

**IN THE SUPREME COURT OF NSW
BANCO COURT**

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

Monday 12 April 2010

**SWEARING IN CEREMONY OF
THE HONOURABLE MICHAEL ANDREW PEMBROKE SC
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES**

- 1 **PEMBROKE 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.

(Commission read.)

(Oaths of office taken.)

- 2 **SPIGELMAN CJ:** Justice Pembroke, on behalf of all of the judges of the Court I congratulate you on your appointment. You come here after many years of practice at the New South Wales Bar. You were a distinguished Silk and I look forward to serving with you on this Court, as I am sure all your colleagues do.

- 3 **MR T BATHURST QC PRESIDENT THE NEW SOUTH WALES BAR ASSOCIATION:** On behalf of all members of the Bar of New South Wales it gives me great pleasure to congratulate your Honour on your appointment to this Court. Your Honour's experience and ability make you an ideal appointment of the Court. After completing your schooling at St Ignatius College, Riverview you graduated from the University of Sydney with a Bachelor of Arts degree in 1976 and a Bachelor Laws degree in 1978. You subsequently attained a Master of Laws degree at Cambridge University.

- 4 You were admitted as a solicitor of the Court in July of 1978 and commenced practicing at Freehill Hollingdale & Page, as that firm was then known. Your wife, Gillian, is of course the daughter of Peter Hollingdale, one of the founders of that firm. That firm had then, as now, a highly successful commercial litigation practice which provided your Honour with an excellent foundation for the career you subsequently pursued so successfully at the Bar.
- 5 Your Honour commenced practice at the Bar in 1982, reading with Mr Robert Hulme, as his Honour then was. Your Honour joined the Twelfth Floor of Wentworth Chambers in 1984 and practised continuously from those chambers until your appointment. Your Honour quickly developed a wide range of practice, particularly in the Commercial and Equity Divisions of this Court and in the Federal Court. You Honour practised in commercial law in the wider sense including undertaking work in the banking law area, the building and construction area, trade practices, telecommunications and international commercial arbitration. By the time your Honour applied for silk you had one of the busiest junior practices at the Bar of New South Wales. In a futile attempt to seek a respite from work your Honour took silk in 1995. Your practice continued to grow. As well as being briefed by most of the large corporations and insurers in this country your Honour did work for the major commercial regulators, the Australian Securities and Investments Commission and the Australian Competition Commission. However, in the true traditions of the Bar you did not hesitate to take a brief against any of those corporations or regulators if requested to do so.
- 6 Your Honour was an economical barrister in the best sense of the term. Your Honour's arguments were always well structured, concise and dealt only with the points that were worth arguing. That was due in large part to the meticulous preparation you undertook in all cases in which you were briefed. Your Honour was an unflappable opponent. You went by the motto don't complain, don't explain, and no matter how difficult the case was your Honour always maintained a calm and cheerful composure. I

had the privilege of appearing with and against your Honour on a number of occasions, the last being only a few weeks ago. Your Honour was always a formidable but courteous and fair opponent.

7 Notwithstanding the size of your Honour's practice you found time to engage in activities outside the practice of the Bar. Your Honour is a member of the London Court of International Arbitration, you were Chair of the Appeal Tribunal of the Australian Stock Exchange where I also had the privilege of appearing before you, a member of the Australian Institute of Company Directors and the St James Ethics Centre.

8 In a marked contrast to the generally held view that the dry exterior of practitioners at the commercial bar is matched by an even drier interior your Honour is an incurable romantic. Your Honour has constructed a remarkable property at Mount Wilson, replete I'm told with a lake which is described by many as a mini-Versailles. Justice Nicholas has described it to me in even more extravagant terms. However, not content with designing and building such a beautiful edifice your Honour has written about it. Your Honour's works, Trees of History and Romance-Essays from a Mount Wilson Garden was reviewed by John Griffiths SC who described your writing as rich in its imagery and pregnant with sexual innuendo. It described your description of a birch as slim, subtle and unmistakably feminine. I don't know how your Honour's submissions would have been received by the Court had they been written in that style, I can only hope that your judgments will be.

9 Your Honour, as your close-knit family well know, the Bench these days provides no respite whatsoever from the rigours of the Bar. The community is fortunate that you have agreed to take this appointment. The Bar wishes you every success and satisfaction in your new role.

10 **Ms M MACKEN PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** Since time began trees have symbolised strength and serenity, providing shelter and sustenance and maintaining the quality of the air we breathe.

