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

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

Friday 25 March 2011

**FAREWELL CEREMONY FOR
THE HONOURABLE JUSTICE TOBIAS AM RFD
UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE
OF THE SUPREME COURT OF NEW SOUTH WALES**

1 **SPIGELMAN CJ:** I take as my text a poem by the late Peter Porter, one of Australia's greatest contemporary poets. The poem bears the title which some might regard as incongruous: "Tobias and the Angel". It is based on the visit of the Angel Raphael to the righteous Tobias. The Book of Tobias is part of the Catholic and Orthodox biblical canon, albeit not accepted in the Hebrew Old Testament. Appropriately, however, Porter's poem is about departure.

2 The first two lines are:

"When I play the sad music my conscience urges,
I hear through the great summary of our loss
..."

3 The penultimate stanza of the poem is:

"I shall get home one day or if I die instead,
An Insurance Angel will tell my waiting wife,
His grave is furnished by his good upbringing,
His habits were proper, his doubt all to the good;
From his warm orthodoxy melancholy shrinks,
He did what he was told, obedient and sane."

- 4 But for the reference to obedience, these are words that can be applied to Justice Murray Tobias: “good upbringing”, “proper habits”, ‘purposeful doubt’, “warm orthodoxy” and, underlying it all a fundamental ‘sanity’.
- 5 I know I speak on behalf of all of the judges of this Court, when I highlight at the outset, the contribution you have made to the collegial atmosphere of the Court. We have all been the beneficiary on a personal basis of your generosity of spirit, your intelligence, your thoughtfulness and your compassion. These personal characteristics are also reflected in your conduct during hearings and in your judgments.
- 6 Your principal professional characteristic, which I wish to emphasise is your rigour. As many of your judicial colleagues experienced at the bar, often to their cost, and on the bench, always to their benefit, your Honour approached every legal task in a meticulous, conscientious and complete manner. There were no gaps in your preparation, nor in your judgments.
- 7 You brought to the Court the wealth of experience acquired by a silk who had been at the top of the profession for over two decades. This Court has had the benefit of that experience across the entirety of its civil and criminal appellate jurisdiction. There are two particular features of your contribution which I wish to highlight.
- 8 First, your Honour has an extraordinary capacity to deal with complex fact situations and to ensure that all of the varied elements of a case were properly assessed and placed in their correct sequence and relationship. These skills explain in large measure your Honour’s extraordinary success in planning and environment law at the bar. It is a field which always involves multiple interrelated variables. This was a skill set that you successfully deployed in the full range of civil appeals in this Court. Your colleagues who sat with you in complex fact cases always appreciated the thoroughness of your preparation and of your judgments.

- 9 Secondly, although your legal learning was broadly based, your depth of knowledge and understanding of every aspect of planning and environment law and of administrative law was simply unsurpassed.
- 10 Your Honour has delivered influential judgments which will continue to be relied upon in the future on a wide range of areas of the law. This includes native title, estoppel, rectification, indefeasibility, easements, jurisdictional facts, procedural fairness, legal professional privilege, delay in proceedings under the *Corporations Act*, indemnity costs in untenable appeals, directors and officers insurance, workers compensation, exemplary damages, unconscionability in contracts, the application of development standards, the validity of local environmental plans, development consents, local government notices, conditions on a development consent, and of a purported delegation of council powers.
- 11 Your Honour brought to the Court of Criminal Appeal relevant experience acquired in criminal trials in the Navy, where you appeared as prosecutor and defence counsel whilst head of the New South Wales Reserve Legal Panel and later presided over such trials as Judge Advocate. In the Court of Criminal Appeal you presided over conviction appeals raising complex issues of evidence law which appear in virtually every conviction appeal, conduct by the Crown, inconsistent verdicts and a wide range of sentencing issues.
- 12 In addition to this formidable output of judgments, your Honour has made further contributions to the administration of justice and to the legal profession as a judge.
- 13 You have always manifested a concern for the maintenance of professional standards. This was a product of your personal sense of fairness and also of your strong belief in the traditional professionalism of the bar. You brought with you to the bench a firm commitment to maintaining the symbiotic relationship that has always existed between the bar and the bench requiring mutual respect. The strength of your

commitment to the fundamental ethical principles of the profession is manifest throughout your judicial service.

- 14 Your sense of courtesy, particularly to counsel, has ensured that the atmosphere in the courtroom was proper and appropriate. On one occasion that I heard about at the time when you were presiding in the Court of Criminal Appeal when a judge, now a former judge, of this Court was engaged in a somewhat vigorous exchange with counsel, you adjourned the Court for a few moments and during the adjournment you informed the judge that you were not prepared to preside in a case in which counsel was treated so rudely. On return, the conduct stopped.
- 15 You have served for four years as Deputy and then Presiding Member of the Legal Profession Admission Board. To this role you brought your deep commitment to the profession as an institution and to the importance of maintaining its ethical standards, promoting its competence, preserving its independence and reinforcing its integrity.
- 16 There were two developments of particular significance for the future of the legal profession to which you made a critical contribution during your tenure of this office.
- 17 During the period a national set of Uniform Principles was adopted with respect to the admission of overseas lawyers to practise in Australia. In many respects these Principles were over engineered to say the least. They reminded me of an earlier time when the Commonwealth government was seeking to corral all of the States to adopt a system of uniform censorship, so that material then regarded as salacious by some, which was permitted to be imported into Australia, would not be banned in some States. The then Attorney General of the State of Victoria, Sir Arthur Rylah, sought to protect the morals of, as he put it, his teenage daughters. I recollect a cartoon in *The Bulletin* which depicted Sir Arthur sitting in a chair encased in a straight jacket. The caption read, "Of course I believe in uniform censorship and I will supply the uniform."

