

Address upon the Occasion of the Retirement of the Honourable Mr Justice Philip Powell AM

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THE HONOURABLE MR JUSTICE PHILIP POWELL AM

BANCO COURT, SUPREME COURT OF NEW SOUTH WALES, SYDNEY

8 NOVEMBER 2002

The purpose of this ceremonial sitting of the Court is to mark the retirement from the Court, after more than twenty-five years of public service to the administration of justice, of the Honourable Mr Justice Philip Powell AM. Your Honour was appointed as a Judge in the Equity Division of the Court in April 1977 and as a Judge of Appeal in October 1993.

The High Court is sitting in Canberra today. Chief Justice Gleeson has asked me to express his apologies for his inability to attend the ceremony. The other Chief Justice of this Court under whom you served, Sir Laurence Street, also expresses his apologies. He has a prior commitment, dedicated, he assures me, to reducing the workload of this Court.

After graduating from the University of Sydney with first class honours and the Equity Prize, your Honour was admitted as a solicitor of the Supreme Court in 1954 and to the bar in the following year. You took silk in 1970. Your Honour's practice was wide-ranging, extending in your later years at the bar to be leading silk in industrial matters for the State of New South Wales. However, the primary focus of your years at the bar was trial work in commercial and equity suits.

It was in the course of your Honour's practice at the bar that the principal characteristics of your contribution to the law first emerged. Those characteristics included a meticulous attention to detail, not only of the law but of the facts, and a mastery of the intricacies of legal procedure and history. This was a time when arguments of sublime technicality received greater acceptance by the courts than they do now. Your Honour acquired an encyclopaedic knowledge of old and technical law relating to procedure and to the history and evolution of equitable doctrine. This knowledge is also the foundation of the contribution your Honour has made to the people of this State as a Judge of the Court.

Those members of the bar, like myself, who appeared before your Honour as a trial judge came to admire your Honour's learning and attention to detail, though they would not have described the experience as a pleasure, unless they had punctiliously followed the required procedures and were fully prepared. On a number of occasions I, like many others at the bar, was the beneficiary of your Honour's skill in drafting complete and precise orders, interspersed with a question from your Honour: "I suppose Mr Spigelman you would also want ...", identifying a mode of escaping from the clutches of the imperfectly drafted injunction contained in the initiating process, which could only have been imagined by someone with much experience of the darkness of the human soul. The answer was always, "of course".

Your Honour always displayed the utmost courtesy to legal practitioners, litigants, witnesses and court staff. Nevertheless, your Honour did manifest, from the outset, a particular dedication to dispelling the long held prejudice of common lawyers that equity practitioners speak only in whispers.

No litigant or lawyer who appeared before your Honour ever had any doubt that the intricacies of the dispute which had brought them to the Court, and the detail of their argument, received anything but the closest attention and that all the substantive arguments put were dealt with in meticulous detail. Throughout your judicial career you approached your tasks with the appearance that it was a great privilege for you to be allowed to handle the affairs of others. Everyone who appeared before you left the Court knowing that their cases mattered.

There were, of course, in such a long career on the bench, cases of considerable public interest and significance. None more so than the Spycatcher trial in which your Honour's judgment (*Attorney-*

General (United Kingdom) v Heinemann Publishers Australia Pty Limited (1987) 8 NSWLR 341) was affirmed twice on appeal and made a significant contribution to the law on confidential information, although, in the subsequent television series, your Honour's survey of the law in this regard remained on the cutting room floor.

In *Perpetual Trustee Co Limited v Groth* (1985) 2 NSWLR 278, your Honour affirmed the validity of the Archibald Prize as a charitable trust, your judgment containing a comprehensive survey of the case law relating to trusts of general public utility in relation to the arts and education.

Your Honour also charted a course through the quagmire of artistic temperament, when you admitted to probate the will of the artist Bret Whitely in the form of a document which could not be found after his death, had been witnessed by only one person and had last been seen fixed with sticky tape to the underside of a kitchen drawer. Day after day the people of New South Wales were entertained by the intricacies of s18A of the *Wills Act* and the endless possibilities of informality in will making.

Of course your Honour's views on the law have not always prevailed. There is no judge of whom that is not true. In your Honour's case one example that comes to mind is your Honour's campaign to extirpate the heresy of the Mareva injunction. (See *Ex Parte BP Exploration Co (Libya) Limited; Re Hunt* [1979] 2 NSWLR 406).

Your Honour's judgments have made numerous contributions over a wide range. Some examples are: surveying the law of passing off (*Cadbury Schweppes Ltd v Pub Squash Co Pty Ltd* [1980] 2 NSWLR 854); identifying the indicia of a de facto relationship in the then new legislation (*Roy v Sturgeon* (1986) 11 NSWLR 454); provision for widows under the *Family Provision Act* (*Luciano v Rosenblum* (1985) 2 NSWLR 65); the locus standi of a beneficiary to sue to protect an interest in an estate (*Ramage v Waclaw* (1988) 12 NSWLR 84); the testamentary capacity of a person who suicides after making a will (*Re Hodges* (1988) 14 NSWLR 698); procedure for references out (*Clark Equipment Credit of Australia v Como Factors Limited* (1988) 14 NSWLR 552); the requirements for undue influence affecting a will (*Winter v Crichton* (1991) 23 NSWLR 116); the first judgment on s18A re informal wills (*Re Application of Brown* (1991) 23 NSWLR 535); the practice on discovery of a further will after the grant of probate (*Re Estate of Wilson* (1991) 24 NSWLR 334); testamentary capacity of persons subject to an order under the *Protected Estates Act* (*Perpetual Trustee Co Limited v Fairlie-Cunninghame* (1993) 32 NSWLR 377).