Trees have been the subject of many an artistic endeavour from the Roman poet Ovid's *Metamorphosis* collection to the late Brett Whiteley's painting *The Jacaranda Tree*. Your Honour, your own love of poetry and trees has filled the pages of your book, the book which Mr Bathurst noted is *Trees of History and Romance-Essays From a Mount Wilson Garden* which was published in 2009. This rather whimsical look at the history, mythology and botany of tree species interspersed with personal memoirs and poetry focused on many of the trees growing on your property at Mount Wilson in the Blue Mountains. As Mr Bathurst has noted, the property is aptly named Hawthorn and spans some five and a half acres, once being a pine forest. Today it has made way for a park-like landscape with natural groups of trees, mainly oaks, beeches and birches overlaid with a lake and a small temple. Light in winter and providing shade in summer the mighty oak, the first tree to be planted, is one of your Honour's favourites. Like the words of Lord Tennyson's poem, *The Oak*, your Honour "strives to live thy life young and old like yon oak".

- 11 Your Honour, on behalf of the Law Society of New South Wales and the solicitors of this State it is a privilege to congratulate you on your appointment. Like the mighty oak, your Honour's roots are deep, being a direct descendent of Nathaniel Lucas and Olivia Gascoigne who came out with the First Fleet in 1788 and to Captain Thomas Rowley of the New South Wales Corps who arrived shortly after. The eldest son of Lois and Arthur Pembroke MC your Honour's siblings are Richard and Susan. We are delighted to welcome your parents, brother Richard, wife Gillian, daughter Olivia and son, Nicholas, here today. I know they will be very proud of your Honour's achievements. No doubt your Honour is likewise proud of your family and their contribution to your success today.

- 12 Your father, an Australian Korean War veteran, was awarded the Military Cross for bravery during an attack against Hill 317 during the battle of Maryang San in October 1951. Mother, Lois, is a published writer. *Children of the Anzacs* was released in 2007. Wife, Gillian Hollingdale, whose family founded Freehill Hollingdale & Page is a former teacher and

mother to your four children, none of whom I note have yet taken up law. Olivia, aged twenty-five is in publishing, India is studying arts and is currently in Chicago and Nicholas is focusing on social science and the political economy. However, second born Harriet is about to follow in her grandfather's footsteps, having been accepted into the officer training course at Duntroon. George, the cocker spaniel, is yet to show any academic inclination but has proved to be a very loyal and loving companion.

13 As a child of a military man your Honour travelled widely, with sea voyages between England and Australia in the 1950s and 60s. Wherever you were stationed your Honour found enjoyment in the gardens but it wasn't until later that your Honour developed a real affinity with nature. Your Honour began school at Sandhurst in Surrey, England and at the age of eleven returned to Australia where, as Mr Bathurst has said, you completed your schooling at St Ignatius College Riverview in 1972. I am told that 1972 was something of a golden year at View, a year when the school reached an apogee in terms of winning sporting events. Your year, 1972, was the year when your Honour was appointed Head Prefect at Riverview and won the Australian Youth of the Year Award, the latter providing opportunity for overseas travel. Your Honour was reputed to be a diligent scholar and a good sportsman. In fact, your Honour readily admits that playing fields and cricket pitches dominated your Honour's horizons as a teenager.

14 After completing a Bachelor of Arts and Bachelor of Laws at Sydney University in 1977 your Honour undertook a Master of Laws at Cambridge University. It was here, at the ripe old age of twenty-three years, that your Honour came upon the herbaceous borders in the gardens of Selwyn College, the impact of which inspired you. It was the start of your life-long and abiding interest in the natural environment, from the little courtyard garden in the Paddington terrace to the Mount Wilson property and your subsequent positions as Governor of the World Wildlife Fund Australia and Trustee of the Australian National Wildlife Collection Foundation.

- 15 Admitted to the Bar in December 1978, your Honour took silk in 1995. Your Honour has built a huge international practice in commercial law, appearing in complex litigation for a range of financial institutions, banks and insurers in Australia, London, Singapore and New Zealand. Your Honour is adept at not communicating pressures to others and colleagues have commented on your extremely calm demeanour. On a professional level you are reputed to be kind and fair, generous with your time and advice and a great mentor to junior barristers. Your research is thorough and instructions are clear and precise. Two Linden trees mark Hawthorn's front gate and two more frame the front door. Some would say these pairings offer both protection and good fortune. For Chambers perhaps a couple of Happy Plants or Lucky Bamboo will have to suffice.
- 16 Your Honour, the solicitors of New South Wales wish you well in your new role as a judge of this Court.
- 17 **PEMBROKE J:** Thank you, Mr Bathurst and Ms Macken, for your generous remarks. I am sure that my father enjoyed them and I am quite certain that my mother believed them.
- 18 This occasion gives me a unique opportunity to correct the false impression that you may have conveyed, to the limited extent that I may wish to do so.
- 19 Mr Bathurst, throughout the whole of my career I have looked up to you as a leader of the Bar, both when you were a junior and later after you took Silk. It was a privilege for me, and a pleasure, to conduct my last case against you.
- 20 Ms Macken, the best litigation solicitors have skills and expertise that I could not hope to achieve, but from first to last I have been fortunate to be briefed by the most professional representatives of your branch of the profession, for many of whom I have formed an abiding respect and friendship.

