

**IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT 12D**

FRIDAY, 7 DECEMBER 2018

**INFORMAL FAREWELL CEREMONY FOR THE HONOURABLE
JUSTICE ROBERT CALDER MCDUGALL
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES**

- 1 **ANDREW BELL SC:** Your Honour, I have an application in the matter of Robert Calder McDougall.
- 2 I have no solicitor. I have no papers. I have no instructions. I certainly tender no filing fee. I do have, however, slightly more merit than usual. If necessary, I will resort to abject flattery.
- 3 If your Honour is prepared to hear me and waive the usual filing fee, I'm prepared to undertake to the Court not to refer to you as "Frugal McDougall" for the rest of this speech.
- 4 The Supreme Court of New South Wales is regarded by all rational lawyers as the strongest Court in the country and the Commercial List is the jewel in its crown. Today marks the last official sitting day of one of its very, very best judges after a career on the Bench of more than 15 years and hundreds and hundreds of judgments, virtually none of which have been overturned on appeal. I haven't actually checked whether the statistics support that last assertion but please accept the claim as evidence from the Bar Table which, as the late Mr McAlary taught me, is what the best evidence rule is all about.
- 5 To continue with the theme of abject flattery bordering on obsequiousness, your Honour is widely admired by the Commercial and Construction Law Bars, for your great intelligence, ability to cut through to the key issues, to absorb a massive amount of detail and to deliver judgments with enormous efficiency and the occasional flourish.

- 6 With the possible exception of Emmett J - and his is very good company to be in - no other judge that I have appeared in front of in the last 24 years has had the ability to deliver an ex tempore judgment with the same skill as your Honour. That is a function of your clear and deep understanding of legal principle and ability to master complex facts in a short space of time and to process them coherently.
- 7 It could be said that the Commercial List is on a spectrum; "a spectrum", not "the spectrum" and if someone were to say that, they would be talking about a spectrum of humour. At one extreme there is the South African end of the spectrum associated with slapstick, particularly in the Friday list. In the middle of the spectrum sit those two loud larrikins, Ball J and Stevenson J, and your Honour resides at the other, more refined, Scottish end of the spectrum associated more closely with droll and at times mordant wit often laced with a little well directed acid.
- 8 Whilst your Honour, for example, has never been heard to say "you appear to be at the deep end of the pool without a snorkel Mr Bell - what do you say?", your Honour has been more than capable of conveying that sentiment in fewer words and indeed sometimes non verbally.
- 9 Your Honour's body language in this regard and facial gestures whilst not as expressive as those of the current Chief Judge in Equity or her illustrious and formidable predecessor, are nonetheless capable of conveying precisely what you are thinking. You are a very effective communicator I have found.
- 10 One example of your Honour's effective communication can be taken from the well-known decision in the Chocolate Factory Apartments litigation. That case sounds far more enticing than it actually was. In that decision, your Honour said as follows:

"In Politics Book 3 chapter xvi Aristotle observed (in translation) [very good of your Honour to spell that out - very precise, and admirably so] that the law is "reason free from passion".

- 11 Then you said:

"For the most part Chocolate Factory's submissions may be characterised as passion free from reason."

- 12 Corsaro SC, if he is here, and who may have appeared in that case did not draw my attention to this passage (just saying).
- 13 Your Honour's imminent retirement will bring to an end a great stint of public service, not only as one of the best and clearest thinking of judges but also as the very model of a commercial judge.
- 14 Whilst the C7 litigation was occurring upstairs before Acting Justice Sackville as he was soon to become, your Honour presided over a case, Ingot, which went just as long, involved more than twice the number of parties and you delivered judgment more than six months earlier with no fuss or fanfare. One of many very long complex decisions which your Honour has dealt with absolute acumen and skill.
- 15 You'll be sorely missed by the profession and your judicial colleagues who hold you in the highest esteem.
- 16 There is no doubt that, although your Honour has plans to spend more time on the sands of Mollymook and in the members stand at the SCG, you'll be in heavy and immediate demand as arbitrator not only here, but throughout south east Asia. Many corroding pipelines and buildings riddled with concrete cancer lie ahead. The excitement is palpable. The hearings will be gripping. The construction Bar is itching to thrust appointments upon you so in that respect good luck and enjoy your return to the free market.
- 17 Your Honour, I understand Mr Newlinds of Senior Counsel wishes to support this application on behalf of his generation of advocates.
- 18 For once I think he and I are in a similar interest but I remain apprehensive.
- 19 Both personally - and I have had the privilege of appearing before you probably as much as any other judge - and on behalf of the NSW Bar and the Bar Association I thank your Honour for your outstanding service and wish you well.
- 20 May it please the Court.
- 21 **ROBERT NEWLINDS SC:** Your Honour, that august publication of public record, bar brief publicised this event earlier this week and they described what was to

