

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

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

Monday 29 June 2009

**SWEARING IN CEREMONY OF
THE HONOURABLE DAVID LLOYD DAVIES SC
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES**

1 **DAVIES J:** Chief Justice, I have the honour to announce that I have been appointed a Judge of this Court. I present to you my Commission.

2 **SPIGELMAN CJ:** Thank you Justice Davies. Please be seated while your Commission is read. Principal Registrar, please read the Commission.

(Commission read)

(Oaths of office taken)

3 **SPIGELMAN CJ:** Justice Davies, on my own behalf and on behalf of all of the Judges of the Court I congratulate you on your appointment. I wish you a warm welcome as a colleague. You bring to this Court a breadth of practice at the Bar which is actually quite unusual in these days of specialisation. We all look forward to the contribution you will make in the future and I look forward to serving with you on this Court.

4 **ALEXANDER STREET SC TREASURER NEW SOUTH WALES BAR ASSOCIATION:** It is a great pleasure, on behalf of the New South Wales Bar, to congratulate your Honour on your Honour's appointment to this Honourable Court. The President Anna Katzmann SC is unable to attend

this morning's ceremony because she is in London but she asked me to convey her sincerest congratulations and best wishes to your Honour.

- 5 Your Honour has arrived for this morning's ceremony at what was hitherto known as the judges' car park but which must now hereafter accommodate a new chapter of Law Lords by a means of transportation that Justice Harrison has described as "a monster". It is rumoured that Harro said, "Davies' wheels are possibly more powerful than the yellow Monaro".
- 6 I have identified the sales pitch that appealed to your Honour: there's no going back; the line of the toughest, naked bikes, combined with the performance of fair powered bike; high handlebars for top precision handling; a long wheelbase for maximum riding stability; brakes like anchors; engine speeds which will give you goose pimples; high precision handling at all speeds; ultimate dynamics; maximum control in any situation and unique technical features.
- 7 The words "precision handling", "maximum control", "ultimate dynamics" and "unique technical features" tell us much more about the rider than they do about the 1200cc machine. Precision handling, your Honour's care and attention to your Honour's briefs; maximum control, your Honour's craft and command of witnesses; ultimate dynamics, a versatility of style, pace and content in the sanguine and measured path for successful advocacy; unique technical features - here the accolades of juniors, colleagues, Bench and solicitors are too numerous to list.
- 8 I should note the competition between your Honour and Harro in the quest for speed, or perhaps I should say goose pimples and respective vying as to the means of humble transportation, are a quaint eccentricity that satisfy at least two of the aims of s 56 of the *Civil Procedure Act*.
- 9 Your Honour was first admitted as a solicitor in 1975 by the then Chief Justice and practised for a year, having been employed as an

undergraduate with the firm Stephen Jaques and Stephen, now Mallesons Stephen Jaques, which firm has been a constant drawing pool for the finest of legal minds for the highest of judicial office in this State; currently on this Honourable Court, as I recall, Justice Bergin, Justice Barrett, Justice Nicholas, Justice White, Justice McCallum, Justice Rein and Justice Ward. The Federal Court has been a similar beneficiary with most recently Justice Perram.

- 10 Having heard the call of the Bar in 1976, your Honour was again admitted by the same former handsome Chief Justice but this time as a barrister, and without on this occasion the honorary presence of Sir John Kerr as occurred at the time of your admission as a solicitor at the same time as Philip Kerr.
- 11 It is in part your Honour's connection with the source of admission in 1975 and 1976 that permits me to say in this Court this is a family occasion, but the nexus goes deeper. This is a particular honour for me given that your Honour and I were appointed senior counsel on the same day on 1 November 1996, you taking rank and precedence next after one Nigel Anthony Cotman, who you have now heartlessly superseded in favour of one Michael John Slattery.
- 12 Having referred to the family occasion I should also remark that your Honour's partner Paul is present, as well as your sister Pam and her husband and your brother Michael and I believe your father Ron was hoping to attend but I am not sure that he has been able to do so on this occasion - I am sorry, he is present and I do withdraw that. We are all delighted that he is here as well, and all are well justified in being incredibly proud of your Honour's achievements and appointment today which we all celebrate.
- 13 Your Honour through considerable application obtained a music scholarship to Trinity Grammar School and you did Arts/Law at Sydney University and you also obtained a postgraduate qualification in theology.

