

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

**ALLSOP P
AND JUDGES OF THE
SUPREME COURT**

Wednesday 1 June 2011

**SWEARING-IN CEREMONY OF
THE HONOURABLE THOMAS FREDERICK BATHURST QC
AS CHIEF JUSTICE OF NEW SOUTH WALES**

1 **BATHURST CJ:** President, I have the honour to announce that I have been appointed Chief Justice of this Court. I present to you my Commission.

2 **ALLSOP P:** Thank you Chief Justice. Would you please be seated whilst the Commission is read.

(Commission read)

3 Chief Justice, I now ask you to rise and take the oaths of office, first the oath of allegiance and then the judicial oath.

(Oaths of office taken)

4 **THE HONOURABLE GREG SMITH SC MP, ATTORNEY GENERAL OF NEW SOUTH WALES:** Your Honour, on behalf of the State of New South Wales and the New South Wales Bar, I congratulate you on your appointment as Chief Justice of the New South Wales Supreme Court.

5 You are now custodian of one of the oldest public offices in Australia. The first Chief Justice, Sir Francis Forbes, took his place in 1824 and you will

be the seventeenth. However, number five, Sir Julian Salomons, stepped down after fifteen days before he even got to hear a case. His problem was that his appointment was not well received.

- 6 This is not a problem facing your Honour. In fact, your elevation has been widely acclaimed, particularly among the Sydney Commercial Bar. One such beneficiary said, "Tom was simply briefed in every commercial matter of any significance going. So much so that his appointment has resulted in the release onto the market of the workload of two or three silks combined".
- 7 Your Honour was born in Richmond, Surrey in the United Kingdom, the son of an engineer and a champion tennis player. Your mother, Joan Hartigan, won the Australian Open, or Championships, as it was then called, three times, in 1993, 1934 and 1936. You also have a great interest in tennis and the combination of prowess on court and an unmistakable gait, earned the nickname of the shuffling assassin.
- 8 You were educated at St Ignatius College and in that respect, you were not alone at the Supreme Court. In fact, your addition takes the figure to nine out of forty-nine full-time judges now on the Court. This approaches a critical twenty per cent which requires a takeover bid to be announced under Companies Law. For the regulators among you, the numbers will fall to eight when Justice George Palmer retires on Friday.
- 9 You then went on to the University of Sydney and after graduating with degrees in Arts and Law in 1971, you were admitted as a solicitor in New South Wales in February 1972. When you completed your Articles, you joined the city firm of E J Ernest Kirby & Co where your mentor was Ann Plotke. Ms Plotke says you thrived at the firm which specialised in commercial work and they kept you busy to such a degree that you celebrated your twenty-first birthday in New Guinea while working on a matter. Ms Plotke also mentioned that she tried to teach you that it was

important to show courtesy and respect to your fellow practitioners and clients. By all accounts, she clearly succeeded.

- 10 So it was no surprise that the firm continued to brief you when you were called to the Bar in 1977. Only ten years later, you were appointed Queen's Counsel, proper recognition of the skill you exhibited and the respect you earned. Like your mentor, the late Peter Hely, you showed rare skill in being able to reduce complex matters to their very essence.
- 11 Because you see things so clearly, and offer commercial commonsense and sound judgment, your opinions have been widely sought and valued. You have also commanded huge respect from the Bench because of your ability to get to the heart of the matter and to do it with great clarity and economy of language. Not a word is wasted although on occasions, the three points you informed the Bench you would be making, turned into five but only when circumstances intervened.
- 12 Your skills as a crossexaminer were behind many courtroom triumphs. You were always logical and polite, and usually devastating. As a result, your practice covered almost every aspect of Commercial and Corporations Law, including Trade Practices, Administrative Law and Revenue Law as well as Commercial Arbitration. It would be difficult to name a corporate or commercial case of any size or substance in the last two decades, in which you have not had some involvement. You acted in one of the first matters in the era of blockbuster directors' duty cases, *Daniels v Anderson*, a case which set out a statement of principles of the duties of non-executive directors. You have also been involved in a number of State and Federal governments. You appeared for the State of New South Wales in several cases involving ticketing for transportation systems, and for the Reserve Bank of Australia, in a case related to credit card interchange fee reforms.
- 13 Then there are the landmark cases concerning the concept of good faith, liability for professional advice, the ranking of shareholder, claims and

administration, and the ability to bind third parties with Deeds of Company Arrangements.