- 18 The Uniform Principles for admission of overseas practitioners had a somewhat similar quality. They would have been applied so as to exclude overseas practitioners of considerable experience and skill. Under your Honour's leadership the Board ensured that this straightjacket was removed, leading to a change to the Uniform Principles, to the great advantage of the administration of the law throughout this nation.
- 19 The second matter I wish to acknowledge in this respect is the critical contribution your Honour has made in the deliberations to establish a uniform regulatory system and, thereby, create a national legal profession. With your Honour's usual thoroughness and attention to detail you served as a member of the National Legal Profession Consultative Group. Your efforts were always directed to ensuring that the reality of an independent profession would be maintained by this new regime. In some respects this was a reprise of your Honour's significant contribution when you were President of the New South Wales Bar Association in an earlier period of comparable legislative change.
- 20 I relied on your advice in these respects for my own involvement in this issue including in the deliberations of the Council of Chief Justices. I am particularly grateful for your assistance in this respect. The legal profession owes a great deal to your diligence during this period.
- 21 The strength of your commitment to the profession is a product of your personal history both as a barrister, as a silk, as an elected member of the Bar Council with some interruptions from 1976 until your election as President in 1993, of your family background as the son of one of the most esteemed solicitors in the city who worked as a solicitor for 58 years and of your education at the University of Sydney Law School and at Oxford. You are a great example of the tradition of the common law and of the bar which traces its roots to England as you have always understood, maintaining to this day a number of your connections to Oxford and with your fellow students in the BCL course.

22 For that reason perhaps it is appropriate for me to end as I began with a poem from Peter Porter, who lived most of his adult life in England, but still reflected his Australian roots in his poetry.

23 Porter's poem *The Last of England* concludes:

"Sailing away from ourselves, we feel
The gentle tug of water of the quay -
Language of the liberal dead speaks
From the soil of Highgate, tears
Show a great water table is intact.
You cannot leave England, it turns
A planet majestically in the mind."

24 So it has been with your Honour. England has turned majestically in your mind, to the great advantage of the legal profession of this State and of this Court.

25 **MR T BATHURST QC, PRESIDENT, THE NEW SOUTH WALES BAR ASSOCIATION:** It is my privilege to have the honour to speak on behalf of the Bar today. I was going to say that I was delighted to do so but thought that might be misinterpreted. Your Honour's retirement is in truth a great loss to the Court and to the community generally. Today marks another milestone in a career notable for its service to the law and community. I do not propose to dwell on your Honour's early years at the Bar except to remind everybody that you read with one of the great Equity lawyers in this State of recent times, Mr John Kearney, as his Honour then was. The late Justice Kearney was a man of great learning coupled with charm and humility, a truly great judge. Your Honour has shown those qualities throughout your Honour's career both at the Bar and on the Bench.

26 Your Honour's career from a highly skilled junior to one of the undoubted leaders of the Bar is well known. For many years you were the silk of choice in the Land and Environment Court. The skills which the Chief

Justice has referred to provide ample testimony to why that was so. Your Honour was also across many other jurisdictions. Your Honour was always in demand in appellate advocacy and brought unparalleled knowledge to the area of administrative law, particularly in fields such as local government.

- 27 Notwithstanding the extent of your Honour's forensic skill you will be most remembered for the service you gave to the Bar and the legal profession outside the confines of the courtroom. As the Chief Justice has said, your Honour was President of the Bar in 1994 and 1995, a time of real turbulence for the Bar and the profession. The interaction of the national competition laws with the zeal of some reformers made that period a turbulent and difficult time. Your Honour's skill and determination produced an outcome in the interests of the Bar and preserved the integrity of the profession. It was not easy as some of your Honour's comments at the time illustrated. Writing in the winter edition of Bar News of 1994 your Honour commented dryly:

"Those elected to high office are usually permitted 100 days when they can do no wrong. Everything runs smoothly and without aches. I wish I could say that had been my experience."

- 28 Things did not improve. At the end of the year your Honour wrote:

"I commented upon my first 100 days in office referring to it as a period of some considerable turmoil. The following 265 days have not been any easier."

- 29 Notwithstanding this gloom your Honour's dedication to the task produced a result and enabled the legal profession to sail into what might be described as relatively calm political waters until the last couple of years.

- 30 Your Honour served the community in many other ways. You were a member of the Casino Control Authority and chaired an Inquiry into the grant of a licence for the new casino. That of course again was a controversial matter. Your Honour there, as always, never shy from

controversy although you never courted it. You served with distinction in the Royal Australian Navy Legal Reserve as Judge Advocate including defending officers in relation to the grounding of HMAS Darwin in Hawaii which was one of the many matters that your Honour did on behalf of the Reserve. Your services to the New South Wales Bar Association, the Australian Bar Association and military law were recognised with membership of the Order of Australia in 1998.

- 31 Those who knew you, or thought they knew you, thought you would never go to the Bench but we underestimated the persuasive powers of the Chief Justice in that regard. You have been a model appellate judge, a pleasure to appear before, courteous but incisive in argument and your judgments have been a model of clarity and learning. However, you were not content merely with participating in the work of the busiest court in the country. In 2008 you replaced Justice Windeyer as presiding member of the Legal Profession Admission Board. Once again you dealt successfully with matters relating to the independence and competence of the profession. For example, as the Chief Justice has mentioned, your Honour resisted considerable pressure to remove the Board's discretion to exempt eminent overseas legal practitioners from certain academic and professional training requirements under the *Legal Profession Act*, something which has preserved the openness of this profession and increased its interaction with overseas practitioners and its own ability in that regard.
- 32 As I said, as President of the Bar Association in 1994 your Honour battled hard and successfully to preserve the integrity of the profession in the face of proposed reform. In 2009 you had to start to do it all over again. As the Chief Justice said, you were appointed in that year to the National Legal Consultative Group, a group intended at least to be consulted on the proposed national profession reform. In that capacity you have worked tirelessly and fearlessly to preserve the integrity of the profession and the rule of law. At first it may have seemed against the odds but your work has contributed significantly to the landscape being altered from one where the independence of the profession was under a very real threat to

one where the draft bill to a very significant extent has preserved the independence and integrity of the profession. I know your Honour is not fully satisfied with the result and I will be surprised if your Honour does not say so but you should take great satisfaction in what you have in fact achieved in that regard.

33 It remains for me on behalf of the Bar to thank you for your outstanding contribution to the legal profession and the community generally. I know you will continue to play an active role in public life but you take with you our very best wishes in whatever you choose to do.

34 **MR S WESTGARTH, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES:** “The true gentleman is the man whose conduct proceeds from goodwill and an acute sense of propriety who speaks with frankness but also with sincerity and sympathy and who appears well in any company a man with whom honour is sacred and virtue safe.” I quote from John Whalan’s definition of a true gentleman as published in the *Baltimore Sun* newspaper in 1899. That newspaper had run a competition for the best description of a true gentleman and I have quoted part of the winning entry. Judging by the accolades that have been forthcoming on the occasion of your Honour’s retirement from the Bench it is clear that we are indeed saying farewell to a gentleman in the truest sense.

