

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

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

Thursday 11 June 2015

**SWEARING IN CEREMONY OF
THE HONOURABLE JUSTICE DESMOND JOHN FAGAN SC
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES**

- 1 **FAGAN 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.

(Commissions read)

(Oaths of office taken)

- 2 **BATHURST CJ:** Justice Fagan on my own behalf and on behalf of all the members of the Court we warmly welcome you and hope you have an enjoyable and stimulating time on the bench.

- 3 **THE HONOURABLE GABRIELLE UPTON MP ATTORNEY GENERAL OF NEW SOUTH WALES:** Your Honour on behalf of the State of New South Wales I congratulate you on your appointment to the bench of the Supreme Court of New South Wales. I also extend my warm congratulations to your wife Bridget and to your children, Kate, Georgina, Hugh and Jack. I understand that members of your family and friends are here today enjoying what is a significant highlight of your professional career.

- 4 Your Honour you bring to the bench a very distinguished career. The bench, the New South Wales government and the people of New South Wales will greatly benefit from your wealth of legal knowledge and expertise. You graduated from the University of Tasmania in 1978 achieving a Bachelor of Laws with first class honours and were admitted as a legal practitioner on 25 February 1980. While the charms of Hobart, the River Derwent and views of Mount Wellington must have dominated your early life, you remained determined to reach beyond the boundaries of Australia's most southern state. Perhaps likely due to a desire for warmer weather and for better sailing conditions, in 1982 you relocated from Hobart to Sydney where you were admitted to the New South Wales Bar.
- 5 Your Honour the State of New South Wales was fortunate that you chose to practice law here because you have since had a distinguished legal career spanning over 33 years as a barrister. On 6 November 1997 you were appointed as senior counsel in recognition of your dedication to the profession and your skill and expertise as one of the State's preeminent barristers. Most recently your career as a barrister has been spent at the 8th Floor of Wentworth Chambers.
- 6 Over the years you have worked in both the private and public spheres and you have been involved in a large number of significant cases. Throughout your distinguished career you have practiced in various jurisdictions including the High Court, in both criminal and civil law plus in the areas of corporate law, trade practices, aviation and taxation law. As one of the State's leading practitioners you have remained committed to the view that a good barrister should have a breadth of experience not limited to a specific area of the law. This places you in a strong position to be a well-rounded member of the bench and to bring a thorough understanding to the complex matters that no doubt will require your judgment.

- 7 As a barrister you have maintained the highest standards of professional conduct and remained an advocate for justice and fairness throughout our great State. Throughout your career you have appeared on behalf of the Australian Government Solicitor and for the Australian Competition and Consumer Commission providing your advice and expertise in cases relating to unfair trading and misleading advertising cases. You have conducted cases in the Federal Court and the Administrative Appeals Tribunal in relation to complex taxation disputes. More recently you have also acted for the Crown in one of Australia's largest ongoing taxation investigations, Project Wickenby.
- 8 You also have a keen interest in aviation and acted on behalf of domestic and international airlines in matters related to passenger injuries. Nevertheless, your Honour, your expertise, your experience is not restricted to civil matters, as another distinguished aspect of your career is your extensive involvement in a number of significant high profile criminal matters. You have acted for the Crown in connection with high profile corporate fraud matters and also with high profile terrorism cases.
- 9 Your Honour I am reliably informed by your colleagues that one of your admirable traits is your willingness to share your knowledge with others and that you take a collegiate approach to the practice of law. No doubt you will continue to do so in your role as a Supreme Court justice. You are also revered by your colleagues for your efficiency and your no nonsense approach to legal problem solving. You are known for your uncanny ability to break down the most complex of legal issues quickly and this will be a great asset to the Court. And while your colleagues are quick to praise you for your judicial appointment, I have heard there are a number of advocates who will be somewhat anxious to appear before you at a fear of being chided for veering off topic or being unprepared to appear in your court, however I believe the apprehension of some counsel appearing before you will ultimately serve to improve courtroom efficiency and the quality of advocacy before the Court.