As is usual, the overwhelming proportion of cases that came before your Honour were not of wide interest or public importance but were of high significance, and sometimes of overwhelming significance, to the parties involved. Today I would like to emphasise your Honour's particular contribution to the law in the case of two categories of decisions of the Court which have the greatest effect on the lives of individuals. Your Honour came to serve for a long period as the Judge in the Protective jurisdiction of the Court and then as the Probate Judge of the Court. In both spheres your Honour's judgments, many unreported, decisively developed the law. Further, your administration of the lists ensured that the Court's procedures operated with as much expedition as justice would allow.

The requirements of the Protective jurisdiction include expertise with psychiatry and a personal touch for the disabled. On many occasions your Honour came down from the bench, sat with the disabled person at the bar table and patiently explained what was happening and why. Your Honour's judgments in the field remain a substantial resource to this day. Under the category of Mental Health, the Australian Digest sets out sixty judgments of this Court from its inception in 1824. Twenty of those judgments – i.e. one third - are your Honour's.

Upon your appointment as Probate Judge, the procedures were streamlined, long drawn out and costly inquiries were dispensed with and delays were substantially reduced. Grants of probate which once took up to six months came to be made, and are still made, within a day or two. That advance occurred under your Honour's administration. Abuses of the procedures for caveats were repelled with a firm hand. The Court's substantial, until then, satellite jurisdiction of applications for emergency grants, disappeared.

Your Honour's command of the English language is a singular delight of your judgments. One of the most important contributions that a superior court makes to the administration of justice is the clarification of the law in such a manner as to ensure that clients are able to be advised with assurance. Clarity and lucidity of expression is, for that reason, a primary judicial virtue. Your Honour unquestionably had that capacity.

Whilst the length of your Honour's sentences, often with numerous subordinate clauses, would sometimes leave a reader breathless, the journey was always assisted by the deployment of punctuation with precision and in abundance. These sentences were and are a pleasure to read, but not always so by the litigants and practitioners referred to in them.

In *H v G* (unreported) 24 August 1990, in an extempore judgment, your Honour commenced your judgment with the following:

"At long last, after a delay of the better part of five months, which has been brought about by what I can only describe as blundering incompetence on the part of the Plaintiff's advisers, this application is in a condition in which it can finally be disposed of.

Notwithstanding the delay, and the incompetence, which have marked the application's stumbling and erratic progress to this stage, the Plaintiff's counsel submits that the Plaintiff should have an order that the whole of his costs of the application should be paid out of the Defendant's estate."

It was, perhaps, unnecessary to read the rest of your Honour's careful reasons in order to know the fate of this application.

On other occasions, your Honour's pen was directed to the course of judicial authority:

" 'Words, words, mere words ...' said Troilus (*Troilus and Cressida* V. iii. 109), a sentiment which I am disposed to echo after having spent many hours considering the numerous, and, at times, conflicting, and thoroughly confusing, authorities on the question of whether or not the duties of a director of a limited liability company are, or are not, the same as, or similar to, or analogous to, those of a trustee ... Although – and, once more, I plagiarize the Bard of Avon – I regard the debate as '... weary, stale, flat and unprofitable ...' (*Hamlet* I. ii. 129), I believe that the true position is that, while directors are not, properly speaking, trustees, but fiduciary agents, the range of duties and obligations to which they are subject, or which are imposed upon them, include duties or obligations which place them, in relation to moneys or property which are in their possession, or over which they have control, in a position analogous to, although not identical with, that of trustees."

(*Mulkana Corporation NL (In Liq) v Bank of New South Wales* (unreported) 9 September 1983.)

The litigants in a partnership dispute over a pharmacy were greeted with the following opening sentence in *Taylor v Johnston* (unreported), 14 February 1984:

"After listening, for the whole of the morning, to the evidence, and arguments of counsel, in this matter, I am reminded of nothing so much as the learned gentleman whom Gulliver met on his voyage to Laputa, and who had spent eight years upon a project for extracting sunbeams out of cucumbers which were to be put into phials hermetically sealed, and let out to warm the air in raw inclement summers: I am amazed that, in this proceeding, so much time, money, and intellectual effort has been expended upon a question which has so little relationship to reality."

The sentence contained eleven commas and one colon.

Similarly, the litigants in a landlord and tenant case (*Todbern Pty Ltd v Taormina International Pty Ltd* (unreported) 13 June 1990, were greeted with the following opening:

"Despite the fact that the amount which the Plaintiff, even if it be successful in these proceedings, might recover is not much more than could have been recovered in proceedings regularly commenced in the Local Court at Kogarah, and is not such as would have entitled the Plaintiff, if the proceedings had been commenced in the District Court, or, in the Common Law Division of this Court, to recover full party and party costs, what one can only categorise as a total failure, on the part of the Plaintiff's legal advisers, to understand some basic principles of the law and of practice and procedure has led to these proceedings being commenced by an inappropriate procedure, and in

an inappropriate Division of an inappropriate court.”

Once again eleven commas but no colon.

Your Honour’s predilection for precision is, you should know, much admired. You always stayed on the right side of that fine line between precision and pedantry. The clarity of your Honour’s expression will mean that the judgments you delivered in your long period of service on this Court will stand the test of time. On behalf of all of the Judges of the Court I thank you for your contribution to the people of this State and to the law. I wish you well in your retirement.