happen at 9.15 in Court 12D today as a coup. To my mind, that only emphasised the importance that your Honour has taken on at the heart of the New South Wales Government, that someone and we don't know who it is yet has seen fit to organise a coup today. Of course, what they wanted to say was that there was going to be a "couple of speeches" but you needed to press "read more", to pick up the rest of the word "coup". No barrister that I know has ever pressed that button. The other interesting fact is that no one batted an eyelid when they heard that there was to be a coup here today.

22 Speaking, if I may, on behalf of the younger generation of advocates as I do, I conducted what is these days called a "360 degree survey" about your Honour. I recently myself have suffered under one of these surveys and came out not so well, but your Honour has come out quite well. The take home message is that in Court what we have is this rather dour canny Scott who, if we were going to do a movie of the commercial list would be played by Mel Gibson with the blue and the black crosses over his face saying things like "We fight for freedom".

23 Outside Court, we have a generous kind, hearted, warm, caring man who might be played more by a Hugh Grant character in the romantic comedy version of the commercial list movie. I spoke to your Honour's staff and the redoubtable and loyal Carla Wilson who, although she has met a lot of barristers, has not met very many smart men describes you as "the smartest man I've ever met". No reference to any smart women. I don't know where that lead us. She also describes you as "amazing" and mentioned "your uncanny - if I can go back to the Scottish references - "ability to ex temp difficult and long judgments".

24 Here's a fact that I found out. Sometimes in your enthusiasm to deliver an ex temp judgment and with the focus that involves you have launched into it without a transcript writer being in the Court. Because of your Honour's extraordinary focus when delivering these judgments no one was able to stop you. At the conclusion of these works of art, your Honour then noticed the problem and had to say somewhat sheepishly to the parties "No one really wants written reasons". You're described by your staff as caring, generous, kind and easy to work for.

25 You have had 15 tipstaffs whatever the plural of tipstaff is these days tippies I think, who, to a person describe you as a generous and kind mentor, someone who is entirely self sufficient and doesn't need the help of smart young university

graduates but takes them on and spends a lot of time imparting not just legal wisdom but practical wisdom as to how the law actually works on a day to day basis. They are all eternally grateful. I'm told that you keep in contact with almost all of them and continue to be a real positive influence in each of their lives.

- 26 As to the fellow Judges who participated in this survey, efficient and productive, always willing to take on a case if someone needs to be helped out with the notable exception of the person who is currently in the chambers next to you who apparently doesn't need any help. You never complain about taking on hard cases. You just take them and do them. "Prodigious work ethic" is a phrase that is over used in relation to people. Sometimes, of course, it is to damn with faint praise to describe someone as having a good work ethic. Your Honour does have a terrific work ethic but it doesn't just mean that your Honour works hard yet produces little. Your Honour works efficiently, effectively and produces a lot in a timely manner. That is what matters.
- 27 Importantly for the law generally, you have single-handedly sorted out the proper construction of the Security For Payments Act. That's a very, very important aspect of the rule of law in this, not just this great State but this country and you have done that single-handedly despite, I must say, a recent I think I wouldn't call it a "criticism", a recent comment that perhaps you might have slid towards merits review in an unprincipled way, but nobody in this room takes that seriously. I'll proceed.
- 28 The Bar, of course, has found you over the years somewhat terrifying. They see themselves as the English against the Mel Gibson character and his army. We have noticed a recent slip towards niceness and morning teas. We're grateful for that. We don't think it's in any way linked to your future career and a recognition of the fact that we might be a source of future work. We have very much enjoyed and appreciated your decisiveness and what we have loved, if I may say so, is that you never complain about having to decide something which I find refreshing seeing that it's a judge's job to decide. It's just that these days, some judges have lost sight of that.
- 29 Litigants, win, lose or draw. They know why they lost and won and they find out quickly and I'm sure they're all grateful for that.
- 30 How do I sum all this up? I've lost the thread a bit. Your Honour doesn't like fuss. I'm sure you're finding this a little bit awkward. That's okay once in a while. You've

been a great servant of the judicial system in this State and this country, you have been a great example to many of us as I hope some of us have learnt from that example. We thank you very much for your work and we wish you all the very best for the future.

