

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

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

Monday 8 September 2008

**SWEARING-IN CEREMONY OF
THE HONOURABLE ROBERT BRUCE SCOTT MACFARLAN QC
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES
AND A JUDGE OF APPEAL OF THE SUPREME COURT OF NEW SOUTH
WALES**

1 **MACFARLAN 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.

2 **SPIGELMAN CJ:** Thank you Justice Macfarlan, please be seated while your Commissions are read. Principal Registrar, would you please read the Commissions.

(Commissions read)

(Oaths of Office taken)

3 Principal Registrar, I hand you the form of oaths to be placed with the records of the Court and the Bible so that it may have the customary inscription placed in it and given to his Honour as a memento of this occasion.

4 Justice Macfarlan, on behalf of the whole Court and on my own behalf I welcome you as a Judge of this Court. You and I took silk on the same day. We had very similar practices. Your Honour has an enormous wealth of experience at the bar, particularly in the commercial area, but not limited to that. You bring to the Court a great deal of experience, learning

and a personal demeanour of a character that makes it clear to me that you will be an excellent Judge for many years to come. I look forward to serving with you on this Court.

- 5 **Ms A KATZMANN SC PRESIDENT THE NEW SOUTH WALES BAR ASSOCIATION:** May it please the Court. In the latest issue of *Justinian*, Richard Ackland reports on the American Bar Association Conference held recently in New York. He notes that after the keynote address the band belted out a rendition of “Fly Me to the Moon” while all the bigwigs jitterbugged away tapping their feet and snapping their well-fed little fingers and as the President filed out with his military escort, he reports, the band led it rip with “New York, New York”. Ackland muses about a similar approach for appearances by the Law Council leadership but it occurred to me that today’s ceremony could well do with a musical accompaniment. My reasons will soon become apparent as we travel through the life and times of Robert Bruce Scott Macfarlan.
- 6 Your Honour was born fifty years to the day after the late great Hoagie Carmichael. Hoagie once said, “ragtime was my lullaby”, but according to his biography on the official Hoagie Carmichael website, Hoagie’s mother warned him, “music is fun, Hoagland, but it don’t buy you cornpone”, and fun it is for your Honour. Your Honour is an unabashed fan of the popular music of your generation, from Elvis, to Roy Orbison, to The Animals, Gene Pitney and Patsy Cline. After Roy died you attended a Roy Orbison reminiscence night with a video link to his widow but above all Elvis Aaron Presley is your hero. Your Honour is not only a card carrying member of the Elvis fan club literally, but an Elvis impersonator. I can assure all the sceptics in the room that I am correct, I even have the photograph to prove it, although in it your Honour looks more like the Eric Burdon of today than the Elvis Presley of yesteryear. Yet as Mrs Carmichael said, “music don’t buy you cornpone” and your Honour took the sensible, if at times somewhat duller option, of a career in the law.

- 7 I suppose there never was much doubt your Honour would go into the law. There was also an inevitability about your Honour becoming a judge. The only question was when. Your father of course was a judge. Your first job was on this Court as his associate. At school your nickname was “judge”. Your Honour was an outstanding scholar. You graduated from Sydney University with a Bachelor of Arts majoring in Economics and a First Class Honours Degree in Law, in a year that boasted a high number of exceptional scholars. You were only at the bar for ten years before being appointed Queen’s Counsel.
- 8 After a year working for your father you undertook Articles with Dawson Waldron working under the tutelage of Nick Carson, the man whose record defamation verdicts brought the High Court as close as it has ever come to departing from the principles in *Planet Fisheries*. The firm soon recognised that it had a talented litigator in its ranks. Within one year of your Honour’s admission you were appointed an Associate and you were lured into the Corporate Takeovers Unit commonly referred to as F Troop. In recognition of your Honour’s ability you were given considerable responsibility at an early stage for some of the firm’s most important litigation. Although partnership beckoned, you chose to go to the bar.
- 9 The reason is obvious. Where else could you dress up in funny clothes and a silly hat and still make enough money for cornpone? Your Honour was called to the bar in September 1976. You read with David Bennett who, like your own father, became one of our leaders. You acquired a room on the 13th floor Wentworth Chambers before moving to the 11th floor where you remained ever since and where you are highly and fondly regarded.
- 10 Your Honour is a neat man, compulsively if not obsessively so. Your desk is always clear at the end of each day’s work and also for conferences enabling you to avoid distractions and demonstrate to those instructing you that you have their complete attention. You are meticulous in your

