

FAREWELL CEREMONIAL SITTING ON THE OCCASION OF THE RETIREMENT OF JUSTICE ROBERT MACFARLAN

Banco Court

The Hon A S Bell, Chief Justice of New South Wales

22 February 2023

- 1 I begin by acknowledging the Gadigal of the Eora Nation and pay my sincere respects to Elders, past and present, and extend those respects to all Aboriginal and Torres Strait Islander people.
- 2 This morning we mark the retirement and honour the significant judicial contribution of Justice Robert Macfarlan after his almost 15 years of service as a judge of appeal of the Supreme Court of New South Wales.
- 3 I acknowledge the presence of Justices Gageler and Gleeson of the High Court, judges of the Federal Court of Australia, former Chief Justices Gleeson and Spigelman (noting the apologies of Chief Justices Bathurst and Allsop as well as the Governor), other current and former judicial officers from a range of courts, and many other distinguished guests.
- 4 I single out for special welcome Justice Macfarlan's wife and my very old friend, Nicole Abadee, together with their son, Lachie or "Farlos" as he is known to his mates, as well as Justice Macfarlan's other children, Charlotte (who has flown in from Hong Kong) and Alex and James who are on the live stream from New Jersey and Mexico.
- 5 I also acknowledge Justice Macfarlan's father-in-law, the Honourable Alan Abadee KC RFD and his brother-in-law, the Honourable Alister Abadee of the District Court of New South Wales.

- 6 The significance of Justice Macfarlan's contribution of which I shall speak extends well beyond the Supreme Court as the work of the New South Wales Court of Appeal and Court of Criminal Appeal provides guidance for courts at every level of the judicial hierarchy in New South Wales. Moreover, the influence of those two intermediate appellate courts extends beyond New South Wales, both by reason of the very significant output of each Court, the quality of their legal scholarship and the clarity of reasoning.
- 7 One of the reasons these two intermediate appellate courts command such influence and respect is the discipline and diligence of the judges who constitute them. In his 14 plus years as a judge of appeal, Justice Macfarlan has participated in over 1200 civil matters in the Court of Appeal and over 300 matters in the Court of Criminal Appeal, in addition to a number of matters at first instance. He has brought to all his appellate work the meticulous discipline and preparation for which he was famous at the Bar where I had the very good fortune to be led by him from time to time and, in due course, to lock horns on a couple of occasions. From both perspectives, I observed the precise and systematic way in which he would attack a brief, all from a desk at the tidier end of the spectrum.
- 8 Macfarlan QC, as he then was, brought all those skills with him to the Bench and, as counsel appearing before him, it was not difficult to pick when he had been allocated the star to write the first judgment. First, and although I say this without admissions, he was invariably more on top of the brief than counsel retained in the matter but, secondly, within a very short space of time, his questions would be directed to the nub of the most difficult issues in the case which he had identified in his close preparation.
- 9 No less industrious was he in the speed of his preparation of draft judgments. By speed I do not mean to imply that they were rushed, because they were always careful and considered, but his Honour belongs to that school of judging to which I also subscribe (or at least aspire), namely that appellate judgments should be produced with as much expedition as is possible, consistent with the

complexity and seriousness of the matter and the competing demands of other cases.

- 10 His Honour's discipline also gave rise to the so-called Macfarlan "25 page" rule with which all new Court of Appeal judges are inculcated by his Honour upon appointment – with (I should say) various levels of success! The rule has a measure of flexibility – a case which runs into a second day may warrant an additional 15 pages. By that metric, my final judgment with his Honour was an abject blow-out although (in my defence) there were a lot of facts.
- 11 Although we have all joked about the Macfarlan 25 page rule over the years, there is a serious and profoundly important point that underlies it and that is that appellate judges in particular, if they look to produce judgments which are not only meaningful and clear to the parties but also useful to the profession, must cut through to the key issue or issues raised in the appeal, eliminating unnecessary background and unilluminating citation of authority to support well-established principles. [Note to self!]
- 12 Of course, the identification of what are the key issues and distinguishing salient background facts from surplusage requires great skill, mastery of the detail, first class knowledge of fundamental principle and an ability to express oneself with considerable clarity. Fortunately, these attributes coalesced with great effect in Justice Macfarlan's judgments, both on the civil side and in the Court of Criminal Appeal.
- 13 It is impossible and perhaps invidious to seek to highlight particular judgments from such a rich corpus of work but some important decisions of his Honour on the civil side include:
 - *Leerdam v Noori* (2009) 255 ALR 553; [2009] NSWCA 90 (TORTS – concerning misfeasance in public office and whether a solicitor acting for Minister in AAT proceedings holds a "public office" amenable to the tort; and whether an advocate's immunity from suit applies to the torts of misfeasance in public office and collateral abuse of process;