- 14 That did not mean you could escape some affectionate barbs from your colleagues, many of which focussed on your walk - or shuffle. At the 1998 Bench and Bar Dinner, Ian Barker QC, was President of the Bar Association and MC for the night. Your Honour was Mr Senior and Nicole Macfarlan, nee Abadee, was Madam Junior. So it was Tom and Nicole playing the lead roles.
- 15 Coincidentally, James Spigelman was the guest of honour, soon after his appointment as Chief Justice. Mr Barker mentioned that his running sheet said that he was to call on Tom Bathurst to speak at 8.38pm and that he would arrive at the lectern at 8.43. I am advised your Honour got there with moments to spare. You are lucky to have friends like Mr Barker. When asked, by me yesterday, if there was any scandal, he replied, "stacks, but it's all subject to suppression orders".
- 16 Those who remember you from E J Kirby days, say you have not changed much. You still have the same dry wit but are not given to self-promotion. One senior judge suggested you offered a reminder of Bill Dean as a shy and a retiring person who is very succinct in his observations. This economy of words and movement, means that when you speak, people listen. Thankfully, this has been put to good effect with your mentoring countless young lawyers and the vital role you have played in issues concerning the legal profession.
- 17 You are the immediate past President of the Australian Bar Association. You were President of the New South Wales Bar Association from 2009 until your appointment. As President of the Australian Bar, you proved a strong leader at a time when the move to a unified national legal profession was in doubt. Should this move ultimately come to pass, the contribution of your Honour who helped draft rules which have been

adopted by all State Bar Associations should be acknowledged, and I am sure will be.

- 18 As President of the New South Wales Bar, you went out of your way to go to legal education events in regional and rural, or remote areas, so that you could hear first hand, the concerns of people in those areas. So it was not surprising to see that you have declared one of your priorities will be to continue efforts to make the justice system more accessible at a reasonable cost. You have also said you wanted to make the best use of technology in the courts which shows you are prepared to embrace change but some things will stay the same. Such as the morning swim, followed by the crossword on the way to work.
- 19 On the home front, you are a devoted husband to wife, Robyn, and father to daughters, Emma and Sophie, who will no doubt be very proud of you on this occasion but Emma, a lawyer, who works on refugee cases, was puzzled at your career transition. She asked, “Why do you want to be a referee when you can still be a player”. She chose a metaphor that could get through to her rugby mad dad, who has shown laudable, if not tragic, devotion to the New South Wales Waratahs. As a fan of the West Tigers, I know how you feel. You might also have mentioned to her, as you did to others who ask why, that it was your duty.
- 20 It is this attitude of public service that will serve the Court and the people of New South Wales very well over the next decade.
- 21 We all wish you well.
- 22 **MR STUART WESTGARTH, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES:** Today marks the beginning of a new chapter in the life of the Supreme Court of New South Wales and the administration of justice in this State. I am very privileged and honoured to be standing here to witness the swearing in of your Honour, as the State’s seventeenth Chief Justice, and to be a part of this moment in history.

- 23 On behalf of the 24,000 solicitors of New South Wales, I am pleased to add my congratulations and good wishes on your Honour's appointment to the position of Chief Justice.
- 24 The first chapter in the history of this Court began with the appointment of Sir Francis Forbes and the Colony's first Chief Justice, and the last chapter ended yesterday, with the retirement of the Honourable James Spigelman AC.
- 25 Interestingly, the sole signatory to the Charter of Justice which established the jurisdiction of the Supreme Court of New South Wales in 1823, was that of the British Secretary of State for War and the Colonies, namely the third Earl of Bathurst. His father, the second Earl, was the Lord Chancellor of Great Britain and Keeper of the Great Seal from 1771 until 1778. At the time, and indeed until 2005, the Lord Chancellor was the head of the judiciary. Now my copy of the Lives of the Lord Chancellors, was written by Lord Campbell and published in 1846, does not portray the second Earl of Bathurst in an entirely favourable light, although the author does describe the son, the third Earl, as a distinguished Statesman. On Friday last, my team of researchers reported back to me that there did not appear to be any blood relationship between the Bathursts described in Lord Campbell's book and the Bathursts of Sydney, and indeed, a member of your Honour's family has denied such relationship. Given Lord Campbell's somewhat nuanced remarks, that is something of a relief.
- 26 The position of Chief Justice, has been held by some iconic names in our legal history. Without offending by omission, it is worthwhile reflecting that your Honour occupies a position once held by the former Chief Justice of the High Court of Australia, the Honourable Murray Gleeson, three generations of the Street family and the Right Honourable Sir Alfred Stephen, who held the position for nearly thirty years, to name just five of your predecessors.