work and remarkably efficient. One of your former juniors described you as the most focused person he had ever met.

- 11 You also have an economy of language and a capacity to separate the wheat from the chaff reminiscent of the Honourable A M Gleeson QC. As always your Honour took your lead from your hero. “A little less conversation, a little more action please. All this aggravation ain’t satisfactioning me. A little more bite and a little less bark. A little less fight and a little more spark”. Good advice for any aspiring barrister.
- 12 Throughout your career your Honour has always been in great demand. Your practice has been broad covering all jurisdictions at all levels and although you have concentrated on commercial and related work, your profile within those areas was varied. You have appeared in many of the leading cases, including some of the most significant corporate governance cases in recent Australian history. Known as the gentleman’s gentleman, your Honour is a hard and dangerous opponent but utterly scrupulous, never devious and always charming and affable out of court. With the possible exception of overseas holidays, your Honour is frugal with yourself, always chasing a bargain, while at the same time infinitely generous to others and I do not just mean financially generous. It has been said that you take to extremes the open door policy of which our bar can justifiably be proud.
- 13 Your Honour has also made a significant contribution to the life and governance at the bar. You served on the Bar Council for two years, as a director of the Barristers’ Sickness and Accident Fund for fourteen, and represented the Bar on the New South Wales Supreme Court Commercial List Users’ Committee for thirteen. Your Honour also contributed to the legal profession and the community in other ways as a lecturer in Equity at your alma mater and as a member of the Legal Services Tribunal and later the Legal Services Division of the ADT. In that role, unsurprisingly, your Honour quickly earned respect for the efficiency and professionalism with which you handled many difficult and protracted cases.

- 14 You have also made a valuable contribution to the wider community as a member of the Australian Theatre for Young People's Foundation Advisory Committee, not to mention the Cranbrook parents' night when your Elvis impression brought the house down.
- 15 Despite your Honour's after-hours activities I doubt we can expect to read references to popular songs in your judgments, like those of a District Court Judge from Montana in a judgment he delivered last year when sentencing a man for burglary. The prisoner was asked to recommend to the court the sentence he should receive. He optimistically replied, "Like the Beatles say, *Let it Be*".
- 16 In his scathing response the judge incorporated passages from forty two of the band's hits in his reasons. It might sound corny but I expect that the words resonated with the offender far better than anything else he might have said, particularly the references to "Fool on the Hill" and "Nowhere Man". Were your Honour to sit on the Court of Criminal Appeal or an application under the Proceeds of Crime legislation I can imagine "There Goes Your Only Possession, There Goes Your Everything", or "The Grass Won't Pay No Mind", having a similar effect.
- 17 Music is not your Honour's only passion. Proving the value of physical fitness you are reputedly an excellent squash player. Justice Rein claimed he could not win a point against you, but that may be more of a reflection on him than you. Your Honour is also an ardent golfer. Golf is a sport designed to test anyone's patience. Once your Honour was seen trapped in a bunker from which it took no less than fourteen shots to extricate yourself. Your Honour's battle in the bunker provides an illustration of your most outstanding qualification for judicial office, your even temperament. As always your Honour remained calm and composed where others would have taken out their frustration on innocent objects or resorted to language only fit for repetition in the criminal courts. However as Eric Burdon sang, no one alive can always be an angel.