- 14 After 12 March 1976, on your hearing the call of the Bar, I gather that your Honour developed what I am told is a healthy ritual of sustaining the morning and afternoons with scones and tea, which I assume is a habit that your Honour quickly adopted to overcome the burdens of co-sharing a room shortly after you joined the 13th floor with a dour and droll colleague, the fabled Harro, as his Honour was affectionately then known. I believe your Honour's penchant for scones and tea probably developed from his Honour Justice Harrison's renditions of the Monty Python's Flying Circus lyrics that included "and have buttered scones for tea".
- 15 Your Honour formed a powerful triumvirate with Harrison and Hallen, vanquishing opponents in the courtroom and wielding control in the spiritual corridors of camaraderie at the Bar. At this stage only the duumvirate has been restored on the Bench.
- 16 Your Honour brings to the Bench thirty-three years of experience in practising at that Bar in a wide variety of jurisdictions in almost every field of the law in the full range of superior courts, and it is perhaps appropriate to mention two of the legends of the Federal Court of Australia who in particular you enjoyed appearing in front of on a number of occasions, Justice John Lockhart and Justice John Lehane.
- 17 Notwithstanding your Honour's more modest identification of areas of practice on the website of the distinguished 13th floor of Selborne and Wentworth Chambers, in all fields of practice in which you have appeared you have been a dominant leader at the Bar. Your Honour's loss from the 13th floor and from the Bar will be greatly felt but is a great boon for the people of this State and another adornment to our illustrious judiciary.
- 18 Your Honour's exceptional qualities as an advocate and the skill and success of your Honour's forensic art in the courtroom has obviously been translated into your Honour's success in mastering the art of survival in the motorised field of two-wheeled transportation. Your Honour's faceless

helmet has struck fear into the hearts of many that have seen you dismounting the large steel horse. Your Honour's true demeanour of compassion, wisdom, judgment, learning and humility provides the soundest of virtues required for our esteemed custodians of judicial power and in carrying out the largely unsung burdens of the independent administration of justice and upholding of the rule of law.

- 19 Your Honour has a broad expertise in art, and a passion and interest in music which will enrich the orchestral talents already echoing around the Supreme Court. Your Honour's capacity to move from trombone, flute, organ, piano to that of tenor and bass should ensure the avoidance of any musical disharmony on the bench but your Honour's ear will be quick to detect the flat notes and flaws in the harmony of justice from the siren songs played on the wind instruments from the Bar table.

- 20 Your Honour's contribution to the New South Wales Bar Association has been of the highest calibre and of long duration, like your twenty-four years of service on the board of the illustrious 13th floor of Selborne and Wentworth Chambers. You have been a member of one of the Professional Conduct Committees since 1994. You were a member of the Educational Committee and a member of the Equal Opportunity Committee, Convenor and Chairman of the Examinations Working Party since 2003 and your Honour was at the forefront of orchestrating the successful achievement of our first and only Professional Standards Scheme through the Professional Standards Committee on the New South Wales Bar Association.

- 21 Your Honour now joins your former master on this august court as another prodigy of the sparkling, brilliant and athletic Justice Henric Nicholas. Your Honour, the New South Wales Bar is elated at your Honour's appointment to the Supreme Court of New South Wales and we wish your Honour every continuing success, happiness and fulfilment in this, the oldest superior court in the Commonwealth of Australia.

- 22 **MR JOE CATANZARITI PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** On behalf of the solicitors of New South Wales, it is an honour and a privilege to add my remarks on this auspicious occasion.
- 23 Your Honour, we share a common bond, having both begun our legal careers at the law firm Stephen Jaques and Stephen, as it was then known. However your Honour's time as a solicitor was short-lived in that, within barely a year of your admittance to the profession in 1975, you were called to the Bar. Some ten years later, as a young lawyer at Stephen Jaques, I had the privilege of briefing your Honour in one of your most famous cases, *Perpetual Trustee Co Limited v Groth & Ors*, where your successful representation on behalf of the Trust of the Art Gallery of New South Wales saw the administration of the Archibald Prize monies transferred to the Art Gallery.
- 24 Justice Powell did not accept the argument that these works of art had become little more than cave paintings. He said, "Then it matters not that the popularity of portrait painting, as such, may have declined over the years, or that, in the view of some, the quality of any particular winning portrait may have been dreary and uninspired or negative, indeed quite insipid, or that those who may have attended any particular exhibition were motivated to do so, not by any desire to improve their appreciation of portrait painting but by some current controversy as to the winning portrait, although I would suggest that even those who came but to stand and stare must learn something". I am sure that the last statement is also true of your Honour's art collection, which I believe includes two-times Archibald Prize winner Judy Cassab. Your Honour's love of art is evident both at your Bondi residence and your Pearl Beach holiday retreat, the latter being a purchase that was undoubtedly prompted by the realisation that it was a trendy location when Lindsay Foster, now Justice Foster, bought his first fibro there, but I digress.
- 25 Born 24 August 1950, your Honour is the oldest son of Ron and Judith, elder brother of Pam, a physiotherapist in Coffs Harbour, and Michael, a

Sydney neurosurgeon, both of whom have been able to join us today. I am sure if your mother could be here she would be very proud of her son's achievements as undoubtedly is your father.

