. I never presumed I could emulate them, but I thought one day I would at least try.

- 39 I am still friends with many of my contemporary associates, including Justice Mark Leeming, my co associate to Justice McHugh, Justice David Mossop of the ACT Supreme Court, and Michael Green, who later became one of my tutors. I met Richard Weinstein, now on the District Court, when he was a tipstaff to the Late Justice Roddy Meagher. I am grateful to each of them for their encouragement and advice.
- 40 In Cambridge, I was fortunate my PhD supervisor was Professor Jack Beetson, who later became a judge on the Court of Appeal. I valued his intellect and generosity during those years. I was pleased that my mother was able to visit Cambridge, and she witnessed the completion of my PhD before her untimely death.
- 41 Returning to Australia, I accepted a position at Sydney Law School, where I enjoyed teaching thousands of students over more than 20 years. I was delighted that some former students briefed me at the bar, and many more have stayed in touch. Fulltime academic life was busy with four young children, writing books and articles, teaching, and working as a consultant to some large law firms. But the idea of going to the bar remained.
- 42 When the law school moved to campus, I decided to keep the same daily commute to Phillip Street as a barrister rather than an academic. I am pleased that so many friends from academia are here or online. I enjoyed reading on 13th floor, St James Hall, where my other tutor was my former university tutor, Patricia Lane, from whom I learned much.
- 43 My move to 12th floor was with the assistance of now Justice John Robson and it led to some enduring friendships with members of that floor. It was there that I started playing football for the Bar Association team, where my best skill was getting in the way, usually of the opposition. That love of soccer has remained, and I relish my games with my women's over 35s team, and I am delighted that some of my soccer buddies are here today.

- 44 Since my move to 3 Wentworth, I have enjoyed the collegiality of all and Wayne Muddle's generosity with his time, razor sharp strategic mind and fine wine. I am also pleased that some of my former personal assistants and researchers are here today; I have enjoyed watching them progress through their law degrees onto varied and interesting careers.
- 45 When I started at the bar, Justice McHugh told me that he never ran the perfect trial. I doubt that was true for him. Despite my best efforts, it was definitely true for me. However, I treasure the memories of so many cases where I had excellent instructing solicitors, leaders, juniors and opponents. I feel greatly privileged that many solicitors who briefed me in my first year at the bar continued to do so every year thereafter and have become some of my closest friends. They know who they are and how special they are to me, and I thank them.
- 46 As you have heard, all four sons, Josh, Sam, Ben and Michael, are here today. I am very proud of each of them, even though they have to date sworn off law. I have enjoyed watching them grow into kind and intelligent young men. Every day they keep me grounded. They have been very supportive of my transition, which they tell me in their Generation Z jargon is "eets", "poggers", "no cap". While I cannot claim to be fluent in "zoomer", based on my working proficiency, translated that means, "really great". I did think that I should let them know that, while I will no longer be paid to cross examine witnesses, I plan to continue cross examining them and their friends about their late homecomings and who drank the last of the milk. Thank you to Greg for the unfailing support you always provide the family.
- 47 I am honoured to be taking a place in the Equity Division, triggered by the move of President Ward. While I cannot hope to fill her shoes – in any sense – she continues to be an inspiration and generous supporter to many, including me. I also thank the Chief Justice for his friendship and ongoing help and encouragement.

48 While I would obviously prefer it if my parents were here today, I have a wonderful memory of my mother moving my admission in this courtroom. I am very pleased that my mother's sister, my Aunt Mary, and cousin Andrew are here. I also thank all my extended family and friends for all their support and advice and all the special times we share and for being here for me today. I have not named everyone who has been significant in my life or assisted me be here today, but I know I owe a great debt to each of you.

49 Finally, I am reminded of a phrase I studied in Goethe's Faust: "the deed is everything, the glory nothing". I understand the responsibility I am undertaking, and I am grateful for this opportunity to serve the administration of justice in this State. Thank you.