- 27 I understand that your Honour was born in the United Kingdom, which means that the majority, namely nine of our Chief Justices, have been born overseas and only eight born in New South Wales.
- 28 Admitted as a solicitor on 11 February 1972, having obtained a Bachelor of Arts and Bachelor of Laws degrees at Sydney University, your Honour completed your articles before joining the Sydney firm of E J Kirby & Co where you were fondly remembered as a bright young man with an ability to grasp matters quickly. Just five years later, your Honour went to the Bar and in 1987 was appointed Queen's Counsel.
- 29 One of the key requirements of the role of Chief Justice is the ability to command the intellectual respect of the judiciary and the profession. Your Honour has, without doubt, established a reputation as a lawyer of the utmost skill and learning, and will unreservedly satisfy that key requirement of commanding the intellectual respect of the judiciary and the profession.
- 30 Your Honour has received universal acclaim from the Bar and the broader profession and indeed, received a standing ovation at the recent Bench and Bar Dinner on your final occasion as the New South Wales Bar President. In recent years, your Honour has been listed in the highly respected peer review publication, Best Lawyers.
- 31 Your Honour is renowned for thoroughness in your preparation and for being a superb technician, with commercial judgment second to none. Colleagues have referred to your ability to sum up facts and legal principles very quickly, churning through large volumes of complex work easily and efficiently. Solicitors have commented on how your Honour is easy to brief, describing you as a favoured counsel of choice, because of your incisiveness and ability to get to the heart of the matter, your razor sharp intelligence and strategic insight. In respect of the art of cross-examination, your Honour is said to know what difficult questions to

ask and how to ask them, characteristics that now augur well, particularly well for Court of Appeal hearings.

- 32 Your Honour's capacity to juggle tasks is described as phenomenal, whether it relates to appeals, trials or advice work. Solicitors and clients would come to your Honour in droves, confident that they would be provided with a very sound commercial assessment in a succinct and cost effective way. Your Honour would keep conferences short, do your own opinion work and be particularly meticulous in your written advices. As one of the leading commercial silks in New South Wales, there are few large complex cases your Honour has not been involved in over the past 15 years.
- 33 As has already been widely reported, your significant cases have included acting in the long running case, *Seven Limited v News Limited & Ors* (C7 case), the Sons of Gwalia case (2007), the Bell Group litigation (2009), and most recently, *ASIC v James Hardie Directors*. Some of your Honour's high profile cases have been the source of subsequent pieces of reforming legislation. I cite the decision of Justice Rogers, Chief Judge of the Commercial Division, in the case of *AWA v Daniels* (1992) which was subsequently overturned by the Court of Appeal in *Daniels v Anderson* (1995) and in which your Honour represented AWA. The Court of Appeal determined that the standard of care required of a non-executive director was not different to that of an executive director, a determination which left non-executive directors, arguably, unreasonably exposed to the threat of litigation. This case was instrumental in the introduction of the Corporate Economic Law Reform Program Bill 1998, and the subsequent enactment of the Statutory Business Judgment Rule in 2000, designed it stated, "to promote optimal corporate governance structures without compromising directors' flexibility and innovation". No doubt your Honour's extensive experience in these sorts of cases, makes you ideally suited to considering how the Court should manage complex cases and maintain the high levels of efficiency already established.