35 Your Honour, it gives me great pleasure to add my valedictory remarks on behalf of the solicitors of New South Wales. At the time of your swearing-in to the Court of Appeal in 2003 there was some speculation as to why your Honour had waited so long to leap to the judiciary. When you did make that leap it was without any prior experience as a puisne judge, a measure of the high esteem in which your Honour was held by all in and associated with the profession. Whatever the reasons the profession and the public have benefited greatly from your contribution whilst on the Bench. Your Honour did have a practice run as a judge magistrate in 1994 in the case of *R v Askew* where Mr Askew was found not guilty of arson associated with the bushfire at Peats Ridge. Your Honour may not

readily recall this case perhaps because it related to the finals of the Law Society's thirteenth mock trial competition which attracted some 4500 secondary school students and the assistance of 700 lawyers. One aspect of the mock trials that your Honour and many in this Court would appreciate were the time limits which were imposed for reading witness statements, cross-examinations, opening and closing addresses, all up a maximum of three hours. With more than 1200 students competing in the same competition this year should your Honour wish to volunteer your expertise again your contribution would be most highly regarded.

- 36 Your Honour, as I anticipated, the preceding speakers have already poached the highlights of your illustrious career, but I must add that your Honour took to the bench like a duck to water. Indeed, you thrived in the community of judges. Commending your Honour's contribution to the Court, the President, Justice Allsop, has said the following.

"It has been one of the delights of being President of the Court of Appeal to have dealt with Justice Tobias at a personal and professional level. His intellect, conscientiousness and personal warmth have made my job much easier than it might otherwise have been."

- 37 Likewise, your decision to poach a most loyal and wonderful assistant, Eva Adams, from Selborne Chambers, undoubtedly made your Honour's job that much easier. Unfortunately, the benefits of computer technology have continued to elude your Honour and your reputed propensity for loquaciousness - that is not my assessment - has not abated. Of considerable sorrow is that an imminent birthday will of course by force of statute cause your Honour's brain to immediately atrophy. One can only hope that consistent with the appointment of Acting Judges in recent times, your keen intellect and work ethic will not be left to languish long.

- 38 From an early age, there was no doubt that your Honour would pursue a career in the law. In awe of your late father, Raymond, a highly respected solicitor whom your Honour noted at your swearing-in speech in this Court,

continued to hold a practising certificate until his eighty-sixth year, you were from an early age passionate about the law and totally focused on becoming a lawyer. Likewise, your younger brother, Robert, chose to join the legal profession. It remains to be seen if either son can top their father's years of service.

39 Like your father before you, your Honour attended both Sydney University and Oxford. As well as many Prime Ministers, famous writers, actors and academics, Oxford boasts twelve saints. Your Honour is not one of them, although your peers at Exeter College who witnessed your solo crossing of the quadrangle on those freezing frosty mornings to take a winter shower may wish to disagree. Your Honour has maintained strong links with Exeter College and last year helped organise a dinner for old members and friends at St Paul's College, Sydney University.

40 While the law has been a lifelong passion, your Honour's interests are much broader. You care very deeply about social issues and your loyalty to family, friends and colleagues is second to none. Your generosity of spirit is evidenced in the number of charities you support, in particular the Children's Hospital at Westmead. Rumour has it that your Point Piper unit was rented out to the American actress Kate Bosworth during the filming of the movie Superman Returns. Once your Honour had ascertained that the young man you apprehended wandering around those premises was none other than Orlando Bloom, you promptly invited them to stay at your Mittagong home and also to visit the children at Westmead, which they apparently did. If this story is true, this must be one of the few times that that unit was not undergoing extensive renovations. Being someone who needs a project, I am informed that your Honour has never quite grasped the fact that projects tend to have a beginning and an end. Perhaps your Honour has become overly enthused by the Supreme and Federal Court renovations.

41 Your term as President of the Bar Association from 1993 to 1995 grappled with the then ongoing proposals for the restructure and reform of the legal

profession and, as we have heard, was a period of relentless pressure. In 2009 you were given the chance to directly influence the subsequent reform process when there was an announcement that the Honourable Justice Murray Tobias AM, RFD, Justice of the Supreme Court of New South Wales and presiding member of the New South Wales Legal Profession Admission Board, was appointed to the consultative group charged with advising and assisting the Australian government's task force on the reform of the legal profession. However, your Honour's record in eliciting government action is not encouraging. In your Honour's judgment in the 2005 case of *Westpac v 789Ten Pty Limited* which concerned the question of whether solicitors' letters to auditors were protected from disclosure because they were privileged communications, your Honour said, "There is obviously a problem which requires legislative intervention. Five years on we still await that intervention".

- 42 While some may not have shared your views on matters of artistic merit, your strong sense of justice and strength of character in addressing complex issues won great respect and indeed admiration. Your Honour's commitment has particularly been noted by the women you directly and indirectly have championed over the years in both public and private life. The Honourable Justice Margaret Beazley AO, whom your Honour tutored, has publicly reported on her early difficulties of obtaining briefs in a male dominated profession where women were subject to significant discrimination on the basis of their gender. Your Honour was persistent in persuading people to brief her and fought long and hard for rightful recognition. Another colleague from sixth floor, Selborne Chambers, and now a judge of this Court, described your Honour as "the last true gentleman with a heart of gold and the warmest, kindest person I have ever worked with".
- 43 In the early days of your Honour's career, former New South Wales Children's Magistrate, author and long time friend Barbara Holborow, said that as a clerk at a firm of solicitors in Burwood, she briefed your Honour almost exclusively because you were very thorough, knew your law, and

she was very confident in your abilities. Subsequent sojourns to her popular Bowral residence named Zot with the late Barry Robiason made for some wonderful weekends and lifelong memories. Such was the impact on Barbara that she duly named her two cats Tobias and Barry. I hope your Honour is suitably chuffed by this revelation.

44 The solicitors of New South Wales wish you well in your future endeavours and trust that your Honour's departure from this Court will herald yet another rewarding and fulfilling stage of life. As the Court pleases.

45 **TOBIAS JA:** Chief Justice, your Honours, Mr Bathurst, Mr Westgarth, my wife and family, members of the profession, my dear friends from Wunulla Road and other friends, ladies and gentlemen.

46 When I was appointed to this Court on 28 April 2003, I commenced my remarks by referring to my well-founded fear that if I was ever appointed to this Court, upon entering this vast Courtroom I would see nothing but row upon row of empty seats. The same fear enveloped me when I was asked by the Chief Justice, nay told by the Chief Justice, that I would be having a farewell ceremony this morning. It was one of the reasons why I was extremely reluctant to partake in one. I cannot tell you how grateful I am that I have once more been relieved of that fear by so many of you who have taken the time to honour me with their presence today.

