

Swearing in Ceremony of the Honourable Paul Le Gay Brereton SC as a Judge of the Supreme Court of New South Wales

THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT

SPIGELMAN CJ
AND THE JUDGES OF
THE SUPREME COURT
Monday 15 August 2005

SWEARING IN CEREMONY OF THE HONOURABLE PAUL LE GAY BRERETON SC AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES

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

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

(Commission Read)

Justice Brereton, I ask you to rise and take the oaths of office, first the oath of allegiance and then the judicial oath.

(Oaths of Office taken)

3 Principal Registrar, I hand to you the oaths so they may be filed amongst the records of the Court and the Bible so that it may have the customary inscription placed in it and presented to Justice Brereton as a memento of this occasion.

4 On my own behalf, and on behalf of all the judges of the Court, I congratulate you on your appointment. I wish you a warm welcome to the Court. You have arrived here after a career at the bar which is not only of the highest quality but, in this day and age of an exceptionally wide-ranging nature. We look forward to the contribution you will make to this Court. I look forward to serving the people of this State with you for many years to come.

5 THE HONOURABLE R J DEBUS MP, ATTORNEY GENERAL OF NEW SOUTH WALES: I take great pleasure in congratulating your Honour on your appointment to the Supreme Court bench, on behalf of the State of New South Wales.

6 Your Honour has distinguished yourself in your practice of the law in this state. I am confident that you will continue to serve the legal community and the people of New South Wales as a dedicated and skilful judge of the court.

7 Your appointment to the bench is not the first for the Le Gay Brereton family. Your father, the Honourable Justice Le Gay Brereton, previously served on the Supreme Court and it goes without saying that if he were here today your father would be immensely proud of your appointment.

8 I understand that your interest in the law was first sparked as a five year old boy when you would sit at the back of your father's court during your school holidays taking in the day's proceedings. In your teenage years you would accompany your father and his colleagues on the Goulburn circuit. In today's more censorious climate, this would probably be in breach of numerous statutes, exposing your father, the court staff and possibly the Attorney General to vigorous prosecution and tabloid denunciation. But you seem to have escaped without ill effect.

9 You completed your Bachelor of Arts and Bachelor of Laws degrees at Sydney University. During your time at university you were an active member of the campus community and you served as president of the Students Representative Council from 1979 to 1981.

10 On the weekend I was browsing through old copies of Honi Soit from those turbulent years, as is no doubt your Honour's own regular habit. I was concerned to read therein vigorous calls to protest on the front lawn because of what was alleged to have been the sexism, homophobia and boorish behaviour of the SRC president.

11 With relief, your Honour, I realised that these remarks pertained to your somewhat notorious predecessor who has gained eminence in a quite different field of endeavour.

12 The editors were, as is normal, a rather rigorous anarcho-feminist collective and, in an edition of April 1979, excitably entitled, "Fascism on Campus", they go so far as to describe your Honour as "relatively" fair minded. In context, a quite staggeringly favourable tribute.

13 Leaving behind the delights of student politics, following your admission as a solicitor in 1982 you practiced with Duncan Barron & Co. During this period you established enduring relationships with the principals of various country and regional practices. As a result of the talent and dedication you displayed during your practice as a solicitor, many of those principals became your clients at the bar.

14 You practiced as a barrister from 1987 until the present time. In 1998 you were appointed Senior Counsel. During your career at the bar you have practiced in a wide range of areas, particularly in trial and appellate advocacy in commercial law, equity, family law, professional negligence, professional discipline, immigration and criminal law.

15 In 2003 you represented the Australian Securities and Investments Commission in a ground-breaking case before the Family Court of Australia, challenging the scope of the then section 90 of the Family Law Act 1975. That section allowed couples to enter into binding financial agreements to change property ownership without separating or divorcing.

16 This case spurred the Commonwealth to introduce urgent amendments to the Family Law Act designed to prevent these agreements being used to frustrate the claims of third party creditors.

17 Your Honour also appeared in a series of bankruptcy cases with family law implications, and since 2004 you have been the bar representative on the Family Court of Australia Steering Community for Children's Cases Programme.