- 34 I also note from press interviews that reforms aimed at limiting the costs and time spent in the discovery process, greater efficiencies through technological initiatives and supporting efforts to increase access to justice, are high on your Honour's agenda.
- 35 In the courtroom, your Honour was always a worthy opponent, "When Tom got to his feet", one colleague has remarked, "you could hear a pin drop and almost immediately the judges would lean forward and start writing". As to your Honour's personal penmanship, many have marvelled at your ability to interpret such scripts. Your Honour will emerge from chambers with a foolscap pad where every square inch is covered and where the pen has pressed so hard, it has gone through the paper.
- 36 Your Honour, over the past year or so, you and I have attended the directors' meetings of the Law Council of Australia and during that time, I have observed and admired your technique for achieving outcomes which you thought appropriate. You were always silent at the beginning of the debate but the silence was broken by your strategic and succinct intervention, after you had carefully assessed whatever battlelines had been formed and your interventions, persuasively expressed, were always the turning point. Invariably, the directors came to the view preferred by your Honour.
- 37 My spies inform me that outside the law, one of your exercise regimes includes swimming. Not many can boast meticulous case preparation whilst partly submerged but I understand that swimming provides the necessary concentration required to present watertight cases. I have no doubt that your Honour will keep your head above water in coming to terms with the diversity of the areas of law which come before this Court. At the risk of taking these idioms too far, I say that many of your colleagues tell me that you will be like a duck to water, as have been some of your predecessors, in quickly adapting to presiding over proceedings in the Court of Criminal Appeal.

- 38 Allowing for a settling in period, perhaps the Jesuit teachings of your old school Riverview, and the school's motto will stand your Honour in good stead, "*Quantum Pottas Tantum Owdee*" – "As much as you can do, so much dare to do". Apart from swimming, your Honour's interests are listed on your CV, as rugby, tennis, travel and opera. The latter, I am informed by an insider, probably more by virtue of your wife Robyn's keen appreciation. No doubt, once handy with a tennis racquet, particularly in the light of your late mother Joan's professional tennis career, your practise now tends to be confined to other courts. Your mother won the Australian Open three times (1933, 34, 36) and was a semi finalist at Wimbledon in 1934 and 1935.
- 39 Spectator sports, particularly when it comes to rugby, and the sometimes mighty Waratahs, are high in your Honour's leisure activities. So too is travel, more often to the United Kingdom, perhaps due to the fact that your youngest daughter Sophie, is studying languages at Oxford. The UK is also your Honour's birthplace. Your Honour was born in Richmond, Surrey where your late mother Joan was accompanying your father Hugh on business. Sister Mary was a later addition to the family. No lawyers to be found there but your Honour can take heart that your eldest daughter, Emma, is carving out a career as a solicitor.
- 40 Your Honour, on the swearing in of your immediate predecessor of the then President of the Law Society Ron Heinrich stated that the solicitors of New South Wales looked to:

"A judiciary that remains steadfastly independent of the State and unrelentingly committed to applying the rule of law. We look for analysis and insight, thoughtfulness and thoroughness in judgments. We also seek a justice system which is well managed, where parties appearing before the Courts, can reasonably expect the efficient handling of matters through well managed administrative systems".

he said.

- 41 That sentiment remains. The New South Wales Court system has undergone many improvements in administrative processes and cost efficiencies since that time and a truly collegial atmosphere amongst the judiciary has been forged.
- 42 Under your Honour's stewardship, we are confident that this *l'esprit de corps* will prevail and New South Wales will continue to be at the forefront of development in the administration of justice and further build on its global competitiveness and reputation.
- 43 If I may respectfully say so, the Court is in capable hands and the solicitors of New South Wales wish your Honour every success in the task ahead.
- 44 As the Court pleases.
- 45 **BATHURST CJ:** I would like to start today by acknowledging the Gadigal people of the Eora nation who are the traditional custodians of this land. I would also like to pay respects to the Elders both past and present, of the Gadigal people and extend that respect of other Aboriginal Australians who are present.
- 46 Your Honours, Premier, Attorney, distinguished guests, members of the legal profession, ladies and gentlemen. Thank you for your presence here today. It both honours and humbles me but more importantly it honours the Court.
- 47 Mr Attorney and Mr Westgarth, thank you both for your kind remarks. You have wildly exaggerated such qualities which I do have, whilst charitably ignoring my many failings.
- 48 To say that I am daunted by the task which lies ahead of me would be an extreme understatement. In my time at the Bar, I have had the privilege of appearing before three Chief Justices of this Court, all of whom are here

today, Sir Laurence Street, Chief Justice Gleeson, and my immediate predecessor and good friend, Chief Justice Spigelman.