47 In particular, I would like to express my appreciation to all those retired and current members of the High Court, Federal Court Supreme Court and the Land and Environment Court, who have also honoured me with their attendance this morning. I have known many if not most of them for up to forty years and I look forward to joining them on the side benches of this Court on future ceremonial occasions. I acknowledge in particular the presence of my dear friend Brian Cohen. Brian was a member of my floor for many years before he became a member of this Court. He was articled to my father's partner as I recollect, and he has known me since I was a

little boy in short pants, which could not have been of much assistance to him.

- 48 Thank you, Chief Justice, for your very kind and generous remarks with respect to my relatively short career as a member of this Court. When some weeks ago you asked me to list for you what I thought were my leading judgments as a member of the Court of Appeal, I indicated to you that there were none, or at least none I was prepared to, or even could, recollect. The fact that your researchers have been able to unearth decisions on the disparate topics to which you have kindly referred, somewhat embarrasses me for I have never thought of myself as being other than in the rearguard of the Court of Appeal's contribution to the jurisprudence of this State. In fact, I can only think of one decision that I thought might fall into that category and it received short shrift in the High Court. It was *Say-Dee Pty Ltd v Farah Constructions*, decided in December 2005 in which I wrote the lead judgment with which the then President, Justice Mason, and Justice Giles were careless enough, as it turned out, to agree. In that decision I adopted what was referred to by Justice Hansen of the Victorian Supreme Court in a 1998 case as the principle of recipient liability under the first limb of *Barnes v Addy* and more colloquially known as the doctrine of unjust enrichment.
- 49 You will appreciate from what I have just said that it was not entirely my original idea. It had its genesis not only in Justice Hansen's judgment but also in English academic writings and some curial and extra-curial comments by some distinguished judicial members of the House of Lords. What was referred to in one article as a safari into the exotic world of unjust enrichment received, as I have said, short shrift from the High Court which, unanimously stated that it was a grave error for the Court of Appeal (meaning myself) to have taken this heretical step, as not only was it very unjust but also had caused great confusion. One recent text described the High Court's decision as a brutal rebuff of the doctrine of unjust enrichment. Professor Peter Butt described it as a "pungent reversal of this Court's decision." You cannot sink lower than that!

50 A reading of the High Court's judgment bears out my comment to its author at a social function shortly after it was published, that it was death by a thousand cuts, a description that did not meet with any disagreement. However, as my confidence and dignity had been trashed, and as some may think that I am still harbouring dark thoughts, I hope that you will permit me the indulgence of referring to two responses to that decision: one to my judgment and the other to that of the High Court. With respect to the former, in a case note in the *Law Quarterly Review* drawn to my attention by Justice Handley (who religiously reads these things), Professor James Edelman, Professor of the Law of Obligations at Oxford University and a Fellow of Keble College, oddly enough the College of which the author of the High Court's judgment was also a Fellow at one point of his illustrious career, in a detailed case note entitled "*A Principled Approach to the Unauthorised Receipt of Trust Property*" - a promising title I thought - described my judgment in the following terms.

"This excellent decision" - let me repeat those words - "This excellent decision achieves the symmetry between common law and equity first contemplated by Lord Hardwicke."

I have to admit that that connection eluded me, at least at the time. The article continued:

"It avoids conundrums such as why a different test for liability in equity should apply to an unauthorised recipient of assets belonging to a company at common law."

I never thought of that either.

51 No one, let alone an Oxford law professor, has ever described anything I have written, before or since, in such glowing terms. I was suitably chuffed until I was brought down to earth with a thud by an article published a short time later in the *Australian Law Journal* that was highly critical of my so-called safari into the exotic world of unjust enrichment.

- 52 The second response that has helped heal my damaged pride came from my former research assistant, now reading for the BCL at Oxford University, restitution being one of her subjects. She emailed me a couple of months ago indicating that one of the difficulties with the subject was that none of the eminent professors teaching it agreed with each other on anything except with respect to one matter, namely, that the High Court decision in *Say-Dee* was wrong. In that they were unanimous. But what would those Oxford law professors know? They were clearly biased for, after all, it was the late Professor Peter Birks of that university who started the unjust enrichment hare running, but it seems that it will never run as far as Australia. That is the prerogative of the High Court which, of course, I unhesitatingly accept, believe it or not, without rancour. They do their difficult job as I have attempted to do mine. Having got that off my chest I return now to the matter at hand.
- 53 Thank you Mr Bathurst and Mr Westgarth for your very kind, generous and thoughtful remarks about my rather short career on the bench. Mr Bathurst, you and I have known each other for nigh on 27 years when you joined Sixth Floor Selborne, of which I had been a member since shortly after being admitted to the Bar in 1964. We have had a long and close professional relationship and I have the greatest admiration for your skills as a lawyer and an advocate.
- 54 Mind you, I can only remember two occasions in which you appeared before me. One was an appeal towards the end of 2003. I had the star and I wrote my judgment before I started my Christmas vacation. I think I circulated it to the other two members of the bench but they had not come back to me by the time the Christmas break had started and I therefore expected to hand the judgment down at the commencement of the new law term in early February. However, on my return from vacation I was informed that the matter had been settled. My judgment was therefore consigned to the shredder so that you will never know whether you were going to win or lose. Mind you, I did keep a copy just in case, but we can talk about that later if you are still interested.

- 55 Mr Westgarth, we have also known each other for a very long time and I remember you briefing me when you were a very junior solicitor and I was a relatively junior barrister. I take it as a great privilege that as President of the Law Society you have taken the time to represent the solicitors of this State at this ceremony and I thank you sincerely for the honour you do me and your kind remarks. Your researches are quite awesome.
- 56 I indicated earlier that I was very reluctant to partake in this ceremony for a number of reasons. The first was that I did not consider that I had been here long enough to justify it. I have been on the Court a month short of eight years which pales into insignificance against the many years of public service of such distinguished judges as Justices Handley, Sheller, Mason, Beazley, Hodgson, Young, Giles, James, Hulme (the elder), Simpson and Hidden, all of whom have been or were members of this Court for in excess of 15 years, some of them over 20 years.
- 57 I would also include in that list my dear friend and former colleague the Honourable David Ipp AO, QC who gave long and distinguished service both to the Supreme Court of Western Australia and to this Court also totalling in excess of 20 years. It is they and others who serve or will serve the Court for fourteen or fifteen years or more who deserve the plaudits of the community for their selfless and distinguished public service rather than myself.
- 58 The second reason is that I am not really going. As many of you now know, I propose to return in May as an Acting Judge of Appeal and, with the Chief Justice's approval, to continue in that role at least for the time being. Whether I will do a Handley or not remains to be seen. Frankly, I do not believe that I could maintain the acuity of mind and the energy that he has exhibited over the last four years since he formally retired as a permanent judge of the Court.