- 10 Your Honour I understand you also have an avid interest in sailing, having recently skippered your own yacht, Lisdillon, to great success in professional races and without being trite, skippering most likely will prepare you for your life on the bench. Having traversed and tamed the unpredictable high seas you will most likely be able to take control of the most difficult situations and advocates in this courtroom.
- 11 Your Honour it goes without saying that your appointment is a natural progression in your legal career. Given your outstanding ability, your intelligence, your vast experience, I have no doubt when I speak for the people of New South Wales in saying that it is for the great benefit of the people of this State that you have taken up the robes of a Justice of the Supreme Court. In your new role, your Honour, you will preside with integrity, with fairness, with independence, those qualities you have demonstrated already as an advocate in the Supreme Court.
- 12 Your Honour in closing, I wish you a long and rewarding experience on the bench and once again I congratulate you for answering the call to the bench.
- 13 **MR JOHN EADES PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court. There is nothing, absolutely nothing half so much worth doing as simply messing about in boats. So said Ratty in Wind in the Willows. There is also something magical about watching competitors in the Sydney to Hobart race make their way up the Derwent to the finishing line. Such experiences were readily available to you as a young boy growing up on the shores of the Derwent River as was access to the magnificent wilderness in that State. Those two influences combined in a most interesting way in your recently sold yacht, Lisdillon, which was named first of all for the seafaring activity that you enjoyed but also after a property you worked on as a student on the east coast of Tasmania, an interesting conjunction.

- 14 Your Honour has an impressive family background. Your late father was highly regarded as counsel in Tasmania, serving there as Attorney General for over 20 years. He was very well regarded both as counsel and as a politician but particularly in the way in which he chose judges for that Court of the highest integrity. Equally inspirational was your late mother, Mavis. She was a gifted teacher of English at a school in Sandy Bay for many, many years, was awarded the Medal of Australia in 1996 for her services to Alzheimer's Association of Tasmania and was instrumental in bringing about the construction of Hobart's Roy Fagan Nursing Home in 1990. Both would have been extremely proud to have shared celebrating this day as are your brothers Jim, Peter, your half sister, Betty, your wife Bridget, children, Kate, Georgina, Hugh and Jack. But Bridget also has a claim to fame, she is the daughter of a former Tasmanian Supreme Court judge, Justice Robert Nettlefold. It is so with great pleasure that on behalf of the solicitors of New South Wales I welcome you to that bench.
- 15 Intellectually your Honour has been described as a polymath, a gifted student of humanities and a ghastly thing called mathematics. Your Honour's ability to master those disciplines would have opened many doors. For instance engineering may have been available to you because of your resourceful activities in textile making, little boats in bottles, building your own kayak and catamaran. Your manual skills would have been equally employed as a surgeon following your late Uncle Kevin who had a distinguished service of record including assisting prisoners in World War 2 in the camps of the Japanese. We are fortunate that your Honour has chosen a legal career.
- 16 My learned Attorney has spoken of your practice, from prosecuting to defending, from the High Court to the Local Court. David Marr once described Barwick's practice as "a dog's breakfast" – and certainly that might be appropriate for yours. Your colleagues on the 8th Floor Wentworth Chambers where you were floor leader described you as being easy going, down to earth, extremely organised, (and that is frightening),

and a great family man with a good sense of humour. The last mentioned will certainly be a wonderful criteria for your present career.

17 Few would choose to join you in some of your extracurricular activities. Your idea of a great summer holiday is to tramp through really some of the most inhospitable parts of Australia, that is the Tasmanian west coast walk carrying a 60 kg pack, eating dehydrated food and freezing to death in a flimsy tent. The outcome of your last trip was very distinguished. You damaged your knees and hamstrings to the extent that you had to come down backwards on stairs on all fours for a month.