31 If the Court pleases.

32 **HIS HONOUR:** I'm humbled at the attendance here, and rather wonder if it represents a degree of relief that my retirement is imminent, but I would like to thank you all, colleagues past, colleagues present, colleagues from other Courts for being here and to thank all the members of the profession for being here.

33 I would also like to thank Dr Bell and Mr Newlinds for their words. I find it difficult to understand why the tradition of flattery which is inherent in a swearing in should be continued at a farewell when you don't have to worry any more, although that is not quite true in Dr Bell's case. That may explain why, even by his standards, he was somewhat florid. Mr Newlinds, who doesn't have that problem, felt safe.

34 I'm happy to see, Dr Bell, that you have not lost your ability to put the very best construction you can on an obviously untenable proposition, otherwise known as putting lipstick on a pig, I think. And Mr Newlinds, I'm sorry to see that your apparent tendency to rely on unreliable sources is continuing. There's not much you can say about that.

35 I have been here for more than 15 years. I have outlasted one Chief Justice, two Presidents, two Chief Judges and at least one List Judge. Putting it that way may sound rather flippant but it conceals a deeper truth, which is that the support, the advice and the encouragement that I have received from each of them over the years has been wonderful. I don't think I could have lasted the distance that I have without it, and I don't think that whatever a judge I might be now I would have been without that. I thank them all for it, those who are present and those who are not.

36 I have also had the wonderful privilege of having a number of graduates or graduands as my tipstaves – that's the plural, Mr Newlinds – over the years. I have never understood why anyone with the obvious intelligence of those people would come to work for a judge for the miserly amount the Court allows, to learn how to make cups of coffee without spraying it all over the profession who have assembled

for morning tea and to do other similarly important things, but they've all been wonderful. Some of them are here, as one might think, in the dock. And again, I thank all of them, not just those who are here but those who can't be here.

37 I've also had two associates. I started with Mrs Jennifer Donaldson who had been the associate to Handley JA and before that had worked in chambers of Gleeson CJ. She was wise in the ways of the Court and she was an absolutely wonderful invaluable source of advice, on how to find paper clips and other more important matters, to a new judge. She sadly decided to leave and I acquired one of Mr Newlinds' informants, Ms Carla Wilson, who has been with me now for more than 11 years. Carla has been a wonderful source of support. She and I do have disagreements about spelling and the like but they normally get sorted out before the judgment is published. If they don't, Promulgate picks them anyway. I would like to thank Carla and Jenny, and all the tippies over the years, for the support they've given me.

38 The profession has been a great source of support too. One of the privileges of working in the Commercial List is that one tends to get the very best advocates. I certainly have had that. In one sense, it makes the job harder because the arguments each way are more compelling, but in another sense it means that I know that everything that is relevant, and sometimes the bits that aren't relevant, have been put before me and that it's all packaged up there for me to decide.

39 I do rather wonder who is going to take over the function of Court pedant now that I am about to retire. I know that the curious and indeed etymologically absurd battle against the split infinitive is in good hands with the President and the Chief Judge, but I'm not sure who will be left to insist that data and criteria are plural words; that fulsome, which could have been used today, does not mean very full; or that only is singular, few is not, and they are not interchangeable. Perhaps Justice Leeming who I know isn't busy enough between writing judgments, writing text books and teaching could take over.

40 The other person who does need to be thanked is sitting here with me on the Bench: my wife, Jenny. She has provided, not just for the last 15 years but the 30 years before that, support, guidance and encouragement. She has listened, mostly patiently, to my diatribes against incompetent counsel, obstinate litigants and the obtuse judgments of the Court of Appeal. None of the authors of the last, of course,

are present today. Without that support and without the secure basis so to speak that it has afforded me, again I know that I could not have lasted the 15 years they have.

41 So thank you all for coming. I do in fact have work to do today. It's called the motions list and the directions lists. I will now adjourn so that the interlopers can leave and those who have work to do, can remain.