26 Your Honour grew up in Cremorne where you attended Neutral Bay Primary and later won a music scholarship to Trinity Grammar, where your brother described you as a typical swot, hardworking and conscientious.

27 I believe your Honour's first career choice was to be a psychiatrist, given your fascination with the workings of the human mind. It is a calling that would indeed have been preferable to the specialist area of the medical profession chosen by your brother Michael as, by all accounts, your Honour does not cope well with needles or the sight of blood.

28 Rumour has it that in the year you completed a Red Cross First Aid Course not only did you need a week off to recover, you were advised to avoid ever volunteering in an emergency. Secondly, an assessment regarding your suitability for the field of psychiatry might have been called into question given your apparent youthful delight in slapping the table and shouting, "Off with her head", a reference to one of your Lewis Carroll characters. Perhaps your Honour could equally well have pursued a career in government, addressing the shortcomings of Sydney's public transport network, given early evidence of your organisational skills. Presented with your first train set you devised strict timetables for the train drivers, being yourself and Michael. Pam was not allowed to be a driver and was relegated to moving houses, shops and people alongside the train line.

29 A man of many talents, your musical and liturgical interests could have also taken you into a different field of endeavour. Your many years as an organist and choirmaster at St Peter's Cremorne and as assistant organist at Christchurch St Lawrence, coupled with appointments as parish counsellor, Synod representative and nominator, have given expression to both your musical interests and religious beliefs, as has your membership

of the New South Wales Bar Choir and your lesser known but well-developed skills as a trombonist.

- 30 Perhaps taking up trombone was more to do with opting for an active role in cadets via the school band rather than trying to improve your cricket skills, skills that were not to be realised and were consequently bemoaned by your 'cricket tragic' father whose disappointment knew no bounds when he finally resigned himself to the fact that neither of his sons was ever going to rise to the dizzy heights of Donald Bradman. However, he was surely consoled by his children's musical accomplishments and the fact that they followed in his footsteps as church organists.
- 31 Your Honour, we are very pleased that you chose to enter the legal profession. Indeed many would regard you as the leader of the Common Law professional negligence at the Bar. Lawyer Stephen Remington, whom you first met through the Anglican Society at the University of Sydney in the early seventies, said you had told him that you "couldn't imagine any other job you would rather be doing" than law.
- 32 In later years Stephen briefed your Honour in matters of family provision, equity, contested estate matters and professional negligence. Stephen described your Honour as sensitive, courteous, never dismissive of lawyers, intellectually very able but possessing no hint of grandeur or arrogance, a gentleman and a truly great bloke.
- 33 In the courtroom your Honour was not averse to an occasional outburst reminiscent of a Shakespearian dramatic work. A certain District Court hearing comes to mind where, in a submission to the Judge, you accused a witness of fabricating an "arrant untruth and pernicious lie" with added emphasis provided by much finger pointing.
- 34 Your Honour has made many friends in the legal sphere and beyond, including that merry band of musketeers, Justice Ian Harrison whom you

now join on the Bench, Phillip Hallen SC and District Court Judge Jim Bennett.

- 35 Your Honour met Justice Harrison when he joined the 13th floor of Selborne Chambers in 1976 and kindly offered to share your room with him. The following year a self-professed considerably younger Phil Hallen joined the floor. The latter day D'Artagnan was Judge Bennet who, contrary to the Alexandre Dumas' tale, managed to become the fourth musketeer. In keeping with the motto of the musketeers, "All for one and one for all", these musketeers have chosen to keep mum on certain anecdotal items that might incriminate one or all of them.
- 36 However, what is common knowledge is the musketeers' choice of wheels, suggesting a certain rev head propensity. I note in the swearing in of Justice Harrison, a reference to the infamous yellow peril Monaro and the motto, "Out to drive you wild"; likewise Judge Bennett, with his silver fox Monaro. It was rather apt to find that Philip Hallen's vintage Jaguar is badged as swift and silent, which probably accounts for his interest in "the dead", while your Honour sports a BMW 1200cc motorbike. In your Honour's case perhaps the better description is a "law lord" as opposed to "warlord".
- 37 Your Honour may not lay claim to being the biggest rev head of the four but no doubt you would be the loudest. In your defence it must be noted that your Honour has demonstrated some commitment to the environment with the purchase of an eco friendly hybrid, the Toyota Prius.
- 38 Having grown up with cats, dogs, chickens and budgies, to name but a few of the four-legged and feathered friends that frequented your childhood home, it is not surprising that several felines have taken up residence with your Honour. These felines of Burmese persuasion have been afforded rather famous names, Sophia as in Loren and Carlo as in Ponti. Likewise your previous cats were named Mikhail and Raisa after the former Soviet Union leader, Mikhail Gorbachev.

