THE SUPREME COURT

OF NEW SOUTH WALES

BANCO COURT

GLEESON CJ
AND JUDGES OF THE
SUPREME COURT

Monday 3 May 1993

CEREMONY OF FAREWELL TO

THE HONOURABLE JUSTICE ROGERS

CHIEF JUDGE OF THE COMMERCIAL DIVISION

UPON THE OCCASION OF HIS RETIREMENT

AS A JUDGE OF THE SUPREME COURT OF

NEW SOUTH WALES

GLEESON CJ: The purpose of this gathering is to mark the retirement of the Honourable Justice Andrew Rogers, Chief Judge of the Commercial Division of the Court.

His Honour came to this country in his youth, having had his initial education in Switzerland, and was then educated at Cranbrook School and at the University of Sydney from which he graduated in law with honours. He was admitted to the Bar in 1956 and was appointed one of Her Majesty's Counsel in 1973.

His Honour had a busy and successful practice as a barrister and he appeared in many important Commercial and Constitutional cases. He was highly regarded for his keen intellect, his wide knowledge of the law, and his vigour in prosecuting the interests of his clients.

His Honour was appointed a Judge of this Court in 1979 at the age of forty six, leaving behind him a highly successful and lucrative practice. From then until the present time, he has devoted to the administration of justice those same qualities of intellectual acuity, learning and personal vigour that distinguished him whilst he was at the Bar.

Most of the work of this Court that Justice Rogers has done has been as a member of, and ultimately Chief Judge of, the Commercial Division. It was my personal pleasure to appear on many occasions before his Honour in his capacity as a Commercial Judge, and I can attest to the high esteem in which he was held, both by legal practitioners, and by members of the commercial community.

His Honour has also served the State and the administration of justice as a part-time member of the Law Reform Commission of New South Wales.

I should make special mention of the work done by Justice Rogers as a Member of the Policy and Planning Committee. I am personally indebted to him in many ways for his advice and assistance and for his contribution to the work of that Committee. He is a man who is always bubbling over with ideas and many initiatives that he has proposed have come to successful fruition.

His Honour has also served as a member of the Rule Committee of the Court, and the Education Committee of the Judicial Commission of New South Wales.

Justice Rogers has acquired an Australia-wide reputation as a talented, imaginative and innovative judicial administrator. The success that he has achieved in the management of the Commercial Division has been outstanding. At a time when there is so much public comment about court delays, it is interesting to note that the Commercial Division disposes of more than eighty percent of its cases within approximately ten

months of commencement. These are often difficult and complex cases and frequently involve very large sums of money.

His Honour was a pioneer in this country of case management. Proceedings that are instituted in the Commercial Division of the Court come before a Judge of the Division for directions within three or four weeks of their commencement, and the progress of the cases thereafter is closely monitored and judicially-controlled. The Commercial Division provides a fast track, but practitioners in that area are left in no doubt that it is also a hard track. To use a racing metaphor, the going in the Commercial Division is always firm. That suits some horses and riders better than others, but it suited me well as a barrister, and it suits me even better now.

In recent years, his Honour has been perhaps best known for his interest in what is sometimes called Alternative Dispute Resolution. That expression covers a variety of activities including, for example, arbitration, conciliation, rights-based mediation, interest-based mediation, and early neutral evaluation. It may be expected that when he leaves the Court his Honour will pursue his interest in that subject, and if he does so, he will have an opportunity to make a continuing contribution to the administration of justice. Procedures of the kind I have just mentioned are a valuable supplement to the available means by which civil disputes may be resolved. Litigants in the Commercial Division of this Court, and those whose cases are in the Building and Construction List, have for some years now been encouraged, where appropriate, to take advantage of these techniques of dispute resolution.

His Honour's departure from the Court will be a great loss. He has been an outstandingly creative and active judge, always willing to explore new methods and ideas; the very opposite of the fictional semi-retired barrister so often popularly depicted as the judicial prototype.

On behalf of all the members in the Court, I assure him of the value we place upon the contribution that he has made, and wish him every success and happiness in his future.