18 Another good idea of a great time for you is to rise at some ungodly hour called 6.00 am, take your kayak down to the water's edge and paddle solo around Sydney Harbour. In the dead of winter you are known to practice what is called the death roll. That is where your vessel remains upside down with you strapped in frantically trying to upright it. As my learned friend has said you are a distinguished sailor, you have sailed in two Sydney to Hobart races and also chartered yachts to cruise around the South Pacific and the Mediterranean.

19 From your parents your Honour has inherited a great sense of fairness and a deep belief in the equality of all before the law. Your balanced perspective and inherent intellectual capacity have seen you carve out a great career at the Bar and that will be invaluable to you in your career on the bench. On behalf of the solicitors of New South Wales we wish you a successful and a rewarding career. And if I may interpose a personal note your Honour, if your Honour is considering those peripatetic activities I suggest the Cradle Mountain Walk and the Morphett Track with Sherpas. May it please the Court.

20 **FAGAN J:** Thank you Madam Attorney and Mr Eades for your very generous addresses. It certainly is a very great honour to have been entrusted with this appointment and it will be a privilege to work with the very strong and distinguished bench of this Court.

- 21 I cannot claim all the credit for such successes as I have had at the Bar. I had every encouragement from the start and a great deal of assistance from all sorts of sources along the way. I certainly was not pushed into the law by my parents but they did encourage me and my brothers to pursue a profession, any profession, which they defined to us as a field of complex learning and skill, something that would be useful to others, a field in which there would always be more to know, more capacity to improve the skill, to sustain one for an entire life of hard work and the law is certainly all of that. Certainly as long as they keep publishing the Commonwealth Law Reports there will always be new things to know.
- 22 I had an excellent grounding in the law at the University in Tasmania and from the senior professionals in Hobart. I was apprenticed to a delightful man named Peter Cranswick who was the senior litigator in the town and he took a good interest in me and gave me a lot of assistance to teach me the practicalities of the work. But I had taken up the law with a view to becoming an advocate and to learn the art of advocacy one has to run a lot of cases and when I went to the courthouse in Salamanca Place I saw the lists were alarmingly short and I never thought I would get enough practice there.
- 23 So it was a choice between the larger centres on the eastern seaboard, a choice between really Melbourne and Sydney but I was not detained very long over that dilemma. I was very much encouraged to come to Sydney by my late good friend Mark Nicholas Johnson who had been at school with me in Hobart because his father was assigned there for a while to work with the Commonwealth Bank. He was in practice here at Holman Webb and encouraged me to come and try my hand. He moved my admission here before Sir Laurence Street in this Court late in the summer of 1982.
- 24 The firm that I had worked for in Hobart was Dobson Mitchell & Allport, a firm that had been there for many, many years and they flattered me by

encouraging me to stay with various inducements. When that did not work they put the Solicitor General on to me, that was a man named Roger Jennings who had worked here in Sydney for Allen's for some years. I outlined to him my plans to come straight to the Bar in New South Wales and he was aghast. He said that the Sydney Bar is like a pool of white pointers in a feeding frenzy. Having been in the pool for 30 years I think that is really most unfair. I do not think I have witnessed anything that I would call frenzy.

25 Certainly it is a very competitive profession when individual barristers are assigned their opposing briefs but the Bar has a very strong institutional sense and I was the beneficiary of that. From the first time I came to the Bar the more senior members were constantly encouraging the refreshment of the junior ranks to continue the whole and I was very fortunate to be introduced to Stephen Austin on the 10th Floor of Selborne Chambers who went out of his way to align me with solicitors with whom I would be compatible, to introduce me to other active floor members who did the same. Through that I established many long-term productive relationships with other counsel and solicitors.