49 Chief Justice Gleeson of course went on to become Chief Justice of the High Court. Sir Laurence Street and Chief Justice Spigelman, along with Sir Frederick Jordan, are recognised as the three finest legal minds in this State not to have served on the High Court bench. Of equal importance, in addition to their judicial skills, they led the Court with distinction, meeting the challenges they faced, maintaining the independence of the Court and preserving and enhancing its reputation as the premier state superior court in this country. Those are very large shoes to fill indeed. I am comforted, however, that Chief Justice Spigelman could not have left the Court in better shape and by the warmth with which the judges of the Court, have welcomed my appointment and by the encouragement which they have already given me. To know that I will have their support and cooperation is very important to me.

50 I practised as a barrister for over 30 years. That was a long time, some have said recently, an inordinately long time. It did not feel like that to me. I love the profession and even after that time, it was a real wrench to leave it. I remain convinced that dialogue between the Bench and the well prepared advocate, aided by focused written submissions, provide the best mechanism for quickly identifying the real issues in dispute in any litigation, even in the most complex case and in assisting the Court to reach the most appropriate result. It is vital to the continued success of that process that advocates recognise the paramount obligation of the Court, an obligation which in my opinion, extends not only to conducting cases with integrity and fairness but also seeking in the interests of their clients, other litigants and the Court, that cases are efficiently conducted, focussing on issues which are a real substance in the dispute. It must be said that most advocates in my experience do this.

51 In making those remarks, I am not ignoring the vital role that solicitors play in the administration of law. They are, generally speaking, the immediate

contact members the public have with the law and the legal profession, in both litigious and non-litigious matters. It is from contact with them that most members of the public derive an impression, favourable or otherwise, of the legal system and its practitioners. I have had the privilege over many years of working with many fine practitioners. Their skill and dedication to their clients was outstanding. Their clients knew that they could be relied upon to give them sound advice and to carry out their instructions in an expeditious fashion. That conduct, which I think is common to most solicitors, does much to enhance respect for the legal system in the community at large.

- 52 As Mr Westgarth said, I practised as a solicitor for about four years. I was entirely hopeless. The most helpful thing I did for that branch of the profession, was to leave it. I sincerely hope the same thing will not be said about me when I leave this office. Having said that, the two solicitors for whom I worked, Ernest Kirby and Ann Plotke, gave me a thorough grounding in the field in which I have mainly practised.
- 53 Underlying what I have said, is the notion that the legal profession is exactly that, a profession. The object of all of us should be to serve the community in a way consistent with the rule of law and the traditions of the profession. The Courts succeed in that task if they administer justice impartially, regardless of the wealth of the client, his or her ethnic background, gender, or otherwise. The profession succeeds if its members bear in mind that they are not merely conducting a business for profit or to blindly serve the whims of their client but are rather there to assist the client in a manner consistent with their ethical obligations, as members of the profession and consistent with their duties to the Court.
- 54 The Court and the profession, generally face different challenges with each generation. The present time is no different and I would just like to dwell on a few of the issues. As you all know, there has been a significant movement towards a national legal profession. I have been privileged, first as President of the Australian Bar Association, and then as President of

the New South Wales Bar Association, to be involved in some of the decisions leading towards that goal and it is an objective which I regard as desirable. However, it cannot be achieved at the risk of the independence of the judiciary or for that matter, the whole of the legal profession. Any surrender of that independence, however slight, may seem inconsequential at the time it occurs, but an erosion of such independence over time can be equally damaging as an immediate surrender of the independence. The separation of powers and the independence of the judiciary from the Executive Branch are the foundation on which our democratic institutions are built. It is of crucial importance that that independence be maintained. Fortunately, in my experience, the members of the Executive Branch are alive to this issue and appreciate the need for the maintenance of judicial and what I might describe as legal independence.