J S COOMBS ESQ QC PRESIDENT NEW SOUTH WALES BAR ASSOCIATION: May it please the Court. Your Honour was a particular favourite as a junior counsel of my master solicitor, the late and great Clive Sisley. Thus my earliest years in the law saw me beating a path to your chambers brief laden. I learned early that what ought to be in the brief had better be in it. Future events cast their shadows before. It is therefore with a great deal of personal pleasure that I express the Bar's good wishes to your Honour.

The early association continued over the years and was both valuable and enjoyable for me. When I was called to the Bar I joined what was then the first floor of the old Selborne. When the building was pulled down I was one of the refugees in the Queens Club Building. In the new building there was no room for me on the new seventh. Your Honour arranged for me to join Harry Dobeson's sixth. This was typically generous and indeed gracious since I had stolen the bottom third or so of the Sisley segment of your Honour's practice. No matter. You prospered and diversified.

You were an outstanding advocate. I had the privilege of being your junior after you took silk in fields as diverse as divorce, constitutional law and crimes, as well as in your more usual fare of commercial and appellate work.

The Chief Justice has spoken about your outstanding judicial career and with him I respectfully agree. I note that your Honour's CV has the mareva injunction prominent. Your Honour's seminal work in bringing Lord Denning's love child to the New South Wales Supreme Court is well

known. Perhaps less well known is that your Honour emulated the Chancellors of old in giving yourself the jurisdiction to grant it.

When the issue of jurisdiction to grant the injunction arose (again) in *Riley McKay v McKay*, your Honour promptly referred it to the Court of Appeal, then sat as an Acting Judge of Appeal on the Court that considered the reference. The judgment is signed cryptically *"the Court"*, but some claim to recognise the style.

Style your Honour always had. In the early 80's I drove into a circuit town in Wales, following a guide book route, to an old and picturesque hotel probably called the Red Lion. I asked to be accommodated in the High Sheriff's Suite. *"I am sorry Sir, the suite is booked"*, I was told, *"But are you from Australia?" "I am"*, I said. *"Oh Sir, an Australian Judge, Justice Rogers, is in the suite. Perhaps you would like to see him."* Sadly your Honour was out.

Also prominent in your Honour's CV is your work on and your writings about foreign exchange cases, so prominent since deregulation. Some have asked whether the same judge who wrote of the notion of there being such a beast as a prudent financial adviser in a forex situation. *"This is somewhat akin to suggesting that an adviser to a player of Russian Roulette would tape up the firing mechanism unless there was no bullet coming into the chamber"*, would have asked the questions of Dr Mehta described by Justice Meagher as leading, unable to be put by his own counsel, questions which *"would not have been put"* by the opposing counsel; nonetheless questions, the answer to which persuaded your Honour to bring Citicorp and those who advised Dr Mehta unstuck, at least at first instance.

A lot can change it seems between 1986 and 1991!

I mentioned Clive Sisley earlier: I should also mention that your Honour's kindness to his widow in the time soon after his death was truly appreciated by her and also by his many close friends.

Some very junior and also the less rigorous members of the Bar may feel some sense of relief at your Honour's departure. Whether that relief is short lived may depend on the qualities of your replacement. Short lived or not, it is confined to the very few.

The Bar as a body will miss your rigour, your vigour and your scholarship. It also looks forward to more encounters with your Honour in what we expect to be your new fields. Real retirement seems most unlikely. Whatever is to come, the Bar wishes you health and happiness in it. May it please the Court.

J NELSON ESQ PRESIDENT THE LAW SOCIETY OF NEW SOUTH WALES: May it please the Court. Your Honour, most people in the legal profession in this State associate you with the efficient high speed disposition of cases. True enough. Let's be frank about it. You have been something of a terror to practitioners, especially those who are not quite as fast off the mark in the handling of their matters as they might be.

Yet as against that commanding image, there have always been those remarkable instances of personal care and compassion that you have exhibited. Care and compassion that has had the effect of re-fortifying the morale of stressed practitioners, many of whom can testify regarding the understanding you have shown them.