26 And when I took rental chambers on 13th Floor Selborne, Justice Geoffrey Lindsay who was then a junior, a few years ahead of me, made himself my mentor and again went out of his way to ensure that I would get a chance to show whether or not I could do the work. It was a very big sea change to move from such a small profession, cut myself off from the connections of school and university and family in Hobart and start afresh. Fortunately I had from the start great moral support because my then fiancé, Bridget, agreed to come with me, join me and we were married two years later. She underwrote my early days at the bar and has backed me up in every way ever since. I think my clients would have no idea how much they owe to a supportive family that enables a barrister to do work as intensely as sometimes we have to do.

- 27 I have also had the good fortune from the beginning of my career in the law to have complete confidence in the utility of what I have been doing. The rule of law is the basis of what everybody else does, it is the basis of civil society. Clear rules, equally applicable to everybody, applied by impartial courts, these things are sometimes taken for granted but they are essential, they make commerce and investment with confidence possible, enable people to resolve broken relationships and move on and enable peace to be kept.
- 28 And I have also had from the outset a complete confidence in the content of our law and the way it is formulated. Our inherited common law system with its respect for precedent, careful adjustment, taking account of the changes in society and the parliamentary system that we have inherited from Westminster and adapted to our own needs, again gives the people the opportunity through the polls to direct which way the law and the rules may go as made by their representatives in parliament. That means that the people really own and have an influence over the laws that are made. It really means that the people of Australia are very much governed by their own consent which is a very sound arrangement.
- 29 So I am delighted to see here today so many of the people who have supported me throughout the years since those early days at the Bar. My staff, my loyal secretary, Tara, who has made herself indispensable over the past 15 years in chambers has agreed to come to the Court and be my associate and assist me with that transition. My clerk Michael Wilcox and receptionist, Annette and her assistant, Chloe, who have provided the friendly face of the 8th Floor Wentworth Chambers while I have been there. I owe a lot to them, I am very glad to see them here today.
- 30 I am delighted to see so many of my floor members who have made 8th Floor a very comfortable and harmonious home and a professional base and to see all of the juniors that I have worked with over the years since I took Silk. They have provided me tremendous support and given me great confidence in the future of the Bar. They have worked self-reliantly,

contributed to every case, every one of them that I have worked with. It has been in every case a great relationship and I have great confidence that whatever gap I may leave will quickly be filled by others who step up.

31 I am very pleased to see here today many of the solicitors who have loyally supported me. I have greatly appreciated the confidence that they have placed in me over the years to handle their clients' affairs and the contributions that they have made to my cases. I have always tried to maintain good and even tempered relations in any legal team that I have worked in, I think that is a very important aspect of the way a barrister works. I have tried to contain the stresses, not allow sharp words or impatience or rebukes to make the work harder than it otherwise has to be. I think the worst, probably the most direct rebuke I ever had for failing on that account was from a young solicitor with the Securities Commission who instructed me in an eight week trial before Judge Howie when his Honour sat on the District Court. On the first day I had a lot to think about with an indictment of about 40 counts of wilful false pretences and a witness for every charge, a lot of documents and quite a complicated story that would have to be revealed to the jury so that it would make sense of what would follow. And we got the trial underway and later in the week this young solicitor complained to me that during the half hour between 9.30 am on the first day and when the accused was arraigned I had become in his word "unapproachable". I had to ask myself what solicitor in his right mind would be going anywhere near senior counsel at that stage of the proceedings. We patched it up and I am sure that hearing that, my children present today will think that they must have borne the brunt of the stresses of my work. On any Sunday afternoon or Monday morning before a big trial if I was no worse than unapproachable they would regard that as a pretty good result in the case.

32 My long suffering family have watched me labouring over transcript after dinner in the evening and heaving folders full of documents back and forward through the front door of our home. They probably see the work of a barrister as a bit like that of a pit pony in a British coalmine but I am very

pleased that they can be here today with all of you and see that my work thus far in the law has mostly been about people and all of you good people and certainly from my perspective it's not been so bad.

33 And now for the future, having agreed to take the Queen's salt I'm sure there is something I am required to do to earn it.
