

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

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

Wednesday 30 March 2016

**SWEARING IN CEREMONY OF
THE HONOURABLE JUSTICE ANTHONY PAYNE SC
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES
AND AS A JUDGE OF APPEAL**

- 1 **PAYNE JA:** Chief Justice I have the honour to announce that I have been appointed a judge of this Court and a judge of Appeal. I present to you my commissions.

(Commission read)

(Oaths of office taken)

- 2 **BATHURST CJ:** Justice Payne, on behalf of all members of the Court I welcome you. We are delighted you agreed to join us. We hope you have a long and enjoyable tenure as a judge of the Court thank you.

- 3 **THE HONOURABLE GABRIELLE UPTON MP, ATTORNEY GENERAL OF NEW SOUTH WALES:** Your Honour on behalf of the State of New South Wales and the New South Wales Bar it is my great pleasure to congratulate you on your appointment to the bench of the Supreme Court of New South Wales and your appointment as a Judge of Appeal.

- 4 I also extend my congratulations to your partner, Jill, and to your daughter, Emma, and of course your son, Thomas.
- 5 Your Honour has had an illustrious career. It is with pleasure today that I appear to take part in your swearing-in as a judge. Like all successful careers the hard work had to begin somewhere and it is fitting that I now say a few words of where it all began for you.
- 6 Your Honour studied at the University of Sydney graduating with a Bachelor of Economics in 1983. Your Honour then went on to study law, also at Sydney University and you graduated with Honours in 1986. Of course, later you went back to the university to study a Master of Laws that you obtained in 1991, also from the same university.
- 7 After graduating you started your career in the New South Wales Ombudsman's office in 1986 under the first Ombudsman appointed in New South Wales, George Masterman QC. I understand you were held in high regard by his Honour amongst a cohort of bright young staff at that time.
- 8 In 1987 your Honour commenced work with the Commonwealth Office of the Director of Public Prosecutions where you gained solid experience as a young solicitor. You were able to take those new skills to the UK where you took up a position as solicitor with the Crown Prosecution's Service of England and Wales from 1987 to 1991 before returning to Australia to take up the position of Assistant Director of Commonwealth Public Prosecutions in 1992.
- 9 Your Honour was called to the Bar in 1995 and you took up residence at 6th Floor, Selborne Chambers and of course, in 2008 your Honour took Silk. Your career at the bar has been in commercial and taxation law and you have appeared in a number of high profile cases including at the very beginning of your career the somewhat controversial matter in the sporting world at the time, the Super League litigation which ran from 1995 to 1996 and from first instance to the High Court.

- 10 That case, not only had the eyes of the legal profession on it, but the Australian rugby league community, of course, from clubs to players and to the fans. Indeed one of your colleagues suggests that is when your career really took off and recounted that you had the ability to pull any required document from the voluminous material at a moment's notice. It is said that Senior Counsel began to notice you and enquired as to who that brilliant junior was. You were indeed then led by the former Chief Justice of this Court James Spigelman AC QC who is with us today.
- 11 In your early career you also worked closely with the now retired Justice Edmonds. You also worked closely with Dick Edmonds on the well-known case of *Consolidated Press Holdings v Commissioner of Taxation*.
- 12 As a young barrister you were regarded as a leading commercial law junior. You worked with many leading Silks such as Arthur Emmett, whose retirement has seen your elevation to the bench today. You also worked with Steven Finch SC and, of course, the now Chief Justice presiding over your swearing-in.
- 13 Throughout your career, your Honour advised many of Australia's leading companies such as major banks and government agencies, such as the Reserve Bank of Australia in a number of cases relating to interchanged fee reform, a matter relating to fees for use of bankcards and the Commissioner of Taxation in the *Fituris* case, a matter relating to statutory powers of the Taxation Commissioner in the High Court of Australia led by the now Chief Justice.
- 14 Your most recent and significant brief was appearing for the Commonwealth and with the Solicitor General in the Commonwealth's successful prosecution of an international law challenge to Australia's plain packaging tobacco laws.

