THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
FAREWELL CEREMONY FOR THE HONOURABLE JUSTICE REGINALD IAN BARRETT UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE OF THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES
20 APRIL 2015

1. We are here this morning to mark the retirement of the Honourable Justice Reginald Barrett from the Court of Appeal of the Supreme Court of New South Wales.

2. Farewell ceremonies are rarely joyous occasions and this one is no exception. It is always a pity to lose a hardworking, collegiate member of a team, who is committed to public service. Today, I find the occasion all the more glum, primarily because I feel the Court of Appeal has sorely missed out in only having you for three years. In this respect I am envious of the judges in the Equity division who had you for a considerably longer period of time.

3. It was fourteen years, one month and one day ago that you were sworn in to this Court. That followed a distinguished career as a partner, first at Allen, Allen & Hemsley and second at Mallesons (as they were then called). It also followed a stint of time as general counsel for Westpac Banking Corporation.

4. Throughout the past fourteen years at the Court you have displayed some of the finer attributes the public could desire in a judge. You have been patient, efficient, pragmatic yet fair. This, mind you, all in circumstances where for the great bulk of your previous practice as a lawyer you had avoided going to court like the plague.

5. At first, you were a judge in the Equity division and in charge of the Corporations List; incidentally, one of the busiest lists in the Court. It would have been easy for things to have derailed. But, characteristically, you stayed cool, calm and collected and under your guidance things ran smoothly and indeed, quickly.

6. In fact, the whirlpool of speed and efficiency with which you ran the Corporation's List became unbearable for some. I am told that at times litigants would approach the bench stressing how very urgent their matters were, only for you to suggest running the matter on the spot! More often than not this would be met with astonishment and then a furious back peddling as counsel endeavoured to explain that it was not quite *that* urgent after all. In my opinion, if amongst all this efficiency the robing protocol was not always strictly adhered to, then justice was not the poorer for it, and the situation was quite excusable given that you had never robed before.

7. In the Equity division and in running the Corporations List in particular, you were responsible for establishing many fundamental principles. These ranged from giving content to the duty of good faith in commercial contracts and leases,[1] deciding when and what judicial advice for managed investment schemes should be given[2] and explaining how to review a registrar's decision to issue an examination summons.[3] You also have explained, in a decision which incidentally I had cause to rely on this month,[4] the types of circumstances where entering into a litigation funding agreement is "necessary" for the winding up of a company.[5]

8. In speaking of your decisions, it would, of course, be remiss of me to not mention the many decisions you made with respect to statutory demands. Your contribution in this area of the law is, like the number of your judgments on the topic, unquantifiable. I managed to count 158 decisions on statutory demands before I gave up. No doubt there were more. Unsurprisingly, by the time you came to the Court of Appeal it seemed you had said all you had wanted to say on the subject. Mercifully, you only have had cause to discuss it on two occasions.[6]

---

[1] See for instance *Overlook Management BV v Foxtel Management Pty Ltd* [2002] NSWSC 17 and *Softplay Pty Ltd v Perpetual Trustees (WA) Pty Ltd* [2002] NSWSC 1059.
[2] *Re Australian Pipeline Ltd* (2006) 60 ACSR 625; [2006] NSWSC 1316.
[3] *Wily Re Led (South Coast) Pty Ltd* [2009] NSWSC 946; (2009) 76 NSWLR 428.
[4] *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher & Barnet* [2015] NSWCA 85.
[5] *Re McGrath and Another (in their capacity as liquidators of HIH Insurance Ltd and Others)* [2010] NSWSC 404; (2010) 266 ALR 642.
[6] *Kisimul Holdings Pty Ltd v Clear Position Pty Ltd* [2014] NSWCA 262 and *Workplace Safety Australia Pty Limited v Simple OHS Solutions Pty Ltd* [2014] NSWCA 115.