- 39 Your Honour's necessities of life include regular morning and afternoon tea with cake, and a fondness for quince tart and puddings, the results of which are happily countered by the fact that you are a bit of a gym junkie. Perhaps the gym regime has contributed to comments that your Honour has the second straightest back at the Bar after Tom Hughes AO QC. However, your Honour never cross-examines people in the public gallery.
- 40 Travel is also high on your Honour's agenda, particularly the South of France and Hong Kong where you can indulge in your love of shopping and fine restaurants.
- 41 The three original musketeers and their partners recently travelled to Hong Kong to enjoy to enjoy a well earned break. Judge Bennett was not in attendance, as perhaps he had taken Justice Harrison's advice offered during his swearing in ceremony that, in order to avoid any controversy, he should not attend conferences, never take annual leave and refrain from travel at all costs, bar country sittings.
- 42 In the vein of the musketeers' disposal of that fiendish spy Milady de Winter or more perhaps the Queen of Cards in Alice's Adventures in Wonderland, one hopes that your new role will not give rise to pounding the bench and declaring loudly, "Off with her head".
- 43 **DAVIES J:** Chief Justice, your Honours, friends and colleagues, ladies and gentlemen. Thank you Mr Street and Mr Catanzariti for your very kind words.
- 44 Thank you to all my family, friends and colleagues who have taken the time from busy lives to come here this morning, particularly my eldest niece who has flown from Adelaide and my sister and the rest of her family who have come down from Coffs Harbour. I am pleased also that my father has been able to attend.

- 45 I came to the law as a complete outsider and with no long-held desire in that regard. No member of my family had, as far back as anyone knew, been a lawyer.
- 46 As an adolescent I was very keen to make music my career as an organist, choir director and music teacher. My mother correctly perceiving, I suspect far better than I could, the limitations on my musical abilities, embarked on a campaign to dissuade me from that course, finally convincing me, correctly as it happened, that I would enjoy music far more if I kept it as a hobby rather than a career.
- 47 Medicine was my next choice but maths and science had never been my strengths and my HSC pass levels in those subjects precluded medicine as a career. I had no further idea what I wanted to do but Arts/Law seemed good as any course being offered. From my first lectures in torts I knew I had made the right decision.
- 48 Whilst working as a solicitor at Stephen Jaques and Stephen, although I had intended to go to the Bar, it was suggested that I should apply to become associate to Sir Garfield Barwick. I was short-listed for the position and went nervously to be interviewed by him at his chambers in the old High Court in Darlinghurst. The interview went swimmingly, and then he asked me what I thought about the Woodward Commission report into the desirability of a national compensation scheme to replace tort law for personal injury. Being still full of Whitlamesque zeal and assuming that national compensation was part of the zeitgeist I waxed lyrical about the benefits of such a scheme, justice and compassion for all, the minimisation of lawyer involvement, et cetera. A chill fell on the room, and in a matter of minutes I was told rather abruptly that I would be notified about whether or not I had been successful.
- 49 But I knew. So I went to the Bar in March 1976. In those days there were no exams in Practice and Procedure or Evidence or anything. One

attended a lecture or two on what was said to be Barristers' Ethics, but otherwise on learnt on the job.

50 The first Brief arrived in a matter of days from my friend and fellow solicitor at Stephen Jaques, Geoff Pike. You can imagine my trepidation to find that it was a brief to appear before the full High Court without a leader, and my opponent was Peter Hely, and of course that interview had only been a few months earlier. It was one of those then prevalent applications under the *Judiciary Act* to remove a matter that had been legitimately commenced in the High Court by a resident of one state against a resident of another to a more appropriate State Supreme Court, and I was for the applicant/defendant.

51 I managed to sit at the wrong end of the Bar table and I did not move to the centre lectern when I rose because I had no idea that was where the recording microphone was. But Sir Garfield, presiding with four others, was infinitely kind. He gently gestured me into the correct position. I said who I appeared for. He said, "And you are seeking an order under s 44 of the *Judiciary Act* remitting this matter to the Supreme Court of New South Wales?" I mumbled a Yes, but before I could utter another word he turned to someone I supposed was Mr Hely and said, "And why should this order not be made?" This hapless person said, "Mr Hely will tell your Honours why when he arrives." Sir Garfield said, "But I should like to know now". The perspiring creature at the end said, "Mr Hely asked me to say that he should be here by 10.30". Sir Garfield said, "Mr Doe, if you or Mr Hely can't tell me now we will have to make the order" and the order was duly made.