Naturally enough, your Honour will always have much to thank your European homeland for, especially in terms of a rich cultural background. From the time of your birth in Budapest, that was sixty years ago almost to the very day, until you left Europe in 1946, you had personal experiences of pain and desolation. Throughout that time, as in

all the years to follow in Australia, the redoubtable figure of your mother, Katie, was an inspiration to you and all around her.

Your Honour ceased to have contact with your natural father after a little more than a year of your life. After your mother's subsequent remarriage you grew into a close relationship with your new stepfather, another Andrew, and with your stepbrother, the child of that second marriage, yet another Andrew. Yet, however, you were soon to undergo the further trauma in the new war-torn Europe of the 1940's of your stepfather being killed, your family dispossessed, the children all separated and, as part of the incredible political persecutions of that time, your mother arrested and you yourself almost perishing.

It was only through your remarkable mother's ingenuity that she, notwithstanding the odds against her, managed to relocate her children, reunite her family and effect an escape into Switzerland. Thereafter followed a period of schooling and that was then followed by a further short period of schooling in India.

Australia, which was to be your home thereafter, was initially a great shock to your Honour and to the little family group in which you arrived in this country. You came here in 1947 as a fourteen year old school boy with your hair - and at that stage there was plenty of it - neatly parted down the centre in the then European fashion. It has been reported to me that your small family group's encounter with the rude local scene, especially with the true blue Aussies wearing blue singlets while swilling beer straight from the bottle, came as something of a culture shock. It was another kind of searing experience.

Your Honour, however, immediately took a crash course in assimilation without of course ever becoming a carbon copy of the local role models. You quickly learned to part your hair on the side instead of the centre and you have never looked back since.

The prime characteristic of your Honour's professional life since admission to the Bar in 1956 has been your inherent soundness. Fellow practitioners who worked closely with you, especially those who have served as juniors after you took silk in 1973, speak admiringly of your capacity to come quickly to the kernel of every legal problem. As one of your former juniors, has said, *"Andrew was at all times sound. He had a great gift for giving succinct explicit opinions which went straight to the economic realities of the matters under consideration."*

There has been certain occasional reference to an alleged brusqueness in your demeanour in Court. Your peers when you were at the Bar continue to speak highly of the great encouragement you always displayed as an advocate. At the same time, it has always been said of your Honour that you have had a remarkable talent for the detection of humbug and once detected an absolute intolerance regarding it.

There remains an underlying sense of humour for which, despite the occasional brusqueness to which I have referred, you are famous. Part of it, I am sure, flows from the fact that although in your time on the Bench you have had to be something of an authority figure yourself, in your heart you have always been an instinctive rebel against authority.

One of the most graphic stories comes from one of your juniors, now am eminent silk himself, who can convulse people with his recitation of what occurred when you and he were facing a tight time deadline in terms of getting to another city to appear in an important case and were informed by the airline that the plane was overloaded and no seats were available. Needless to say, propriety went out of the window and you both ended up on the plane in circumstances that generated a great deal of hilarity all round.

One particular area in which your Honour had expertise when at the Bar, and there were many such areas of course, were cases under s92.

Because of that expertise your Honour came to be much loved by road hauliers, chicken farmers and milk producers. This was because of the many attempts, sometimes successful and sometimes not quite so successful, you made to set aside the state monopolies set up to control the marketing of agricultural products. You always took great delight in dreaming up schemes to frustrate such monopolies.

One case in point concerned the then hen quota legislation which governed the number of hens any egg producer could keep. Your Honour thought up a scheme to circumvent it. The idea that came to you was that at the commencement of the breeding life of the hens they would be sold for delivery interstate to an abattoir. Hence by the end of their breeding lift they would have had two years during which they were successfully laying eggs. Throughout that time it would be arguable that they had been part of interstate trade and commerce, therefore, they would not have been the subject of legislation which limited the egg producer to a limited number of hens.