- 21 Unlike some of my colleagues, of whom Justice Slattery is but one example, I was not born to be a judge. For the first seventeen years of my life I neither knew any lawyers nor thought of the legal profession. My sole objective was to follow my father and lead a platoon of soldiers anywhere, but preferably in battle.
- 22 Somehow the years of Latin and English literature and the fact that most of the other boys at school were the sons of doctors and lawyers had an effect. Even then I was ambivalent and when I went away at the end of the year leaving it to my father to enrol me, my instructions were to put me down for Medicine or Arts/Law, whatever I got into.
- 23 So it was that in March 1973 I started at the university with Bret Walker, and others who have become more well known than I am or could ever expect to be. A few years later when I arrived at the Law School, Dyson Heydon was the Dean and Bill Gummow was one of my lecturers. It never occurred to me that in years to come I would work with each at the Bar and appear before both as judges.
- 24 As you have heard, my limited experience as a solicitor was at Freehill Hollingdale & Page. I first went there as a summer clerk during two university vacations. In those days we were called Christmas beetles. Freehills was then at 60 Martin Place and the office was a more relaxed environment than I suspect it has since become. I ran errands for Peter Hollingdale, Kim Santow and others. The place was so relaxed that in one empty office there was a cricket kit and two of us would go there on an occasional quiet summer afternoon and throw a cricket ball around. That other person is now the chairman of a bank. When the ball was thrown too hard or our reflexes were too slow the sound of leather crashing against the plywood panelling of Ian Hutchinson's adjoining office was deeply embarrassing.

- 25 During my student days I had only one never to be forgotten experience of the court system. Kevin Murray was a friend of my father through the Army. By the end of his career he was a Major General and an OBE. He had a room on the Thirteenth Floor of Selborne Chambers in which he had installed a platform so that his desk was raised well above the criminals and their solicitors who came to visit him. As a favour to my father he took me to a murder trial at Darlinghurst. It was an exhausting week of which I have two abiding memories. The first was Kevin brandishing the rifle that was the murder weapon and aiming it at the Foreman of the jury. His objective was to explain how the weapon discharged accidentally. The second was the sight of the accused, after being sentenced to life imprisonment, dropping through the trap door beneath the dock and into the cells. To this day I have never since seen a jury.
- 26 My call to the Bar was inauspicious to say the least. I was due to start on the Eleventh Floor in January, and on 16 December, on the morning of my admission ceremony, I was passed around the Floor in the hope that someone would be free to move my admission. The parcel landed in the lap of a then junior barrister whose surname was Bruce. It was 1981, Malcolm Fraser was the Prime Minister and Andrew Peacock was often in the news. Mr Bruce must have been distracted because when my turn came, he solemnly announced that he moved the admission of Michael Andrew Peacock. With his usual felicity Sir Laurence Street rectified the situation with grace and humour.
- 27 Things settled down and the Floor put me in the corner of a room occupied by the President, the one now sitting to the left of the Chief Justice. It was a large room belonging to George Masterman, who was away being the Ombudsman. I was very much the junior partner and the well understood custom and practice was that I would make myself scarce whenever James had a conference or an important telephone call.
- 28 I made a lot of mistakes but I think I learned quickly. One of my worst mistakes occurred when, in the early months, I dutifully attended my first

swearing-in. Knowing nothing, and not being shy, I arrived in this Court in good time, saw that the best seating appeared to be at the bar table and promptly positioned myself at the left-hand end, where Mr Margo is. I could not help noticing that all the places to my right were gradually filled by very old barristers wearing long wigs. They must have been in their forties and fifties. Eventually I realised that something was quite wrong. I decided to vacate my place when I received a tap on the shoulder from an even older, tubby barrister, whose name I later ascertained was Maurice Byers.