59 Only recently the President proposed to agree with Justice Handley's judgment in a matter to which I also was a party in the following terms:

“I have had the joy of reading yet another of my brother Handley's succinct, pellucid judgments which comprehensively, yet sparely, analyses all issues with clarity and insight in a manner which makes me greatly envious.”

I also am extremely envious of those talents of his Honour for the President's description of the judgment in question sums up the incredible contribution that Ken Handley has made to the law in this State for many years. No one, I repeat no one, has ever accused me of producing a succinct, pellucid judgment. Long and rambling is more my style. More than once did Ken Handley, at least when he was a permanent member of the Court, literally blue pencil my efforts in order to shorten them and delete repetition and irrelevancies. It was like being back at school.

60 Occasions such as this enable the retiring judge, in my case a temporarily retiring judge, to publicly express his or her thanks and appreciation for all those who have assisted the judge over the period of his or her tenure on the bench. In this respect I have been incredibly fortunate both with respect to my colleagues and my staff, including the Court and registry staff.

61 Although I would not deny that the Judges of Appeal work at a reasonably frenetic pace and that the work is both constant and at times difficult, I believe the same observation can and should be made with respect to the Division judges who, in my respectful view, have the much more difficult task of having to deal in many cases with lengthy and complex evidence, including the not necessarily savoury task of making credit findings with respect to the parties and their witnesses.

62 One of the advantages that the appeal judges have is that they receive the material in a packaged form. Much of the hard work sorting out the facts has been predetermined, particularly when the appeal is from the judges

of this Court. Furthermore, by the time the case has reached the Court of Appeal, the issues are often significantly narrowed. This enables us to work much more efficiently but it is the trial judges who are initially required to sort out the multitude of issues in the litigation before them. They work under considerable pressure. I admire them greatly and wish to publicly acknowledge the considerable effort and skill they bring to bear in their work.

63 I would particularly like to mention those members of the Common Law Division who have sat with me on criminal appeals over the last eight years. As they and the criminal bar are only too well aware, I am no expert in that field. I was no such expert when I came to the Court and I am not sure that I have advanced very far since then. This is particularly so with respect to sentencing appeals as I have never sentenced anyone in my life.

64 In determining those appeals I have depended greatly on the experience and skills of the two Division judges who have sat with me. I enjoyed the experience even though I was not a member of the “criminal law club”. I sat in awe of the repartee between my colleagues and counsel who kept referring to cases of which they, being members of the club, were fully aware and of which I was totally ignorant. It was like watching a tennis match, following the ball, going from one player to the other. They have all been very kind to me and I have greatly appreciated both their patience and assistance in resolving those often difficult appeals.

65 I have had the pleasure and privilege of working under Chief Justice Spigelman for the whole of my time on the Court. As many have said before me, he has been and is a great leader. He has significant and extensive legal skills and an encyclopaedic knowledge of fields outside the law. Given his forthcoming retirement from the office of Chief Justice, there is no doubt that he will be in great demand and I personally wish he and his wife, Alice, well for the future.

- 66 I have also been privileged to work under two Presidents of the Court of Appeal, Justices Mason and Allsop. Each of them is a top class lawyer with whom it has been a pleasure and a privilege to sit and, in particular, learn. From my perspective they have administered the Court of Appeal with great efficiency. Significantly, each has been alive and sensitive to the pressures upon their judges. I have never been rebuffed on those occasions when it has been necessary to ask for time out of Court in order to finish a pressing judgment. Both have been thoughtful, kind and one day if I practice hard enough I may even succeed in beating Keith Mason at golf. It is both amazing and annoying how he puts so little effort into achieving so much in his incredibly efficient golf swing.
- 67 I have been blessed with eight tipstaves or research assistants of whom five are here today and whose presence I greatly appreciate. All of them are amazingly bright and personable young people whose future in the law or whatever discipline they decide to pursue as a career is assured. Their legal research and writing skills are awesome and their CVs have only served to emphasise what a complete dullard I was and how little I had achieved by the time that I left law school at the end of 1960. I thank them all for the service and friendship they have provided to me without which I simply could not have done my job. I wish them all well in their future careers.
- 68 It would be remiss of me not to mention the assistance I have received from Registrar Peter Schell and, on his retirement, Jerry Ryznychok. I am delighted that Peter is here today. I cannot thank them enough for all they have done to keep me out of trouble over the years.
- 69 It would be remiss of me not to publicly acknowledge the assistance I received from Robin Szabo when I was the presiding member of the Legal Profession Admission Board. As Executive Officer of the Board she has administered its functions with great skill and efficiency particularly at a time when, as the Chief Justice mentioned, there were a number of difficult issues to resolve. What little I achieved could not have occurred without

her patience, wise counsel, intimate knowledge of the system and good humour. I am indebted to her.

70 Then there is Eva Adams, my associate, who has been a loyal, trustworthy, skilful and efficient assistant to me for eleven years. I knew she would be an excellent associate and I thank Lucy McCallum for letting her come with me to the Court when we shared her services as barristers. Eva has relieved me of many of those annoying personal administrative duties one is required to undertake and has ensured that I have been at the right place at the right time. One of her greatest skills is that she can read my handwriting and her greatest frustration is that, despite Herculean efforts, she has not succeeded in persuading me to master the computer which has remained in my chambers untouched by human hands for the whole time I have been a judge. That, of course, placed greater pressure upon her and my tippies but computers scare the hell out of me. My eyes glaze over when I hear computer speak. Nevertheless Eva and I have worked closely together as a team for many years and I am honoured to call her my friend.

71 I wish to say something about my conduct in Court. I have tried my best, not always successfully I admit, to be courteous and civil to counsel and self-represented litigants. Having been at the receiving end of some not so courteous Judges of Appeal when at the Bar, and I am now speaking of over twenty years ago, I have attempted to ensure that I was not characterised as one of them.