- 15 Even during your busy and demanding bar practice your Honour also co-authored along with your colleagues Neil Williams QC and Sarah McNaughton SC the *Federal Criminal Law* four volumes loose leaf service by Butterworths.
- 16 Your Honour has served on a number of Bar Association Committees and was elected as a member of the New South Wales Bar Council in 2015.
- 17 Your Honour, your colleagues and your friends describe you as extraordinarily loyal. Loyal to them, to your family, your colleagues, your leaders and your juniors. You are well regarded for your high standards of work. Indeed, one of your colleagues stated that Tony has the constitution of an ox in reference to ability not to feel burdened under the pressure of extraordinary workload.
- 18 Your colleagues also say you always have exceptionally good judgment and are highly skilled at worked with witnesses and running a case. Your Honour has also been described as someone who is extremely agreeable to work with. You were also described as an extremely good communicator and it is these traits described by your colleagues that will serve you well on the bench and indeed make you a fine judge of this Court I am sure.
- 19 Your Honour outside the law, I understand, you have a number of interests. You are a wide reader of history and of politics and I have heard that you have a brilliant memory for detail and the grand sweep of history. As practitioners of the law, a considerable amount of our lives are dedicated to the profession and indeed many aspects of our lives are sacrificed for our callings including our hobbies and it is commendable indeed and a tribute to your capacity that you could maintain those interests despite the demands on your time of a stellar career.
- 20 Your Honour your colleagues in chambers and at the Bar will be sad to see you leave but, of course, are delighted to see you receive this great

honour today. Your vast knowledge of the law, indeed your service to the law, your keen analytical ability, sound judgment, strong communication skills and your capacity for work will make you again indeed a fine judge of the Supreme Court of New South Wales and a Judge of Appeal.

21 You will, no doubt, serve the State of New South Wales well. There is nothing more for me to say except to wish you all the best for this next chapter of your career as a judicial officer. I wish your family and yourself all the best in the future. May it please the Court.

22 **MR G ULMAN PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:**

Your Honours, it is my great pleasure to extend to you the warm congratulations of the solicitors of New South Wales on the occasion of your appointment to this Court and as a Judge of Appeal.

23 In my remarks it will be my intention to touch particularly on the sentiments and reflections of those solicitors with whom you have had a close working relationship. As we have heard your Honour was a solicitor with the Commonwealth Director of Public Prosecutions' Office in Sydney, later going on to become Assistant Director.

24 Justice Mark Weinberg of the Victorian Court of Appeal, who was director for much of that early phase, remarks that your Honour was one of the top lawyers in the office and was recognised as such. His Honour goes on to say that he was not at all surprised that your career at the Bar was outstanding and that at a very young age your Honour was head and shoulders above your competitors.

25 At the Bar your Honour appeared in many major cases. As we have heard your Honour was counsel for Australia in the Investor-State arbitration arising from the Phillip Morris Asia's challenge to the plain cigarette packaging legislation.

- 26 In the high profile *Storm* litigation, your Honour acted for the Commonwealth Bank in a class action trial that ran for eight months. Your Honour also appeared as Senior Counsel assisting ICAC in the Sydney Water inquiry for the Crown in the prominent Glynatsis insider trading case, as well as on behalf of many high profile clients from the automotive, aviation, banking, financial services and manufacturing industries.
- 27 I am though told that your Honour would not blink when asked to accept briefs to attend, for example, the Parramatta Local Court for a hearing, something which some have remarked puts you at the rare end of the spectrum.
- 28 Instructing solicitors have been delighted by the amenable willing spirit with which your Honour always undertook your work at the Bar. Your Honour always made time to be in touch with instructing solicitors and clients requiring assistance, evidently when you were on well-deserved holidays. I am reliably informed that when driving around the Irish countryside with your family, you were happy to speak with your instructing solicitor Son the other side of the globe when they needed your help with the finer points of a class action.
- 29 Solicitors have reflected that it did not matter to your Honour whether the task that required doing was a menial one, such as settling endless statements, or absolutely critical, such as cross-examining key expert witnesses, your Honour was always ready to put your shoulder to the wheel.
- 30 Notwithstanding your Honour's standing and seniority at the Bar, you have never acted as though anything was beneath you. This is a quality to which instructing solicitors have alluded at length; your Honour's great and genuine humility. One partner of a leading firm remarks that the measure of your Honour was that you always put all ego aside. I am told that upon taking silk your Honour made a personal vow never to reach a point where you would be unwilling to push your own trolley.