Elegant pleadings were delivered to the High Court alleging that at the end of their useful breeding life it was proposed that the hens be slaughtered interstate. This generated a great deal of heat and controversy. Unfortunately, it was all somewhat theoretical rather than real. The case never came to trial. The egg producer could not bring himself to incur the additional cost of trucking the hens interstate so he simply slaughtered them on his premises, thereby depriving your Honour of the opportunity of mounting an interesting and potentially highly amusing case in the High Court.

I assume your Honour did not win any votes amongst supporters of the RSPCA and the Animal Welfare League, but I am assured that for the rest of your lifetime you will enjoy the fervent support of chicken farmers.

Your Honour is a devoted family man, a keen traveller, a voracious reader and a true citizen of the world. This country has much to thank post-war European settlers for. They have enriched our cultural life immeasurably and in particular you have made an outstanding contribution. I wish you well and I wish you every success. If the Court pleases.

ROGERS CJCommD: Thank you for all you have said. It is customary to respond to speeches at farewell ceremonies by saying that all that has been said has been far too kind. I will not do so for two reasons. First, no lawyer truly believes it. In our heart of hearts we know that all that has been said is true. On one occasion, when I was junior to our departed friend, then Glass QC, I told him that I thought his cross-examination that day was particularly outstanding. Silence fell between us for about thirty seconds and Harold then said, *"Don't stop, go on"*. The other and more important reason is because modestly to disclaim would be to do less than justice to all those whose work brought the Commercial Division of the Court to where it is. Thanks go to those who immediately preceded me, Mr Justice Meares and Mr Justice Shepherd. I am delighted that they are both able to be present today. Over the years I have had the support and help of many judges. Mr Justice Yeldham also is able to be present, Mr Justice Hunt, Justices Wood and Carruthers all contributed greatly in the time they were able to allow for commercial work. Later in time a number of judges spent most of their time on the bench of this Court in commercial work, Justices Clarke, Foster, Brownie and more recently Cole, Giles and Rolfe. Nothing should be read into the fact that a number of those I have named were glad to escape variously to the Court of Appeal, the Federal Court and the Equity Division. Because the Commercial Division is small in number, because of the fact that the

others have all been good natured people, we have been able to work as a close-knit cohesive unit. This led not only to efficiency but also to camaraderie.

For much of my time as a judge I had the support of the former Chief Justice Sir Laurence Street, without whose help we would have found it difficult to achieve what we have done. The present Chief Justice continued the benevolent attitude towards the work of the Commercial Division. I thank all my judicial colleagues, librarians, registry staff, court officers, and the personal staff whose help I enjoyed. I particularly wish to thank members of the legal profession. Although at times they appeared to labour under the wholly erroneous belief that appearing before me was a trying experience, and no doubt charged accordingly, I for my part remain in debt to all those whose efforts have allowed the work to be done efficiently and speedily. I particularly wish to draw attention and to thank the solicitors who constituted the Users Committee on whose advice we drew. When I was appointed I had hoped that we would have members of the commercial community on the Committee. I have not been able to achieve that goal. That is a matter for regret because an understanding of the process and the opportunity to make an input would have been of mutual benefit.

I should emphasise that all that was said and done was driven by nothing else except an anxiety that the litigants whose cases were before the court were put in the position of best advantage that could be achieved. I will remember with gratitude the assistance and guidance I was given. It is fair to say that of course members of the profession were frequently unable to stop me from falling into error. One of the last things that Mr Justice Young must have done before his appointment to the Bench was to settle a notice of appeal, the first ground of which suggested that the judgment was in error by being infected with my *"idiosyncratic*

notions of commercial morality". On my retirement, I intend to engage in a number of activities, one of which may permit me, in the relatively near future, say a day or two, to return the compliment.