9. Your time in the Court of Appeal, as I have said before, has been all too short. However, it is evident you have been making good use of your time. In three years you have been involved in the delivery of no less than 338 judgments. You have grappled with complex equitable principles, such as the "change of position" defence,[7] what constitutes "detrimental reliance" for proprietary estoppel[8] and whether fiduciary duties or a duty of confidence has arisen.[9]

10. In short, your time at the bench has only confirmed what many of us knew before, that you were one of the leading authorities, if not the leading authority, on corporations law in this country. If your handling in the Equity division of the HIH and Centro schemes were not enough to evidence this, your pithy concurring judgment in *Gillfillan* and *ASIC* certainly was.[10] I know the practical instructions you gave in that judgment for directors conducting board meetings has since been relied upon both by the legal and corporate spheres.

11. Of course, you have shown your expertise in corporations law, not only through the judgments which you delivered but the many articles and papers you have given in this area.[11] I should also add that your contribution in working with Professor Austin, formerly of this Court, in the organisation of the Court's Corporate Law Conference, has also been tremendously appreciated.

12. Despite all your contributions to corporate law in this Court, I'd like to think your time at the bench has not all been plain-sailing familiar equitable principles for you. It appears you have also encountered some strange cases in your time. One of your very first cases in the Court of Appeal concerned calculating damages suffered by a fertility centre which had been lumbered with, what the Court at one point euphemistically called, unusable stock-in-

---

[7] *Citigroup Pty Ltd v National Australia Bank Ltd* [2012] NSWCA 381; (2012) 82 NSWLR 391.
[8] *Van Dyke v Sidhu* [2013] NSWCA 198; (2013) 301 ALR 769, affirmed by the High Court, save as to the question of burden of proof, in *Sidhu v Van Dyke* [2014] HCA 19; (2014) 308 ALR 232.
[9] *Streetscape Projects (Australia) Pty Ltd v City of Sydney* [2013] NSWCA 2; (2013) 295 ALR 760.
[10] *Gillfillan v Australian Securities and Investments Commission* [2012] NSWCA 370; (2012) 92 ACSR 460.
[11] See for instance, Barrett, 'Towards Harmonsied Company Legislation-"Are we there yet"?' (2012) 40 *Federal Law Review* 2, Barrett, 'Thoughts on court-to-court communication in insolvency cases' (2009) 17 *Insolvency Law Journal* 4, Barrett, 'Some themes in Australian banking and finance law: 1984 to 2003 and beyond' (2003) 31 *Australian Business Law Review* 6 and Barrett, 'Acting in aid of a foreign insolvency administration: a step too far?' (2007) 25 *Company and Securities Law Journal* 3.

trade.[12] I will however glide over the High Court's treatment of your decision in that case. I'll instead hurry on to *Beck and L W Furniture* where the High Court emphatically agreed with you, and not the judges of the NSW Court of Appeal, in the scope you gave to section 1322 of the *Corporations Act* to retrospectively validate procedural irregularities.[13]

13. However, it should not be thought that your Honour's sole contribution to the Court and to the law has been limited to matters involving corporations and securities law. Ever since a "shopping trip for some dip ended in a slip",[14] you have been at hand to settle the intricacies of the *Civil Liability Act*[15] and, when needed, section 151Z of the *Workers Compensation Act*.[16] In fact, in recent times I have heard you described as the leading expert on "slip and fall" cases. This is no doubt due to your empathetic nature. You have been known to become so immersed in cases, that when asked by colleagues what judgement you are working on you, have responded, "I'm on the railway track" or, more bluntly, "I'm digging a hole".

14. In addition to "slip and fall" cases, you did sit, once, in the Court of Criminal Appeal.[17] I think it fair to say that originally when this was suggested to you, you were not entirely keen on the idea. However, you became more willing and were reassured when it was pointed out that the case in question involved considering the meaning and effect of insider trading provisions in the *Corporations Act*.