18 Demonstrating your belief that everyone deserves a fair hearing, you have also stepped forth where others may have feared to tread, representing those of your colleagues alleged to have engaged in misconduct. You have also diligently represented other clients involved in some of this country's greatest medical controversies. It is a fundamental tenet of the rule of law that even those who may be viewed unfavourably by the public should be allowed an opportunity to fully defend themselves before an impartial adjudicator. You have proved yourself willing to assist all those who come before our courts without fear or favour, regardless of their public popularity or of their position on the scale of culpability.

19 It is not just your Honour's technical argument and advice which has stood out in your practice, but also your amenable disposition. Your colleagues advise that regardless of the number of briefs you have been running at any time, you consistently delivered exemplary service.

20 Similarly, you have made your services available to the disenfranchised and marginalised throughout your career. You have acted pro bono on many occasions, particularly for former servicemen and other individuals or organisations lacking financial resources such as - dare I say - student groups.

21 Despite your frenetic workload, you have also managed to contribute to the community outside of legal practice through your involvement with the Army Reserves, which is where you met your wife, Sue. You recently attained the rank of Colonel as acknowledgment of your hard work and talent. You have also tirelessly devoted your spare time to development of young Army cadets through the Australian Army Cadets Scheme, supervising the cadets on trips throughout regional and rural Australia.

22 Despite the enormous amount of energy you have dedicated to the legal profession and to the Army Reserves, you have also managed to maintain a happy family life. I am sure that your wife, Sue, your son Adam and your daughters, Josephine and Katherine, your mother Mrs Brereton and your aunt, Robin Stevenson, are especially proud of you today.

23 Your Honour, the breadth and depth of your experience makes you a most valuable addition to the Supreme Court bench. I am sure that you will be as successful in your appointment as a judge as you have been already in your career at the bar.

24 I offer you my best wishes on your appointment as judge of the Supreme Court of New South Wales, and congratulate you on what I am sure will be your continued success.

25 MR J E McINTYRE, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES: May it please the court. Your Honour's appointment to the Supreme Court bench is another milestone in an extraordinary legal career, one which clearly merits the appointment of a second generation of Breretons to this honourable court. The solicitors of New South Wales applaud the wisdom of this elevation.

26 Your Honour, your career as an advocate stretches back to your university days with your involvement as President of the Students' Representative Council of the University of Sydney. I am told that the SRC, as it is known, was involved in the 1970s in a running discourse between a group said by some to be populated by the infirm, insane and another label not repeated in polite society. The group apparently was known as the Sparticus Youth League.

27 The other side of the sometimes sharp debate was led by the likes of your Honour and others, such as the Honourable Peter Costello MP, who interestingly was thought at the time to be aligned with the right wing of the ALP

within the circles of student politics. This education in thrust, counter-thrust and parry served to hone the skills necessary for your future career.

28 After completing your tertiary studies and legal training, your Honour was admitted as a solicitor in 1982 and joined the law firm of Duncan Barron & Co where you worked until you transferred to the opposition, the bar in 1987. Before doing so, however, you contributed to the solicitor branch of the profession by serving as a valued member of the Law Society's Ethics Committee for two years. After going to the bar, you quickly established a strong following amongst solicitors eager to brief you as a member of the esteemed Wentworth Chambers. When you took silk in October 1998 your fellow recipients of that honour included your now judicial colleagues, Justices Bergin and White.

29 Your areas of practice at the bar were extraordinarily varied and extensive. You could in fact be described as the true embodiment of the cab rank rule. You have appeared in many courts and jurisdictions and for a wide cross selection of our state's well known personalities and identities, even having a bob each way with Bob Carr and Robbie Waterhouse, when each of them was in dire need of your services for different reasons and, I might add, in different jurisdictions.

30 You will, however, be most acutely remembered by the Law Society as a formidable advocate who possessed a unique combination of all of the legal skills necessary to develop and present a winning argument. Indeed, it is only fair to say that a number of practitioners owe their livelihood to your Honour's mastery of the law relating to professional misconduct which you have so ably demonstrated on many occasions. This is perhaps another reason for the Law Society to be grateful for your appointment.

31 I am told that your Honour is not, however, without fault. Your charming wife Sue talks openly of what she describes as a three-way marriage, in which the third participant is your infamous work bag. This object is not just any ordinary work bag, but one which travels absolutely everywhere and anywhere with you. The expression "three-way marriage" I am told is derived from the fact that the work bag even earned a trip on your honeymoon, no doubt a true reflection of your Honour's commitment and dedication to the practice of law.