- 18 In Italy for example your Honour's reputation is far from angelic. Once a posse was despatched from Positano in search of you after you were driven off to Pompeii in a hire car, unfortunately not your own, carrying the luggage of an anxious American couple who were booked on a flight out of Rome the same day. On another occasion before the European borders were opened, having left your passport behind in your hotel room, you managed to outsmart the border guards and cross into Switzerland without your documents.
- 19 Your Honour, we warmly congratulate you on your appointment. It is what would colloquially be described as a no-brainer, but your departure from the bar will be heartfelt. Generosity, courtesy, intelligence, clarity of thought, concentration of effort, composure, punctuated by occasional bursts of exhibitionism, that, if the Court pleases, is the wonder of you.
- 20 **MR H MACKEN PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court. Your Honour I came across a rather curious report published in the Old Boys section of the Cranbrook school magazine in 1968 which had me wondering if your Honour had considered other professions, other than the law in your early days at university. The report was written by a university colleague and made the following mention of your Honour's extracurricular activities which in my mind conjured up a political or perhaps ecclesiastical career.
- 21 The report read and I quote, "Both Jeff Smith and Bob Macfarlan have been a constant source of support for the current student power movement and stand in grave risk of reprimand by the authorities. Both have angrily accosted me at various times and denied any continuing activity in student power. Having achieved what they were after they have left the ranks. Bob tells me he is now talking to the gods and Jeff likewise to the animals."

- 22 While I don't pretend to fully understand the reference perhaps these conversations with a higher power were fortuitous for today we are here celebrating your Honour's appointment to the bench, although when I say "God help me" it usually doesn't bring such a happy result.
- 23 On behalf of the solicitors of New South Wales I'm delighted to congratulate your Honour and wish you well in your new role. At High Street Wharf in Neutral Bay a small boatshed and slipway once took pride of place. The Sydney ferries would steam up the harbour and moor opposite this wharf. A nearby jetty served as the terminal for the tramline which went from Neutral Bay Junction via Wycombe and Kurraba Roads - that was until 1949 when the jetty was declared unsafe and the terminal relocated. While it may have signalled the death knell for the tramline, 1949 heralded a new beginning for parents Barbara and Bruce Macfarlan with the birth of a son, Robert Bruce Junior, on 22 November.
- 24 Your Honour grew up in Wycombe Road Neutral Bay where you attended Neutral Bay Public School before enrolling at Cranbrook school at ten years of age. Your Honour was one of the first students to sit for the School Certificate in New South Wales under the new Wyndham Scheme in 1967 and won a Commonwealth Scholarship to Sydney University, as has been said enrolling in Arts/Law and graduating with First Class Honours in Law in 1974 with several prizes to your credit into the bargain. As an old Cranbrook boy your Honour shares the distinction with the likes of former Justice Ken Handley AO, as well as your late father, Bruce Macfarlan QC OBE, a very highly regarded and well respected commercial and admiralty list judge of this Court.
- 25 Your father was the first Cranbrookian to become a lecturer at Sydney University and the first from the school to take silk in 1952 before being appointed to the Supreme Court of New South Wales in 1959. Almost fifty years later your Honour now takes your place on the Supreme Court bench, having likewise undertaken admiralty work and university lecturing.