72 In my speech when appointed I referred to the necessity of trust between Bench and Bar. That trust cannot be achieved if judges are rude to counsel. I have therefore sought to emulate my colleagues who, in my experience, have always exhibited polite, albeit firm, questioning of counsel in accordance with the Socratic method of interrogation.

73 I am, however, fully aware of one egregious fault and that is my habit of interrupting counsel when he or she is in mid-sentence. When Michael

Kirby was President and I a senior silk, we constantly interrupted and spoke over each other with each of us trying to achieve the upper hand. Of course, he was entitled to interrupt me but not I him. But as you would expect with Justice Kirby, he took it all in the spirit of robust advocacy. He and Justice Harold Glass were probably the most polite judges I ever had the privilege of appearing before. Michael is a wonderfully kind, thoughtful and sensitive man. He wrote me a delightful note as to why he could not be here today and I remember that back in 1996 when I was having some personal difficulties which attracted a deal of unwanted media attention, he wrote to remind me that today's news was tomorrow's fish and chip wrapper. Even more than Mr Rudd, he has firmly planted Australia's position on the international stage. I thank him in absentia most sincerely for his counsel and friendship over many years.

- 74 Before I say something about my family I am aware that it is generally expected for a retiring judge to make some earth shattering observation about the administration of justice. I would not wish to disappoint on that score, particularly Mr Bathurst. As is well known there are now moves afoot to provide a national law to govern the legal profession. In December last a new draft bill was approved in principle by the Council of Australian Governments. There is much with respect to the bill that requires further consultation and hopefully amendment but there is one issue that I would wish to mention which bears upon the independence of the judiciary from the executive which in our society is, generally regarded as a fundamental article of faith. However, that independence is inextricably linked to the independence of the profession from the executive. You cannot have one without the other. An independent judiciary is a hollow notion unless there is a robust and independent profession of advocates who appear before it. That this is so is underpinned by the fact that every member of the profession is an officer of the Court, a concept the practical significance of which many politicians and members of the media do not seem to grasp, let alone appreciate.

- 75 The new draft National Legal Profession Law sets up a Legal Services Board to oversee the regulation of the profession. The membership of that board becomes critical if the profession is to maintain the independence to which I have referred. The constitution of the board as proposed in the bill does not necessarily achieve that objective. It is so drafted as to have the potential to generate conflict between the national professional bodies and the Council of Chief Justices on the one hand and the Standing Committee of Attorneys General on the other. In one particular respect it demeans the role of the Council of Chief Justices in a manner which I find unacceptable.
- 76 The motto of the Returned Services League is that the price of liberty is eternal vigilance. That motto may be adapted to apply to the legal profession. It must be eternally vigilant if it is to maintain its independence. It cannot be a little bit independent any more than you can be a little bit pregnant. It is my fervent hope that tensions to which the Bill in its current form gives rise can be effectively resolved in a principled fashion.
- 77 Finally and most importantly, I wish to publicly acknowledge the love and support of my wife Colleen, my brother Robert, and my children Belinda, Bradley, Luke and Gabrielle and my grandchildren Thomas, Harry, Olivia, Elsa, Toby and Arlo, the last-mentioned being only ten days old. Having discussed the matter with him, and accepting that the conversation was somewhat one-sided, Arlo has not yet decided whether he is going to follow in his grandfather's footsteps but that is just a matter of time.
- 78 I am grateful to them and to my sons-in-law, Christopher and James, for the love and support they have given me during my time on the bench. Colleen is my rock. When I took this job I said "Oh well, I'll simply take it for three years and see what happens". I am still here nearly eight years later. I have not, therefore, given her the attention that she deserves but hopefully will now be able to do so. Her commonsense, wisdom, patience, sense of fun and gentleness have been the tempering influence upon my

life and, I hesitate to say, upon my ego as a judge. As she and my younger daughter have properly, firmly and constantly reminded me, being a judge is nothing special: you are just doing a particular job. I believe that is so. I am indebted to them all and I love them all dearly. They have brought me much joy and I am sure they will continue to do so.

79 This speech is obviously long enough. Ken Handley would, I am sure, have liked to have taken his blue pencil to it, but I only get one chance. Thank you again Chief Justice, Mr Bathurst and Mr Westgarth for your kind and generous remarks. Thank you all for taking the time to honour me with your presence. It is indeed a humbling experience and one which I shall remember for the rest of my life.

80 For those of you who thought that this was in fact a farewell ceremony and that you would be seeing the back of me for good, may I be permitted to adopt the immortal words of General Douglas Macarthur who told reporters in 1942 shortly arriving in Australia from Corregidor: "I came through and I shall return".

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Swearing-in Ceremony of The Honourable Murray Herbet Tobias AM RFD as a Judge of the Supreme Court of New South Wales and a Judge of Appeal

THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT

SPIGELMAN CJ
AND THE JUDGES OF THE SUPREME COURT

Monday 28 April 2003

SWEARING-IN CEREMONY OF
THE HONOURABLE MURRAY HERBERT TOBIAS AM RFD
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES AND
A JUDGE OF APPEAL

1 **TOBIAS JA:** Chief Justice, I have the honour to announce that I have been appointed a Judge of this Court and a Judge of Appeal. I present to you my Commissions.

2 **SPIGELMAN CJ:** Thank you, Justice Tobias. Please be seated while the Commissions are read. Principal Registrar, would you please read the Commissions?

(Commissions read)

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

(Oaths of Office taken)

Principal Registrar, I hand to you the oaths so that they may be filed in the Court archives, and also the Bible so that it may have the customary inscription inserted in it in order that it may then be presented to Justice Tobias as a memento of the occasion.

3 On behalf of all the Judges of this Court, and on my own behalf, I congratulate you on your appointment and wish you a warm welcome to the Court. You have, for over two decades, been one of the leaders of the bar and it is a great privilege to have you join us as a colleague.

4 **MR B W WALKER SC PRESIDENT NEW SOUTH WALES BAR ASSOCIATION:** May it please the court. There are those of us who suspect that your Honour has left it as long as you have left it in order that this courtroom be distinguished in the following manner this morning. There must be solicitors who instructed your Honour as an up-and-coming junior who are now enjoying retirement from being senior partners. There are almost certainly juniors who learned at your Honour's metaphorical knee and are now scaling the heights of being silk. Worse still, there are juniors who learned probably at the knees of juniors who learned at your knees who are on the Bench you now grace.