32 Despite this inauspicious start your Honour is known to be devoted to your wife Sue and your three children Adam, Josephine and Katherine. In spite of your demanding and hectic work schedule you have always found the time to attend the children's activities, whether it has been school debating or expeditions with cadets.

33 You have made not only an outstanding contribution to the profession but also to the wider community in a number of capacities. You have devoted much of your time to offering legal services and advice to those unable to afford adequate representation. Your involvement in the armed services, which has already been mentioned, has been another great passion of yours outside of the law.

34 We are confident that your Honour will meet the demands and rise to the challenges of your new appointment with the same intellect, rigour and superior knowledge of the law that you have demonstrated throughout your legal career.

35 The community of New South Wales will be well served by your Honour's dedication, determination, compassion and intellectual capacity. On behalf of the solicitors of New South Wales I congratulate you on your appointment and wish you well in your years ahead.

36 BRERETON J: Chief Justice, judges of the Court, Mr Attorney, Mr McIntyre, ladies and gentlemen. Those amongst you who have some passing familiarity with the military will appreciate the warning I received from a friend on Friday evening. "Good luck", he said. "Remember, there is no good RSM present and available to tell you what to do and where to go, and no signaller at the back with flags or other signs to help."

37 Many emotions are stirred by this morning's events. First, I am very humbled by the honour which you all do me by your presence here and as I look around and see the Justices of the High Court, the Chief Justice and Judges of the Family Court and Federal Court, as well as my new colleagues on this court, I am very, very moved indeed. Secondly, I am deeply grateful, and not a little overcome, by the altogether too kind thoughts, Mr Attorney and Mr McIntyre, which you have expressed. I am not at all sure that I am deserving of them. Thirdly, I am more than a little sad at leaving the bar and its daily cut and thrust and combat. Fourthly, I am immensely proud to sit here on a court and wearing robes which my father once wore. And finally, I am astonished at the industry and vigour of your agents, Mr Attorney and Mr McIntyre, in uncovering events and anecdotes which I thought were well and truly forgotten or buried.

38 I first encountered Professor Heydon at law school at the university, when he was dean of the law school and when I was an up and coming young student politician. I had the privilege of sitting with him then and observing him on many committees, and then of being his student in company law. He must have wondered today whether the student who could never make his 8 am company law lectures and used to struggle in at about 8.20 clutching a cup of coffee could possibly make it for a 9.30 start this morning. I suspect there are others in the court today also who had some money on that, too. But I owe much to the university, much to the law school and much to the students' council. And, if one looks around the courts of this state and this country today, you will see many to whom the guidance and grounding that they received in dealing with other people and looking after other people's problems in that setting has been invaluable. Those organisations have made a tremendous contribution to our community's life and law, and long may they do so.

39 As has been said, my career in the law began as a solicitor at Duncan Barron & Co. Stewart Cuddy of that firm, who was then my commanding officer when I was a very, very junior officer in the Army Reserve, was kind enough to offer

me a position as a law clerk during the six month period while I awaited the College of Law. After that I went back for another five years. To him I am indebted for many things, including him showing me that a solicitor could be an advocate, for entrusting the clients of his firm to my inexperienced hands in that role, and for introducing me to the numerous country firms for which Duncan Barron then acted as Sydney agent - with many of whom I have since enjoyed very longstanding and very fruitful professional and personal relationships which I have treasured.

40 My time as a solicitor was invaluable. It gave me an insight into the practices of solicitors and the demands of their clients which I hope beneficially influenced my ability to deal with them at the bar. Since then, I have been privileged to be instructed by a wide range of solicitors, from sole practitioners in the remotest parts of New South Wales to large firms in metropolitan Sydney. The branch of the profession for whom you speak, Mr McIntyre, if it ever was a junior branch of the profession, is no longer. It shares many superb lawyers, the equivalent of the leaders of the bar, and I am deeply appreciative of what you have said on their behalf and in the presence of so many of them today.

41 It was as a solicitor that I first encountered another person who was to become a significant influence, whether or not he knew it at the time, and who will be my new Chief Judge, Mr Justice Young. I had the privilege to instruct him - or purport to instruct him - when a clerk at Duncan Barron & Co, in a takeover matter for a short while; and then I confronted him in court in a case which is reported as *Beaton v McDivitt*, in which halfway through the afternoon of the first day my retainer, or at least my right of appearance, was challenged not by my opponent but by his Honour, who questioned the entitlement of an employed solicitor as Sydney agent of a country firm to appear and conduct litigation in the Supreme Court.