52 But it was not a complete triumph. Perhaps because he remembered the interview or perhaps because I was looking a bit too smug, Sir Garfield asked if I sought costs of the application. I hadn't even thought of it but I remembered that someone had told me, "Always ask for costs", so I did. Sir Garfield smiled very sweetly and said, "An applicant does not get costs on these applications. Costs in the cause".

- 53 Life was tough from a financial point of view in the first years, an experience that I am sure many of you have shared. Had it not been for the considerable assistance of my mother from her relatively meagre resources I do not think I would have survived the first year or two.
- 54 Then help arrived from another direction in my second year in the person of Ian Harrison as his Honour then was. He came to share my chambers for a year or so. It wasn't so much that he paid me a modest fee to offset what I was paying to the then absentee owner. Rather, he had devised this method to slow down the increase in our overdrafts and the hefty interest thereon. It involved making lots of pinholes in the computer numbers on cheques we wrote to various creditors. Apparently, or so he explained, the presence of the pinholes meant that when the cheques went to be cleared by computer the pinholes caused them to be rejected. That meant they then went to be cleared by a human being and that added about three to four days onto the time the amount appeared as a debit in our accounts. So each Friday we could be found, pins in hand, piercing cheque after cheque. From such adversity was a very firm friendship forged.
- 55 An added joy to this appointment is that I will be joining him in the Common Law Division of the Court. But even in these bleak economic days and with the renovations to the Curt we are not obliged to share a room.
- 56 As you have heard I read with Henric Nicholas, who did what every pupil master should do - he handed me over, with their agreement of course, a firm of solicitors who continued to brief me for about twenty years. I am grateful to him for that in particular and for his care of me generally.
- 57 As a junior I was privileged to be led by some eminent silk who taught me a great deal. In particular, what Arthur Emmett and the late Christopher Gee did not teach me about cross-examination and case preparation, and

what Ken Handley and Keith Mason did not teach me about appellate advocacy, was not worth knowing.

58 I had some very good pupils but none more outstanding than Andrew (now Judge) Colefax who managed to beat his old pupil master to judicial office by some two months for a well deserved appointment.

59 As a silk I have worked with very many excellent juniors, some of whom are frighteningly intelligent and most of whom are exhaustingly hardworking. It would not be fair to name some for fear of leaving any out but they know who they are. With such juniors as I have worked the future of the New South Wales Bar as an institution of high quality is assured. I thank them for their assistance and what they taught me.

60 I have greatly benefited by the solicitors who have briefed me over the years. I owe a great deal with them. It is trite, but true, to say that I would not be in the position I am today without their kindness and consideration, and I am pleased to count a number of them as good friends.

61 I spent my entire career at the bar on the 13th floor of Selborne Chambers. I enjoyed very much my time there and made some lasting friendships. In the last twenty-nine years I have had only two clerks, Ruth Ross for twenty-six years and subsequently Paul Walker. Both, in their own different ways, were all that one could ever ask for in a clerk. They enabled my life and practice to run very smoothly and I thank them for their assistance and their friendship.

62 I am also grateful for the work of my secretary during the last nine years, Una O’Gorman, who has a great ability to spot the errors and inconsistencies in my dictation and correct them.

63 My partner Paul has been my rock and my support for so many years now and I thank him for that and for his forbearance especially with my long working hours.

- 64 I have enjoyed my time at the Bar immensely. I shall miss the regular contact with the wonderful people at the Bar Association with whom I have worked closely for many years - Chris D'Aeth, Anne Sinclair and Helen Barrett in particular who keep the Education and Professional Conduct departments of the Association running so smoothly.
- 65 Most of all I shall miss my regular morning chats with my good friend Phil Hallen SC. Not only, as Justice Harrison pointed out at his swearing in, does Phil know more about dead people than anyone living, he is also a fine advocate and possesses a first rate legal mind. I could always count on his thoughtful and reasoned assistance with any problem that I ran past him.
- 66 I am excited but somewhat daunted by this new stage of my legal career. When I reflect on the skills and abilities of so many at the senior Bar against whom I have appeared over the years I am humbled by this appointment. With the support of the Bar and solicitors who appear before me I hope that I will fulfil adequately the trust that has been placed in me and the honour that has been done to me.