5 And it certainly is an atypical piece of ostentation on the part of your Honour to have resisted the temptation, which I know your Honour has felt so keenly for so many years, to become a judge that you have left it so long so as to assemble such a dazzling array of people who have been junior to you, tutored by you, mentored by you to assemble in this courtroom to celebrate this occasion. The Attorney General is to be congratulated, the public has our felicitations.

6 But for our part, speaking on the part of the Bar and of the Bar Association, there is a tinge, just a tinge, of regret at the passing of your Honour from the ranks of the very senior Bar.

7 There is more than a tinge of regret, however, when we consider your Honour's characteristics as an advocate and how it may translate to the Bench. There is much more than a tinge of regret. There is for my part some trepidation as to whether I ought properly to use this opportunity as one of the perquisites of my position. Namely I get in first with the flattery so that your Honour will forever think that it was my original and that nobody who repeats it will ever get the same kudos.

8 Your Honour as a barrister is renowned for your vigour. If a point was bad, as your junior, you would know about it in no uncertain terms, fortunately in chambers. If the point was bad, or even possibly thought to be bad, as your opponent, one would know it by the barely suppressed groan to the left and by the rhetorical roar when you eventually rose to rebut it. Alas, sometimes your Honour would take the advantage of an objection, sometimes to something that most people would not believe to be an objection, in order that you could rebut error sooner rather than later.

9 But your Honour's vigour came from an attachment to the doing of justice which you did with zeal, with enthusiasm and without embarrassment for the enunciation and practice of values of the most fundamental kind at the Bar. With all the seriousness we can muster may we say that we expect with enormous confidence that you will exhibit precisely the same approach without embarrassment but with vigour as a judge.

10 Where all this vigour comes from may be speculated, and if your Honour will forgive me the facetiousness which is possible still in Sydney, it couldn't possibly have come from the school career wearing a kilt. On the other hand, mucking around in boats may have had something to do with it. Others have speculated that perhaps it is the plain velour qualification of having studied law at the University of Sydney. That couldn't possibly explain it. Perhaps a BCL at Oxford. Perhaps that is the explanation. But when one looks at the pattern of your career it is clear that something stemmed from far earlier in your life and I will leave it, I suspect, to your Honour to make the appropriate acknowledgments there because it is clear from the earliest time that your Honour has taken an approach to the administration of justice in which the independent Bar and the judiciary which the independent Bar exists to assist, and the independence of the judiciary which springs from the intention of that Bar in a mutual relation has informed your own career from the beginning.

11 The Bar Association particularly wishes to advance to your Honour its best wishes and congratulations because of a history which is so well-known that it is in danger of being overlooked. Your Honour was a member of the elected Bar Council from 1976 with some breaks until you became president in 1993.

12 It is no accident that the principle parts of the current statute regulating our profession in this state springs from a Bill introduced in 1993. For some years, as my distinguished predecessor to my left, Mr Coombs QC, will attest, there had been storm clouds gathering of a kind which could have simply been a deluge. However, your Honour turned it into more of a life-giving irrigation by the skill, the politics and, above all, the principle by which you sought to guide enthusiastic legislators and even more enthusiastic extra-legislative reformers into ensuring that there was retrieved from some of the earlier proposals, maintained throughout all proposals and finally enshrined in the statute, which has been adjusted thereafter very little, the possibility for the continuing values of an independent Bar to exist in a new, relatively savage, consumerist-oriented time where what is called competition principles were thought to break for the first time upon the unsuspecting heads of the independent practising Bar.

13 As president of the Bar Association at the time, as those of us who tried to help you at the time remember, you were assailed on all sides. This was an argument for which there were more than two sides to every point. There was, for a start, the extremists on both sides as well as those moderates who were prepared to listen on both sides and there were, I suspect, the large mass who had open minds about what the eventual outcome ought to be, let alone what it might be.

14 Your Honour, as we all recall, tackled that very testing time with tact, with diplomacy, but above all with direct speech. At the very worst time when the statute was first being drafted, your Honour eschewed the temptation to tell everybody that things would be all right. I think you commenced your presidency by assuring the Bar that it had no friends in any place of power. The first presidential column you ever wrote had as its second sentence, "The temptation to say something popular". That

was mere rhetoric on your Honour's part, you have never been tempted to say that, but you said that that would not be particularly productive and you went on to say things which were not then at all popular but which have since become greatly esteemed for their prescience and, above all, for their principle. In particular you started by expression from the top of the Bar the type of self-criticism of which you have always been so capable yourself in your own practice.

15 At the same time as your Honour was engaged in that risky political undertaking you were also engaged in helping in the public interest to regulate more pleasurable risk undertakings as a member of the New South Wales Casino Control Authority. But even there, as your Honour will recall, from 1994/1995 there was the controversy of the inquiry that your Honour chaired into the question of the regulation, the licences, as some have called it the licence to print money, and everything that comes in its train in relation to that then new legal industry in New South Wales.

16 Going back in time, whether there was a causal connection or not there was a coincidence between your marriage and your joining the navy. But in this case it was not fleeing to sea in order to avoid pleasurable company, it was in order to devote your legal talents to the doing of military justice, which I understand is not an oxymoron as well. You rose to the giddy heights of captain and, as a Defence Force Magistrate, presided over a number of most important inquiries essential for the good order and efficient operation of that most important armed service.

17 It was not surprising to any of us, except for the interval after which it followed, that on Australia Day 1998 you became honoured with Membership of the Order of Australia for service to the profession, particularly through both the Bar Associations, the Australian Bar Association as well as the New South Wales Bar Association, and to military law. The reference to the Australian Bar Association was no mere matter of form for your Honour was one of the pioneers in what might be called the second, perhaps third, wave of movement by which incrementally and still by no means completely the Bars in this country are realistically coming to form one Bar, one part of the national profession.

18 Meantime, though it is hard to believe, your Honour was able to conduct a practice, as the Chief Justice has already said, at the very highest of levels. It is impossible not to introduce a slightly personal note. I, like many of those present here, were privileged to be your Honour's junior and, unlike many of those present here, were not so privileged but were very challenged to have been your Honour's opponent. Each of them was a stimulating position. In both of them we all learned. We will frankly miss your presence in such cases.