So much for the self congratulatory part of the proceedings. Anyone with a social conscience and a concern for the public good is deeply troubled by what has happened to the litigious process. It is only thirteen years ago that I came to the Bench of this Court, and at that time the average case took one or two days. Any case scheduled to last for a week was regarded as being long, and anything longer was a rarity. Concurrently with the increase in the length of cases came the explosion in legal costs. The courts fulfil a distinct social purpose. To put them out of reach by reason of the cost involved, in unacceptable. There are many reasons why cases are taking longer. Some of them were referred to by Mr Justice McLelland the other day. Accepting as we must that we cannot turn the clock back and that the Parliament and the High Court with a proper concern for individuals will direct more and more detailed personal examination of factual circumstances, witness the requirements of the *Contracts Review Act,* is there anything that can be done to the litigation process in order to reduce expense? Contrary to popular thought this is not solely, or perhaps even primarily, a question for lawyers, but for the community at large. It is for the community to decide whether we wish to, or can afford to, adhere to what has been described by others as a Rolls Royce method of dispute resolution or whether our conveyance should be more modestly priced.

There is an inherent contradiction in the litigation process. Ultimately, in most cases, everything will turn on the findings of fact which are made. These findings will of necessity be infected by structural defects. Not only are witnesses' perceptions at the time to a large extent unreliable, but with the progress of time, self interest and pride will work

wonders in adjusting the recollection of even the most honest of witnesses to conform to a desired purpose. All of us must remember instances where we had as clients the most honest of men, or women, who were disbelieved. Judicial fallibility in witness evaluation is a fact of life. Notwithstanding these inherent vices, laywers labour unceasingly to produce more and more facts and documents calling for evaluation. For the sake of achieving a better result, more and more discovery of documents is had, more and more witnesses interviewed, greater and greater detail gone into. In the same way that photocopies and computers have worked to make hearings longer and more costly the trolleys that trundle into court each day reproduce the functions of tumbrels that carried passengers to the guillotine.

Risks of fallibility are inherent in the trial process and the risk drives many to insist upon even more meticulous processes to guard against an unfair outcome. We ought to evaluate each step in the dispute resolution process to determine their real work, their real contribution to a fair result. A good example is discovery. Is it necessary for a fair result that every document which <u>may</u> lead to a line of inquiry which <u>may</u> lead to a relevant matter ought to be discovered? Should we instead look more appropriately to some test of fairness. Are our rules for summary judgment appropriate to the conditions of today? There is no more high-minded statement than the proposition that every citizen should be permitted to have his or her day in court. Does that necessarily mean that some other citizen should be exposed needlessly and unfairly to the costs which attend legal proceedings today.

Instead of discussion about whether barristers ought to wear wigs and gowns, whether there should be a fusion of the profession, all conducted with the high minded purpose of reducing costs should not questions be the more fundamental. The much more difficult questions

are what is the dictate of fairness in the litigious process, in the particular matter, and how do we implement it.

I have tried to raise an awareness of these issues and to contribute my thoughts to the discussion. Once the guidelines are in place it is for lawyers, no doubt, to assess whether a particular procedure will or will not conduce to the desired purpose.

Judge Newman, of the Second Circuit Court of Appeals in the United States put what I have been endeavouring to say in a more elegant way which might appeal:

> *"We must think hard about ways to save time and money in the litigation system so that the system can function properly and thereby provide justice for all who wish to use it or are affected by it. We need to rethink our conception of fairness not simply to save time and money but to distribute fairness more evenly."*

The Judge suggested that we must gather the empirical data necessary for sound evaluation of the real worth of each component of our litigation system and for hard calculations of the burdens upon the entire system. Today we operate primarily by intuition reinforced by the comfort of tradition. The courts and lawyers should be allowed to experiment with changes. It has been pointed out that whilst the medical profession has made enormous progress by experimenting with matters of life and death, the law shuns experimental ways of deciding matters of probity.

We have had Law Reform Commission Inquiries, Parliamentary Inquiries, Trade Practices Inquiries. What the citizens of this State are entitled to have is an inquiry that looks at the process itself which will allow economically ascertained fairness in place of economically unattainable approximation to perfection.

Maybe that is not what the community in which we live wishes to have, but at the least, the community deserves an opportunity to have it discussed.

It is perhaps not inappropriate to conclude with the words of Lord Denning in *Rahimtoola v Nizam of Hydrabad (1958) AC 379:*

> *"I have stirred these points, which wiser heads in time may settle,"*