- *Lee v Director of Public Prosecutions (Cth)* (2009) 75 NSWLR 581; [2009] NSWCA 347 (PROCEEDS OF CRIME – whether the procedures for examination and forfeiture specified in the *Proceeds of Crime Act 2002* (Cth) validly abrogated the privilege against self-incrimination);
- *S v State of New South Wales* [2009] NSWCA 164 (TORTS – whether the NSW Police breached the duty of care it owed to a police officer in circumstances where prolonged undercover work caused psychiatric injury – consideration of the appropriate response to the foreseeable risk of psychiatric injury)
- *Fleming v Marshall* (2011) 279 ALR 737; [2011] NSWCA 86 (PRIVATE INTERNATIONAL LAW – whether New South Wales was a “clearly inappropriate forum” for the determination of proceedings brought against New York attorneys in respect of their conduct of proceedings in Pennsylvania);
- *Tomasetti v Brailey* (2012) 274 FLR 248; [2012] NSWCA 399 (TRADE AND COMMERCE – misleading and deceptive conduct in financial services and representations as to the soundness of investments
- *Wickham Freight Lines Pty Ltd v Ferguson* (2013) 83 NSWLR 162; [2013] NSWCA 66 (PRIVATE INTERNATIONAL LAW – whether provisions of the *Accident Compensation Act 1985* (Vic) limiting the recoverability of damages for a work-related injury applied to proceedings in a New South Wales Court – whether those provisions were substantive or procedural;
- *Macedonian Orthodox Community Church v Metropolitan Petar* [2013] NSWCA 223 (EQUITY – existence and terms of trust – whether trust was extinguished by incorporation of Association – accessorial liability for breaches of trust)

- *Provident Capital Ltd v Papa* (2013) 84 NSWLR 231; [2013] NSWCA 36 (PROFESSIONAL NEGLIGENCE – whether the proper execution of a solicitor’s retainer to give independent legal advice concerning a particular transaction may, depending upon the solicitor’s knowledge of the circumstances of the transaction, require an explanation of the practical consequences of the client’s legal obligations, beyond mere explanation of the legal effect of the relevant documents);
- *Holt v TCN Channel 9 Pty Ltd* (2014) 86 NSWLR 96; [2014] NSWCA 90 (DEFAMATION – role of evidence in mitigation in reducing award of damages – relevance in assessing damages of assessment of consequences to plaintiff of publication)
- *Bartlett v Australia & New Zealand Banking Group Ltd* (2016) 92 NSWLR 639; [2016] NSWCA 30 (CONTRACTS – contract of employment – summary termination for serious misconduct – whether it is sufficient for valid termination that an employer holds the opinion that misconduct has occurred or whether formal proof of the alleged misconduct is necessary – whether an employer must act reasonably in forming an opinion as to alleged serious misconduct);
- *Pel-Air Aviation Pty Ltd v Casey* (2017) 93 NSWLR 438; [2017] NSWCA 32 (TORTS – personal injury – carriage by air – whether psychiatric injury constitutes “bodily injury” for the purposes of art 17(1) of the *Montreal Convention Relating to International Carriage by Air*);
- *Ireland v WG Riverview* (2019) 101 NSWLR 658; [2019] NSWCA 307 (TRADE PRACTICES – misleading and deceptive conduct in relation to sale of bull – effect of disclaimer – whether statement as to bull’s sire was one of fact or belief – damages – appropriateness of expectation loss for statutory misleading and deceptive conduct claims)
- *Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council* [2021] NSWCA 46 (LOCAL GOVERNMENT – categorisation of land for rating)

purposes – relevance of hiatus in land use – relevance of easement in rating values where easement to benefit neighbouring mine – relevance of the requirement to use land for a particular purpose)

- *CBRE (V) Pty Ltd v Trilogy Funds Management Ltd* (2021) 107 NSWLR 202; [2021] NSWCA 316 (CIVIL PROCEDURE – whether subsequent proceedings brought by a different plaintiff against the same defendant with legal and factual issues overlapping with those in prior proceedings gives rise to an abuse of process;
- *SunWater Limited v Liberty Mutual Insurance Company* [2022] NSWCA 273 (INSURANCE – whether consideration of the commercial purpose of a policy for indemnity permits rejection of the plain meaning of an unambiguous exclusion clause); and
- *Wipro v State of New South Wales* [2022] NSWCA 265 (EMPLOYMENT AND INDUSTRIAL LAW – long service leave – whether overseas service for employer to be counted as part of “continuous service” – statutory interpretation – territorial reach of subject matter of statute).

14 One can see even in this short sample the range of his Honour’s reach and expertise.

15 Another strong characteristic of his Honour has been the very high degree of judicial courtesy he has always exhibited. In that he has been a role model for others, and this has also contributed to the engendering of respect for the Court of Appeal throughout the profession.

16 His Honour has, to my observation, invariably resisted the urge for judicial humour. Perhaps this was because, in his first appearance in the Court of Appeal after his marriage to Nicole, Gleeson CJ (for whom Nicole had worked as Research Director) is said to have insisted on referring to him throughout as “Mr Abadee”. This mischief-making was matched only by Roddy Meagher

insisting on referring to Poulos QC as Mr Conomos over the course of several years!

- 17 Justice Macfarlan's own courtesy has extended to his colleagues behind the scenes, in the preparation for cases and in the dialogue which follows the hearing of an appeal and the circulation of draft judgments.
- 18 Speaking personally, and as someone who has known his Honour for the entirety of my professional career, can I thank him publicly for the support, encouragement and friendship he has always extended to me, particularly on my appointment as President and then, more recently, as Chief Justice. He, as a senior member of the Court, is someone whose views I have actively sought out, and whose advice I have greatly valued over the past four years.
- 19 I make only one complaint – his choice to tell me of his decision to retire from the Court just before my second shot on the fourth hole of a golf game in which I had just begun to pull ahead had all the tactical acumen of the head of Scottish clan. It operated as a canny and continuing distraction for the balance of the round, and plainly affected the result. Fortunately, this did not appear to come as a surprise to the bookmakers!
- 20 Justice Macfarlan, golf, travel, naval history and of course unlimited Elvis await you, interspersed, no doubt, with a steady diet of mediations in due course. On behalf of myself and the Court, could I wish you and Nicole all the best health and happiness into the future.