- 31 Your Honour has also never been one to take yourself too seriously but always took your work extremely seriously to ensure the best possible outcome was achieved for the client. The combination of intellect and preparedness afforded by your representation of clients underpins the reputation for diligence you enjoy among New South Wales solicitors. I am told that your Honour was always thoroughly prepared, absorbing the contents of your brief to an impressive degree. In the courtroom your Honour's instructing solicitors have described you as economical, measured and focused. Your understated but brutally effective manner has been described as, "iron fist, velvet glove".
- 32 Solicitors note that the delivery of your cross-examination and submissions achieves its objectives without unnecessary theatre, hyperbole or shouting. Others point to your tact and precise language noting that your Honour is adept at getting a point across without ruffling feathers.
- 33 There was, however, at least one occasion when feathers were ruffled. One particular attendee of the New South Wales Bar Association's Practice Course who goes by the pen-name of Fledgling, published in the pages of Justinian his own experience of your Honour's effectiveness. I quote:
- "Our first session on pleadings was presented by Tony 'Drill Sergeant' Payne SC who fired a relentless barrage of questions around the room at readers plucked mercilessly from the roll. Five lucky readers had impromptu speeches lobbed at them that had to be delivered from the front of the class the next morning. That was in addition to the Statement of Claim we were drafting overnight and the reading we were doing for the sessions in the week ahead. The Drill Sergeant's approach was effective. In two or three short days we were all pleading not only in tort, contract and bailment but also for mercy, sleep and a drink."
- 34 Your Honour and your partner, Jill Anderson, an academic and public interest lawyer have two children, Emma and Thomas, both who study

biomedicine at Melbourne University. Many have spoken of your Honour's devotion to your children and your family as a whole.

- 35 In your spare time your Honour is a voracious reader, particularly of history and someone who enjoys the company of friends especially around the dining table. These personal qualities which you brought to a case held you in extremely high regard with instructing solicitors as was the way in which your Honour engendered loyalty that brought out the best in the team with which you worked.
- 36 You showed respect and genuine engagement with clients and solicitors, no matter how junior and you took the time to mentor and encourage, qualities that saw you build successful relationships at every stage of your career to date.
- 37 As many in this Court this morning will know, barristers involved in large Federal and international matters are often required to set up shop in unlikely places. In the *Storm* litigation, your Honour's team was required to work and live closely together, working in very cramped office space in Brisbane during a long and difficult trial.
- 38 Your Honour, I am told, stood out as the unifier in that experience and rallied the team's morale ensuring everyone remained focused and at ease. During the trial the legal team would often eat dinner together. The cost of these dinners would often be wagered by your Honour on inconsequential events including whether a particular word was spoken during a hearing. One of your Honour's favour wagers was a "Montrachet", the cost of a dinner at Montrachet, a fine French restaurant in Brisbane. I am informed that on one occasion your Honour even wagered a double Montrachet. It was the belief of your Honour's colleagues that your aim was to give licence to your extraordinary generosity in wanting to fund a fine dining experience for all those around you.

- 39 Your colleagues also believe that your Honour's wide experience of life, generous view of the world and uncanny understanding of people together with your genuine passion for the law will hold you in good stead for this significant new role you are about to embark upon.
- 40 I would like to reiterate the congratulations of the solicitors of New South Wales and wish your Honour the very best during your time on the bench. If the recommendations of your colleagues and instructing solicitors are anything to go by, your Honour will be an exceptional judge. As the Court pleases.
- 41 **PAYNE JA:** Your Honours, distinguished guests, members of the legal profession, ladies and gentlemen.
- 42 Today is obviously a special day for me, but its significance is increased immeasurably by the presence of so many of my family, friends and colleagues. Thank you for your presence here today.
- 43 Madam Attorney, Mr Ulman, thank you for those generous remarks. I am sure that much of the praise is unmerited but I am willing to overlook the exaggeration today. I was warned by some of my former colleagues that to assist you in preparing your remarks they had pressed upon you stories of the kind the younger generation of lawyers describes as "an overshare". Thank you for your discretion and kindness and ignoring any and all such oversharing.
- 44 It is a great honour to be appointed to serve as a Justice of this Court and the Court of Appeal. There have been immensely high standards set by the present members of the Court and those who have gone before. I have been grateful for the warmth of the welcome by judges of the Court and the encouragement they have given me. Their support and assistance has eased the transition.