42 His Honour was good enough in due course to grant leave to appear, and after that for some time we went through the routine for a couple of years of my seeking leave to appear in his Honour's court, and seeking at the end of the case what at least the two of us knew as a *Beaton v McDivitt* order, being a costs order that entitled an employed solicitor to costs, notwithstanding that there was no prima facie entitlement.

43 Enjoying my time as a solicitor as I did, I may well have stayed longer were it not for the intervention of the then President of the Court of Appeal, Justice Kirby, who I am delighted to see here today and what, despite threats from Steward Cuddy of an action per quod servitium amisit, persuaded me to come to the bar. As he then said, rightly, I was cruising in my comfort zone where I was, and it was time to do something different.

44 Although as junior counsel I did not often have a leader, there were some from whom I learned much and who showed me many kindnesses. Foremost amongst them was Roderick Pitt Meagher QC, before he became a judge. Heydon QC, as his Honour then was, led me several times - despite the incompatibility of our biological time clocks, which solicitors said resulted in their getting a 24 hour service: I would be leaving the building, as his Honour arrived. From him I learned in particular, I hope, economy in words. From John Sackar QC I learnt an enormous amount about the cross-examination of experts, and from Malcolm Broun QC I learned much family law. I have also learnt much from some who have more commonly been my adversaries, particularly Bret Walker SC and Grahame Richardson SC, and I will miss our battles.

45 I have enjoyed the very considerable assistance of too many juniors of great promise and ability to mention but they give me enormous confidence in the future of the New South Wales bar.

46 In this state we have had the good fortune, at least since 1825, to have a fearless independent bar. A courageous bar I think is as essential an instrument in the attainment of justice and the safeguarding of civil liberties as an impartial judiciary. It is only while lawyers of ability and conviction can and will fearlessly act for unpopular causes that our adversarial system can produce just results.

47 An early example was set in this state by the man who became our first Primary Judge in Equity, Roger Therry. As a barrister in the 1830s, in the face of strong contrary public opinion, he defended convicts who escaped the service of barbarous masters to whom they had been assigned, and then he prosecuted the squatters ultimately convicted of the Myall Creek massacre.

48 There is never a greater need for fearless independent advocacy than in times such as the present, when the perception of threats to public safety may be thought to justify restrictions of private rights.

49 If I do have a regret about the bar it is at not having played a greater role in its corporate governance; as things have transpired, and some of you have said, my role has become that of being the loyal opposition of the Bar Council and the Law Society Council in the disciplinary tribunals, where they have been my regular adversaries over several years. That makes all the more moving the tributes you have offered this morning. But I have also been touched by the private thanks I have received from many that I see here today of the profession who have come to me in their times of need and who, I hope I have been able to help. We would, after all, not be much of a profession if we could not look to each other for help in our times of need.

50 I should like particularly to mention and pay tribute to the presence today of the Chief Justice, the senior appellate judge and judges of the Family Court of Australia, and the family law practitioners. If ever it was the case that family law was thought to be a less demanding and exacting field of practice, that could not possibly be said today. The practice of family law requires all the skills of lawyers, and more. As well as requiring the resolution of legal and factual issues which arise in the division of family property and the welfare of children, and they are usually far more extensive and

wide ranging than the single transaction disputes that are often seen in this court, those judges and those practitioners are inevitably confronted with the emotional overlay which also accompanies those disputes in the inevitable breakdown of a once close relationship.

51 It has been a privilege to appear before, with and against them, and in particular to have been able to play a part, howsoever small, in the evolution of the Children's Cases Programme. If I can leave the bar with one thing it would be the urge that more of you go down to the Family Court and spend more time practicing there. If for no other reason than that there is always abundant material for cross-examination.

52 And so, once again, it was time after 18 years to do something different. Judicial style and attempting to predict judicial behaviour after appointment is a riddle wrapped in an enigma. I have been buoyed by the confidence so many of you have expressed but I will say only this. First, although it would be evident from what I have already said that I am an admirer in many ways of Roger Therry, I do not aspire to emulate his judicial record as the primary judge in equity. While in no appeal from his judgments as equity judge was any decree of his reversed, it was complained that he won accuracy by delay, reserving for consideration every point of possible difficulty or possible importance. I doubt that the present Chief Judge in Equity would encourage or permit that example today.