- 26 Just as your Honour takes extreme pride in your father's life and career, so too would he be very proud were he with us today. Your daughter Charlotte, residing in Hong Kong, chose not to follow your Honour's career footsteps, although she did keep the profession in the family by marrying a lawyer whose father I believe happens to be a New Zealand silk, an All Black mark on an otherwise green and gold genealogical line. Your eldest son James works in London in commerce and Alex studies Arts at Sydney University. Young Lachlan attends Woollahra Public School.
- 27 As has been mentioned already, your Honour is well known for your fantastic impersonations of Elvis "the pelvis". Your solicitors and readers' junior can well remember being subjected to Elvis tapes in chambers after court during the 70s and 80s. Unfortunately for them Elvis had not left the building. In fact I think I saw him outside today. Of course your Honour may have thought the frantic movements of these solicitors meant they shared your musical passion but I have it on good authority that they were probably half frozen and trying to keep warm. Your Honour believed that by keeping chambers very cold, below 19 degrees centigrade, your brain would remain alert.
- 28 Someone who did share your fascination with The King and whose famed piece de resistance was belting out the lyrics to *Girl Happy* was Sandy Street SC. Sandy described your Honour as one of the finest legal minds in New South Wales, an awesome and fearsome advocate, someone he has always held in awe as one of the best role models and barristers in the legal profession. He said, "I was working as a paralegal at Ebsworth & Ebsworth and thought Rob was the best and brightest at the bar. In fact he stood out like a shining beacon so I asked if I could read with him. I later found out that Rob had read with David Bennett QC, formerly Solicitor General, who had in turn read with the Honourable Ken Handley AO. Ken Handley had read with my father, the Honourable Sir Laurence Street AC KCMG QC, who in turn had read with Rob's father (former Justice Bruce Macfarlan OBE QC)." So it's come full circle.

- 29 Rob had an incredibly diverse practice and covered every area of commercial practice with extreme diligence and expertise. His is a delightful appointment and I compliment the Attorney General on his excellent choice.
- 30 Another to benefit from your Honour's mentorship was Caroline Needham SC who, as has been observed already, noted your desk and chambers were always incredibly neat, you never let work build up, you were always punctual and exhibited incredibly disciplined work habits.
- 31 On the day Caroline took silk in 1999 Justice Rein also took silk - another one of your Honour's readers and also best man at your wedding to your wife Nicole. On the occasion of your Honour's marriage to Nicole, Justice Rein referred to a certain Ghandi-like frugality on your Honour's part and a rather uncanny ability to spot a bargain a mile off, even if it involved free cars in the Amalfi Coast and chases that would leave *The Italian Job* looking pretty lame.
- 32 Your Honour also has a reputation for being a bit of a star in the sporting arena, tennis, squash, golf. Justice Rein aka "Loser" has observed that rugby union was not your forte and in fact the under 15s at Cranbrook didn't even want you in their team, an unduly unkind remark given that the school report noted that as a member of junior second 15 in 1961 your Honour played "well - at times".
- 33 Justice Rein has somewhat redeemed himself with some accolades that he's given us today. He said, "Few have Rob's ability, determination and dedication. He is gregarious and friendly, never pretentious or condescending. He is a stickler for the rules and ethics and demonstrates integrity of a very high level. He knows all about the craft and is respected by his clients, his opponents and their clients".
- 34 An outstanding commercial silk and the quintessential barrister, your Honour is always extremely courteous but a tough opponent, very focused

and efficient and one of the few who manage to achieve a healthy balance between work and home life.

35 Elvis Presley is quoted as having once said, "It's not how much you have that people look up to you, rather it's who you are". Your Honour, I have no doubt people will be looking up to you and not because you're sitting high on a bench, rather because of the sound judgment, keen intellect and compassion which you've demonstrated throughout your career following your admission as a solicitor of the Supreme Court of New South Wales in 1976.

36 Your Honour, the solicitors of New South Wales commend you on your appointment and wish you every success as you take up your new role on the bench of this Court. As the Court pleases.

37 **MACFARLAN JA:** Chief Justice, your Honours, ladies and gentlemen. Thank you for coming here today, I'm honoured by your presence. Thank you especially to Ms Katzmann and Mr Macken. It is one of the advantages of my new role that I do not have to respond to anything that you have said. I will simply make no admissions whatsoever as to the accuracy of what you have said. But thank you very much, it has been very much appreciated.