- 45 As has been remarked I have had a most fortunate legal career. A seminal period in that career was spending 18 months as a reasonably inexperienced solicitor working in the United Kingdom making a contribution to the Runciman Royal Commission. One of the most significant aspects of that role was to examine from first principles the accusatorial system that we had inherited and compare and contrast that system with other systems, in particular inquisitorial models.
- 46 That experience brought home to me the advantages of a system within which parties, with the benefit of independent legal assistance, prepare and present their cases for adjudication by impartial judges who are separate from the executive and not dependent on the executive for their continuing tenure. The New South Wales system of justice has all of those advantages.
- 47 The extent of the contribution of the Courts and the legal profession in this country to its economic success and its social and political vibrancy and cohesion deserves mention. The existence of rules whose application can reliably be predicted by skilled practitioners and which are applied by impartial, incorruptible and widely respected Courts permits and encourages economic activity, enables disputes to be resolved and underpins our security. In both comparative and absolute terms we have been exceptionally well served by our Courts.
- 48 I practised as a barrister for over 20 years. Now said out loud it seems an inordinately long time but it did not seem like that to me. I am genuinely delighted to see so many people here today who have been part of my 20-plus years as a barrister, and in particular so many of my former readers and those I have been privileged to serve with on various committees of the Bar.
- 49 The independent Bar as an institution is in my view one of the central aspects of our justice system. Its institutional significance relies on constant renewal. When I came to the Bar, senior barristers who did not

know me and who had no particular reason to assist me, went out of their way to help me and make me a better lawyer. I hope in a small way I upheld that tradition in the work I have done with new barristers over the years. At its best, the New South Wales Bar ensures protection of the client's interests in the framework of the rule of law, acknowledges individual merit and fiercely guards its independence. Long may it be so.

50 As Mr Ulman has remarked, I worked with many outstanding solicitors. I say a heartfelt thanks to them. Their skill and dedication was outstanding. I have greatly appreciated the confidence that they placed in me over the years and the central contribution that the solicitors made to the cases I was involved in. I take this opportunity to record my thanks for all the work of those solicitors which in my view does much to enhance respect for the legal system in the community at large.

51 Convention constrains me from mentioning by name existing members of the legal profession and existing members of the judiciary from whose example, wise counsel and fellowship I have benefitted. I will strain that convention in only three minor respects.

52 One is to refer collectively to the sixth floor of Selbourne/Wentworth Chambers where I happily and productively spent all of my 20-plus years as a barrister. To all of my colleagues on the sixth floor, past and present, thank you for your support. I also thank the staff and my former clerk Lisa Stewart and her predecessors for their assistance.

53 The second is to refer to the many judges of the Court who sit with me here today and whose help and invaluable guidance was so important over many years. I feel privileged to be given the chance to join you on the Court.

54 The third is to acknowledge the Honourable James Spigelman, a former Chief Justice of this Court and somebody to whom I owe an enormous

debt of thanks. My career at the bar would not have started when it did but for his help and would not have taken the trajectory that it ultimately did.

55 I am very glad that both of my parents are here today. Despite my lack of interest as a child in the many science-based toys showered upon me, each supported my choice to go into the law and I am pleased to record that that support continued even when I announced I was appearing for South Sydney in the first Super League case. The principal lesson that each taught me was the value of both formal and continuing education and, from each in different ways, the importance of intellectual curiosity.

56 My family has had little to do with the more formal aspects of the legal profession. In this regard you may have noticed that this ceremony is being recorded on video. This video recording has apparently underlined the belief expressed by junior members of my family when told that their uncle was to become a judge, "That's great, a judge on the X Factor in the family!" Fortunately for the viewing public there is no prospect of any aspect of my career becoming the subject of a reality TV show.

57 I would like publicly to thank Jill for her love and support. She is, as many of you know, herself a distinguished lawyer and has always been a vital sounding board and supporter of my career. We embark on this new phase together. As one former senior colleague has remarked Jill has an ability to ask the most difficult questions about any legal problem, even problems that prior to the question you did not know that you had. No doubt that skill will continue to be invaluable.

58 I am especially pleased that our children Emma and Thomas have travelled from their university studies in Victoria to be here today. They have always in their own ways put in perspective the day's particular disappointments or triumphs and ensure that I remain grounded.

59 I approach the task of serving as a judge of this Court acutely conscious of the great trust which has been reposed in me on behalf of the people of New South Wales. I will do my best to live up to that trust.