53 Secondly, I will always strive to bear in mind that fallibility is part of the human condition and infects judges, witnesses and lawyers alike. Of my own fallibility I will no doubt have plenty of reminders from the Court of Appeal.

54 Thirdly, I will try to bear in mind the advice received unsolicited from a wise old solicitor who told me that I should strive to ascend the bench at 10 and bear in mind that others will have planned conferences and other engagements on the premise that the court day will finish not long after four.

55 Finally, in finding facts I will probably act on the sentiment that I think I first heard fall from the Chief Justice, although he attributed it to a loftier source, that in deciding the source and reason for a strange concurrence of events, conspiracy theories are usually not the explanation to be preferred.

56 From my first moment at the bar I have enjoyed the professional collegiality, of Third Floor, Wentworth Chambers, where I leave many fond memories. I have enjoyed the loyal service of four clerks - Cec Featherstone, Kim McGrath, and most recently Melissa Dwight, but above all Judy Wilkes who, for almost 13 years, coped with equanimity with co-ordinating my simultaneous presence in different jurisdictions and last minute demands that were imposed on a routine basis.

57 Similarly, my secretary until last year, Judy Kuk, made the same contribution and more recently Julianne Reid, who has been a tower of strength during the transition of the last few weeks and who I am delighted will join me as my associate.

58 Some reference has been made to my Army service. Camouflaged amongst you today, beside me and behind me as judges and in front of me as counsel and solicitors, are many of my former and present commanders and subordinates. To the Army I owe many things. One has been the opportunity to mix and work with people other than lawyers. The second has been the privilege of working with the fine men and women of our permanent defence force who share a code of honour and ethics not dissimilar to that which binds the bar and on whom reservists such as us are dependent for the implementation of our plans in our absence.

59 But above all, I owe no greater debt to the Army than its introduction of Sue. In the 11 years we have known each other and the seven years of our marriage, she has brought to my life a dimension, perception and fulfilment which, until then, it had lacked. And she has also in recent weeks taken very seriously the role of keeping my feet firmly on the ground. I am immensely proud of her achievements, particularly in the cadet unit at Knox, as I am also of Adam, who has been everything one could have hoped for in a son. Josephine and Katherine, too, have brought immense joy.

60 My mother and my Aunt Robin, who was an associate of several judges of this court for many years, have served well above and beyond the call of duty and in many ways, which I will never be able to repay.

61 Although he died when I was young my father has been a great and lasting influence. I have been greatly moved by the references today and elsewhere to his example. In my early years I met two of his closest friends, CLD Meares, Queens Counsel, then leader of the bar and later to become a judge of this court who was my godfather, and WRD Stevenson, a distinguished solicitor, senior partner of Allens and President of the Law Society who was always called and later, upon marrying Robin, became, an uncle.

62 Surrounded from that age by judge, senior counsel and solicitor, perhaps a legal career was a little inevitable.

63 The first ceremonial sitting of this court I attended was on the occasion of my father's death in 1974, then in the old Banco Court in St James Road. It was a "black" court, the judges having discarded these resplendent robes for their more sombre, everyday court dress. It was about a decade later that I made my first tentative appearances here, by kind leave of Mr Justice Young, and if, as a young solicitor purporting to appear in the Supreme Court I was then not only heard but sometimes listened to, I am sure it was at least partly in remembrance of one whose words once carried weight here.

64 The ceremonial robes which were first worn by him have since passed through the hands of several distinguished judges. They have learned some equity from Mr Justice Waddell, they were worn by Justice Blanch when he was a judge of this court, and they have been exposed to professional negligence by Justice Sperling. If they have absorbed a fraction of the wisdom of the wise judges who have previously worn them, and any of that can rub off in turn on their new incumbent, I will be fortunate indeed.

65 The judicial oath which I have taken this morning is an ancient one, and the standards demanded by the obligation which it imposes are exacting. I first heard of it in 1969, when Mr Justice Meares was sworn in as a judge of this court. Though I was not there, in those days the court was much smaller than it is today, and swearing-in ceremonies were newsworthy. It was reported in the papers that on that occasion the new judge's response was: "I will do my best". I can improve neither on his spirit, nor on his words, which I gratefully adopt. I, too, will do my best.