55 Technology presents a challenge. It provides enormous benefits to the Court in the conduct of its operation, as it does in most areas of life today. However, it is important that it be utilised in the best possible manner. The convenience of downloading large quantities of material on disk, and tendering the disk in evidence, should not be a substitute for a careful consideration of whether the material will actually be of assistance in the presentation of a case and in the advancement of a just, quick and cheap result. On a number of occasions in recent times, I have heard a judge confront with a great deal of documentary evidentiary material saying he or she would look at it only if it was referred to in the submissions. A judge should never have to say that. Further, a judge should not have to sift through many pages of submissions to see whether it is in fact referred to in some tucked away footnote. It is my hope that the profession and the Courts will cooperate to ensure that this does not occur and to use technology in the most efficient manner possible to further the ends of justice.

56 Courts today are subject to increasing media and public scrutiny. Indeed, a request was made that the ceremony be televised live. Fortunately for

the viewing public, the structure of the Court did not permit it. I cannot imagine anyone more unlikely a television personality than myself. That said, Courts in my view, should welcome media scrutiny. It is important that the public knows and understands the functions of the Courts and how they operate. Judges speak primarily through their judgments and that should remain the case but that does not mean the judges should lead a monastic life and decline to comment on how the Court operates, and at least in general terms, the process by which the Court arrives at its decisions. I certainly do not intend to disengage myself from the community. It would be a mistake to do so. It is important that judges do all they can to keep abreast of the expectation that communities have of the Courts. I regard it as part of my function, to explain the working of the Courts to the media and to do all that I can to assure the public that the judges of this Court are committed to seeking to administer justice in a fair and impartial manner.

57 The costs of litigation are an ongoing problem. This, of course, is due in part to the labour intensive nature of the process and is to some extent, unavoidable. However, we should be vigilant to ensure that access to the Courts is not restricted to the very wealthy or the limited group of people who are entitled to Legal Aid. This Court has for some time, been putting systems and procedures in place to ensure that litigation will be conducted as cheaply and efficiently as possible. That process will continue.

58 In recent times, there has been an increasing emphasis on alternative dispute resolution, particularly mediation. It is appropriate, in my opinion, for Courts to encourage those processes and on many occasions, insist that mediation be attempted. However, that should not be taken to the extent that parties believe, rightly or wrongly, that they are being denied access to the courts. It is fundamental to the rule of law, that parties have access to the Courts to settle their disputes.

59 I have avoided up to now, reminiscing on my past life. As I said, I love the Bar. When I first came to the Bar, I knew next to nothing about being a

barrister. The help I obtained, not only from members of the floor which I joined, but from other members of the Bar at that time, was fundamental to whatever success I have had as a barrister. So too was the support of many solicitors who initially took me on trust and subsequently briefed me regularly throughout my career. Many of those who assisted me are here today and know to whom I am referring and I will not embarrass them by mentioning their names. However, I would like to mention my debt to the late Justice Peter Hely and the late Doug Staff QC, who particularly mentored me in the field in which I have spent most of my practising years.

60 Over the last twenty-five years, I have been a member of the Sixth Floor Selborne and Wentworth Chambers. The friendship and support of all members and staff of those chambers gave me over the years, is what has made my practising career such a happy one. I will be joining a number of past members of that floor from today on. I know that those who remain on the floor, will always be good friends.

61 I have been fortunate to have wonderful support staff over the years. My personal assistant, Victoria Bradshaw, who is now my associate, and her predecessor, Ruth Adam, have been untiring in their support. My clerk, Lisa Stewart, always has been ready to provide assistance when needed. Without them it would have been impossible for me to carry on my practice in a way that was remotely efficient.

62 I had the privilege of being both the President of the Australian Bar Association and the New South Wales Bar Association. They were both wonderful experiences and I would like to record my thanks, in particular, to the Executive Director of the New South Wales Bar Association, and the Association's staff with whose assistance I was able to undertake the task of those offices whilst maintaining a reasonably busy practice.

63 Finally, but most importantly, I would like to thank my wife of thirty-four years, Robyn, and my two wonderful daughters. They have always been on hand to support me and quick to discourage any sense of

self-importance that I may otherwise have had. The debt I owe to them, particularly to Robyn, is enormous and impossible to repay.

64 All that remains is to thank you for your attendance today and to ensure you, I will endeavour to discharge this office to the best of my abilities.

65 The Court will now adjourn.