- 29 After a few years it was my great privilege to join the Twelfth Floor where at that time there was a formidable array of former members sitting on this Court. They included Andrew Rogers and Malcolm McClelland and Denys Needham and Philip Powell. In the Court of Appeal there were Michael Kirby and Denis Mahoney. Among those who remained on the floor were Morton Rolfe, Dusty Ireland, Bill Caldwell and Mervyn Finlay. They were all graziers except for Mervyn, a former Olympian, who was, I think, more at home in Bellevue Hill. Each became my firm friend. Bill was closest to me in age; was in the room next door; and was a role model for me. I am very pleased that his wife, Hilary, and his daughter, Elizabeth, are with me this morning.
- 30 Shortly after I acquired chambers I equipped myself with some law reports, including a set of authorised reports which I purchased from Neville Wran. The Chancery component of those reports was in pristine condition and had clearly never been opened.
- 31 Michael McHugh was my first President of the Bar Association and in one of my earlier substantial cases I was led by Michael and R D Giles for the stockbroking firm of Meares & Phillips. Brian France was the principal of that firm and I am pleased to say, not only that we have since become neighbours and friends, but that Brian and his wife, Pip, are here this morning. The judge in that case was John Kearney, who was a cousin on my wife's side. He was a model of an Equity judge and I am sorry that he,

like my father in law, Peter Hollingdale, did not live long enough to join us on this occasion. Peter's wife, Patricia, is however here.

- 32 In the beginning I did lots of little equity cases, often defending the indefensible for a small finance company that did not stay in business. As my responsibilities broadened I spent more time in the Commercial List. For my generation the most significant judicial force of the 1980s was Andrew Rogers. I was there at his first Friday list in December 1979 and frequently throughout the ensuing decade. I know that I am not alone in saying what a transformative effect he had on the practice of commercial law at that time. He is currently overseas, but we have corresponded, and I regard myself as professionally indebted to him.
- 33 I am also indebted to two other icons of the New South Wales Bar, one living and one dead. The living one is of course the indestructible Tom Hughes. The other, equally obviously, is Peter Hely. I spent much time with each of them and in one notable case the three of us were together. The lessons they taught me were priceless.
- 34 As the cycle progressed I became in turn indebted to my own pupils and juniors with whom I worked closely. Some have now taken silk and two have become judges – in other places. They all know who they are and they have left me with many fond memories.
- 35 In recent years I became rather more relaxed about my cases and even contemplated an alternative existence. This came home to me about eighteen months ago when my opponent was complaining loudly, with perfect justification, as any normal barrister would have done in the circumstances. My only retort was to say, "John, lighten up, it's only a case".
- 36 I have had three clerks, all of whom are here today. Paul Daley was the first, then there was Greg Isaac and later for many years Bob Rymer. Each possesses a practical wisdom drawn from years of clerking for

multiple barristers with disparate personalities and practices. I am fortunate indeed to have good men like them to guide me.

37 My secretary, Sue Page, has been with me for over twenty-five years. Because Sue has never worked on Fridays I thought that my appointment would mean the end of a successful partnership, but to my great surprise and delight she welcomed the change as much as I did and I'm happy to say that our collaboration will continue. However, as the relationship is a work in progress I should save the praise for a later occasion. But she knows how much I value her. At the front desk I have been blessed by administrative staff whose company and conversation have frequently brightened my day. I will certainly miss them.

38 I should say something about my parents and siblings. I wrote a few lines in my book about my colourful childhood, about long journeys on ships and memories of colonial parade grounds. Through all of those moves and cultural changes my brother and sister and I, and our parents, were a unit whose closeness my parents forged. That closeness has remained to this day and now includes our spouses. My parents have done many other good things but that was one of their greatest gifts and I thank them for it.

39 I hold the view that a public occasion like this is not an appropriate forum for the expression of private affection, or at least not too much. However, my wife, Gillian, has travelled with me a long way from an early age. I'm not certain of her precise age at the time, but when she jumped over the fence and into my car, I had full knowledge that she was still at school.

40 She is the daughter and granddaughter of a solicitor and well made for the role she has now assumed. Her wisdom and caution are a counterweight to my frequent enthusiasm and occasional excesses. She has been a guiding light for me in more ways than I would care to express. For some years she has thought that I was at risk of straying from the straight and narrow. With my acceptance of this appointment I think she believes that I have returned to normality.

- 41 Two of our children, Harriet and India, are currently in the United States and two, Olivia and Nicholas, are here this morning. All of them are inspirations to me and each of them has a recognisable determination and strength of personality that makes me proud.
- 42 Many of our friends are here from all stages of my life and I am grateful for their presence. I am grateful too to so many of my colleagues for doing me the honour of attending this ceremony.
- 43 I have had a fortunate professional life so far but I do not know what the future holds or how I will fare as a judge. I have been flattered by the confidence in me that many of you have expressed but it would be unwise to make any predictions. All I know is that I am usually economical, I am not by nature indecisive and nor is professional courtesy something which I find difficult. And I think I understand barristers.
- 44 Chief Justice, thank you for the privilege of allowing me to serve on your Court. I will endeavour to discharge faithfully the responsibilities that have been entrusted to me.