38 I have attended many swearing-in ceremonies during my thirty-two years at the bar. Most were both moving and entertaining. One in particular however was memorable for what arose out of the inevitable unholy lift congestion that occurs after these ceremonies. The swearing-in in question was that of Justice Keith Mason as President of the Court of Appeal on 4 February 1997. After the ceremony I found myself at the front of a packed lift which resembled a can of sardines. Just as the lift doors were about to close my bachelor's eye caught sight in the throng, waiting for a lift, of a very attractive female barrister. The brilliant idea flashed into my mind that with a little work on my part room could be made in that lift for one more sardine.

- 39 I beckoned the barrister to come forward and with some frantic pushing and shoving of the other lift occupants, I made the required few inches of space in the lift for her. The opportunity for relaxed conversation was limited but in the presence of twenty-five or so fellow practitioners she and I developed a rapport. This encounter proved to be my first meeting of my future wife, Nicole, with whom I have lived in marital bliss for the past ten years. I hope your journeys away from the ceremony today have as happy an ending as mine did on that occasion.
- 40 I served my articles of clerkship in 1972 and 1973 at the firm then known as Dawson Waldron and now known as Blake Dawson. I owe my mentors at Dawson Waldron - Nick Carson and Aleco Vrisakis - a considerable debt. In fact I owe the firm as a whole a considerable debt, not only in relation to the period of my employment with it but also for the overwhelming support it gave me after my admission to the bar. My time at the firm was also the period when I acquired two very special friends, Sylvia, now Federal Magistrate, Emmett and Arthur, now Justice, Emmett. On my admission to the bar in 1976 I had the privilege of reading with David Bennett, later Queen's Counsel and Solicitor General for the Commonwealth.
- 41 I enjoyed being a barrister. In the thirty-two years since my admission to the bar I have never thought that there was an occupation which I would have preferred to undertake. The bar did however have its stresses and strains, especially in the early years. I remember, for example, when I was in full sail in one of my first cross-examinations, having my brimming confidence instantly deflated by the District Court Judge before whom I was appearing. He interrupted my enthusiastic cross-examination in a rather abrupt way to say, "Mr Macfarlan, please correct the jaunty angle at which your wig is positioned on your head". The self-satisfied smile that came over the witness's face seemed to say, "Yes, I thought there was something a bit odd about you, but I could not quite put my finger on what it was".

- 42 Opponents were always a rather annoying feature of life at the bar. The tactics they employed of course varied markedly. One tactic that sticks in my mind was used in a large commercial case in which I was led by a silk. The silk decided to allow me to do the cross-examination of the expert witness to be called by the other side. I prepared assiduously for what was for me a very big occasion. I made endless notes which laid out my opening gambit, and covered all the permutations and combinations of answers that might arise from it. The big moment finally arrived. When the senior silk on the other side completed his examination-in-chief and sat down, I rose with all the gravitas I could muster, ready or so I thought, to launch into my penetrating opening questions.
- 43 I think it was whilst I was giving the witness the requisite preliminary steely glare that panic first set in. My hands were groping for my notes. My eyes had to leave the witness to conduct a frantic search for the notes which were nowhere to be found. It was only after catching sight out of the corner of my eye of the smile on my opponent's face - and it seems he was not known as "the smiler" for nothing - that I realised that a little shove here and there from him had sent the notes into a completely obscured position behind the lectern.
- 44 This setback to the cross-examination was followed about half an hour later by another. After what I thought was a reasonably effective start to the cross-examination, the court adjourned for its mid-morning break. Counsel trooped into the judge's chambers for morning tea. No sooner had we sat down than the judge, referring to the witness I had just started to cross-examine, said to us all, as if there could not possibly be any disagreement, "Well, she really is a very impressive witness, isn't she?"
- 45 Amongst the outstanding juniors whose assistance I had and valued during my time at the bar were Alec Leopold and Phillip Durack, both now Senior Counsel. They remain close friends. I was privileged to have many excellent pupils, including Helen - now Senator - Coonan, Caroline

Needham and Sandy Street, both now Senior Counsel, and Nigel Rein, now a Judge of this Court.