15. All in all, your time, both in the Equity division and the Court of Appeal, has been marked with both pragmatism and fairness. Early on you developed a habit of not interrupting, but listening, to parties. It turns out their breath would invariably run out before your patience did. To this end you seem to have taken to heart the words of an infamous barrister who bravely said "[y]our

---

[12] *Macourt v Clark* [2012] NSWCA 367 at [48].
[13] *Beck v L W Furniture Consolidated (Aust) Pty Ltd* [2011] NSWSC 235.
[14] Gardiner, 'Coles shopper loses $120k after slip in store' Sydney Morning Herald (19 August 2013) reporting *Coles Supermarkets Australia Pty Ltd v Meneghello* [2013] NSWCA 264.
[15] 2002 (NSW).
[16] 1987 (NSW).
[17] *Joffe v R; Stromer v R* [2012] NSWCCA 277.

Honour, you are paid to listen, I am paid to talk, let us perform our respective duties.".[18]

16. Your silence on the bench has been difficult to interpret as it always is accompanied by a poker face. What I didn't know when I appeared before you at the bar was that the only indicator you give as to how well submissions are being received is by your habit of silently flexing your hands under the bench. Regrettably this red flag was not discernible from the bar table and has meant no doubt that many barristers have forged on and on for a point they would have been better to forget within minutes.

17. The inscrutability that you have exhibited on the bench hides the wonderful sense of humour you have in your dealings with your colleagues. You have helped contribute, to a significant extent, to the collegiate atmosphere which exists in the Court of Appeal.

18. This collegiate atmosphere was particularly exhibited by the loyal responses I invariably received when hunting around for some slight flaw, in what otherwise appears to be the very model of a Supreme Court judge. Your associate for the past fourteen years, Margaret Newby, could not criticise you nearly enough for my satisfaction. Having worked for five judges I was sure she would have some secret or humorous comparison to share. However I was rebuffed at every turn. Is he terrible with technology? Does he sing in chambers? Does he play Angry Birds on his iPad? To all of these, there was a dishearteningly consistent response: "No".

19. Your band of tipstaves also painted a picture of self-discipline, hard work and professionalism. In researching for today I had to endure many accounts of your ferocious work ethic. Apparently once one of your tippies asked if they could help you research and do work on a case. You replied, "I'd love you to cavil with this but I don't want to burden you with it." Like the tippy in question, I am still unsure if this was just genuine or genuine jest at your tippy's expense.

[18] Young, 'Civil Litigation' (1985), referred to in Bathurst, 'Farwell speech' (Farwell ceremony for the Honourable Justice Young, Banco Court, 23 April 2012).

20. Your only vice seems to have been a weakness for sweets, which resulted in a constant pillaging of the chamber lolly jar. However, even this tale turned complimentary when Margaret noted you had got rid of the jar of late, due to an imposition of self-discipline. I did learn there had been uncanny impersonations in chambers, but of what and who I was left in the dark. Out of fear they would concern me, I did not press the matter. I concluded though that clearly, like you, your chamber staff have mastered a poker face.

21. Given this apparent state of perfection, it gives me some comfort to reveal something about your future retirement to this audience. I have written evidence that upon your retirement you plan to offer statutory demand tours around the State.[19] These tours, you have stated, will consist of guiding the masses to places of disputed service which featured prominently in your judgments when in Equity. I do not know whether I should be concerned at your fascination with, in your words, these "tantalisingly close but unattainable" points of service.[20] However it is good to hear that, although you are giving up your judicial work, you are maintaining other interests. I expect of course that a good part of these statutory demand tours will be conducted on foot, so you can keep up one of your other hobbies, hiking.

22. Your retirement will also give you a well-earned chance to enjoy all your other interests. No doubt this will include singing pursuits and spending time with your two grand-children. I am sure your wife, Sue, and two sons, Tom and Hugh, are also looking forward to seeing more of you. We can hardly begrudge them this. So I will not prolong the event any longer.

23. May I thank-you for all you have done over the past fourteen years and wish you the very best, both in your retirement and as a tour guide leader.

---

[19] R I Barrett, 'Book launch' (Speech delivered at the book launch to Farid Assaf's second edition of 'Statutory Demands and Winding Up in Insolvency', 19 July 2012).
[20] Ibid.