46 The solicitors to whom I am eternally grateful for having briefed me are too numerous to list. I thank them all for the work that they gave me and acknowledge the many friendships to which our dealings gave rise.

47 I owe a great debt to the members of the Eleventh Floor, Wentworth/Selborne, where I had chambers for all but one of my thirty-two years at the bar. I will miss the companionship of those on the floor. I cannot imagine a better group of people to have shared my professional life with.

48 Twenty-five of those thirty-one years on the Eleventh Floor were spent next door to Jim Poulos QC. Jim always had a ready remark to assist me in my practice. For example, in relation to a matter in which I was briefed to appear on behalf of Stonehenge Constructions, I remember that his helpful remark was that the matter had certainly taken a long time to come on.

49 My clerk, Paul Daley, is the doyen of clerks and was of immense assistance to me, both on a personal and professional basis, for three decades. My receptionist Annie Deighton also did a magnificent job for the twenty-five years she fielded my calls, as did Bill and Maria Goritsis who looked after my chambers for a similar period.

50 I am honoured to have joined a Court which has had so many eminent members over its 184 years of existence. My late father Bruce Macfarlan was a distinguished member of the Court from 1959 to 1974. I feel privileged to follow in his footsteps and also those of my father-in-law, the Honourable Alan Abadee, who was a much respected Judge of this Court from 1990 to 2000. I am honoured by his presence here today and also by that of my mother-in-law Jenny Abadee, who has made a very special effort to be here. I am sad that my late father and my late mother Barbara

are not here today, but I know that they would be proud of my appointment.

51 I have many friends presently on the Court, but none closer than my longstanding friend Justice Nigel Rein. Our friendship commenced when as a solicitor he briefed me in the early 1980s. The friendship flourished when he read with me on his admission to the bar and has continued unabated since then. As a former pupil of mine, Justice Rein will no doubt have been pleased to note when my commission of appointment to the Supreme Court was read a little while ago that he was recorded as being senior to me. As his former pupil master it will however be my duty to point out to him that that seniority only lasted the few seconds it took the principal registrar to read out the following commission of my appointment to the Court of Appeal.

52 I am honoured to be joining the Court of Appeal. The standing of the Court and the eminence of its members, both past and present, makes me especially conscious of the huge responsibility which I am undertaking by accepting this appointment. I look forward to drawing on the great breadth of experience of the present members of the Court, with most of whom I have been associated in one way or another for some decades. The community can be sure that I will do my utmost to discharge my duties with fairness, compassion, courtesy and efficiency.

53 Last but not least I turn to my family. I am grateful for the presence here today of my sisters Babette and Rosalinde, who have been very close to me throughout my life. I do not have any brothers, but in this context I wish to mention my very old friends, David O'Donnell and Ross Beattie, who for many years have been able substitutes.

54 My adult children, Charlotte, James and Alex, are in far-flung parts of the world and sadly were unable to return for today's ceremony. I know that they are with me in spirit. I thank them for their unquestioning support of me and for putting up with my long working hours at the bar. I thank them

also for the videos of love and support which they sent me yesterday by email.

- 55 My son Lachlan, who is six, started school this year. He is representing my children here today. I cannot think of a finer representative. He is an outstanding boy whom I adore. His first question when I walk in the door at home at night after a long day at work always brings me back to reality, "Dad, are you too tired for a wrestle?" Of course there are only two possible answers a father could give to such a question, "No, I am not too tired" or "I am sick and the ambulance is just about to arrive". To say "Yes, I am too tired" is not an option.
- 56 Finally, I want to say that my wife Nicole is the best spouse anyone could possibly hope to have. She has been incredibly loving and supportive of me, and has put her outstanding career partially on hold to guide Lachlan through to school age. The enthusiasm she shows in everything she does is remarkable and infectious. It is for good reason that I am only able to describe Lachlan as the second most excitable person I know.
- 57 I thank you for your attendance.