19 It is impossible, particularly bearing in mind the resources of computer research nowadays, to single out cases from your Honour's practice. That is, if your Honour's name is entered into authoritative reports restricting oneself only to Commonwealth Law Reports and the New South Wales Law Reports and the Local Government Reports of Australia, one comes up with case after case after case that not only settled the outcome of fortunes or governmental policy at the time they were decided, they also informed and added to the development principle in the areas. The areas, as everyone knows, include not only those for which your Honour is justly famous, in particular the judicial review of administrative action and government action in relation to planning and development, but also heavy commercial law of the most far ranging kind.

20 But two in particular stick out as having been decided some time ago, your Honour being victorious, that, no doubt, being more than a mere coincidence, and of application in the position you are about to take up. In *Heron v McGregor*, decided as long ago as 1986, your Honour successfully contended that even the pressing public interest of disciplinary action against professionals, like all other operations of the rule of law, would finally give way to the paramount dictates of fairness and justice in the administration of a disciplinary system. The authority is a good one, the principle was age-old, the application was timely. A reminder of it is also timely.

21 And finally, joining a bench immediately after Justice Ipp in seniority, it is of course important to point out that *San Sebastian v The Minister* in which you appeared successfully for the Council of the City of Sydney, was decided as long going as volume 162 CLR. I am not sure whether your erstwhile floor brother Justice McHugh would regard 162 CLR as still on the compulsory reading list or not, but it suffices to say that in *San Sebastian* matters were held, accepting your Honour's arguments, in relation to the possibility of a duty of care with respect to governmental and quasi governmental actions of a kind which remain extremely current in the kind of doctrine which your Honour will be administering very shortly.

22 The one thing that I have not mentioned yet, which everybody who has spoken about this speech wants me to mention, is to name all those persons - they said it couldn't be a very long list and it won't take a long time - who were older than your Honour when first appointed to this bench. I would like to be able to say I don't have time for such a long list, but that wouldn't be true. What I can say with my fellows is that for such an old appointee, the public, the court and the profession are extremely lucky that we have such a youthful appointee. May it please the court.

23 **MR R BENJAMIN PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** May it please the court. Your Honour, as representative of the eighteen thousand-odd solicitors who practice in New South Wales, the Law Society and personally, it is my pleasure to congratulate you and your family on your appointment as both a justice of the Supreme Court of New South Wales and a justice of appeal of that court.

24 On 5 February 2003 you made a number of observations at the swearing in of Justice Nicholas, including:

"After November 1995 when my term as President of the Bar Association came to a very timely end, and being very conscious of the fact that there is nothing quite so 'ex' as the ex-president of anything - and in this regard the Bar Association is no exception - never in my wildest dreams did I contemplate the possibility of again standing before this Court to welcome a new judge on behalf of the Bar."

25 It is now quite clear that your wildest dreams have been answered and you will now no longer have to stand here addressing the court from this side of the bar table.

26 Further, your address of 5 February has assisted me somewhat in my research.

27 You were born in 1939, some two years prior to the birth of Justice Nicholas, and you are not apparently embarrassed to disclose your age or that of others. You were educated at Scots College and, unlike some, you had no ambition to sell tractors or to march around in Kings School military uniforms.

28 You admit to an aversion to new technologies. This includes, I am told, the computer, although of some consequence with your Honour's appointment it is now that you will be able to avoid the necessity of buying a Macquarie Dictionary, as the thirty-two year old version, owned by Justice Nicholas, and removed by him from chambers in February of this year will again be available to you. I also understand as the world turns that in 1975 one of your readers was one Margaret Beazley with whom you will now join at the Court of Appeal.

29 You have never been short of a word, and I am informed that in what may have been the first integrated development case involving three parties, you were appearing for the developer. Normally in such an appeal it was the local authority who would have opened. However, you relieved them of that responsibility by taking the floor at 10.00 in the morning and not retiring to your seat until 4.00 in the afternoon. "Don't worry, you'll get your turn in a minute", you said to the other counsel. They never did.

30 We have heard that you have made many appearances in the Land and Environment Court. Your enthusiasm for the planning system and a desire to make it work has led to the description of you by some of the solicitors as a "father figure" of that court.

31 Of course you have also appeared widely and in commercial litigation and administrative law. In these jurisdictions you have turned your mind from town planning issues related to furniture and white goods to unravelling the mystery of the French fry.

32 "Be afraid, be very afraid" might have been the advice to any solicitor not fully conversant with their file on entering your chambers. You are said to have a tremendous ability to deal with detail and a prodigious memory. "You know that he has read the brief and every last bit of paper", said one solicitor. "He looks at everything to the nth degree and is a master with the yellow and green highlighter (it seems that some new technologies have been adapted by you). He has a steel trap of a

mind and can make a withering disposal of your whole point of view if he disagrees with you". Another recounted how, having sent you a draft letter for review, you responded initially by telling him, "Firstly, you can't add up."

33 This ability to "keep them on their toes" has greatly endeared you to our side of the profession, not least, of course, because you can employ that legal skill and your tremendous command of it and of the evidence in the conflict in which you were briefed.

34 These skills will no doubt hold you in good stead in the Court of Appeal with its heavy workload and the complexity and variety of legal issues that it regularly entertains.

35 In this court some weeks ago comment was made about expert evidence in Makita's case when Justice Dyson Heydon was leaving this court for another. It is your understanding of experts and their evidence where you are said by those who brief you to be most persuasive. I am informed that when you were cross-examining an expert for some period - during which time you never raised your voice, you didn't lose your temper and you did not ever look directly at your subject - you managed to have the expert disavow the entirety of his evidence.

36 In fact, your ability to find and understand the underlying principle or principles upon which the expertise is based and understand the application of that expertise to the facts is, I am told, legendary.

37 While you have been able to present an implacable facade to those you oppose and an ability to tell them why they wouldn't win, you have also been ruthless in the process of self-examination and the uncovering of any flaws in your own case. "On the way to court", said one solicitor, "he would say, 'We are going to lose this one. How can we win this one?'" Apparently this made your briefing solicitor feel like throwing herself under the oncoming traffic. This became something of a hallmark: the pronouncement five minutes before a case was to begin that it was "unwinnable". Those who instructed you say that, "At 9.30 in the morning he'd start to doubt. He was never happy that he had done enough."

38 This desire to do the very best and to work tirelessly in the preparation and presentation of material has meant that you have pressed everyone about you into service. Once you have briefed him, they say, you are on the Tobias Weight Loss Program. One solicitor tells me that after spending twenty minutes on the phone with you he was given a long list of tasks. Within five minutes of hanging up, you would be on the phone again with more. "You can always tell if he is involved because people are running around frantically. 'I can't talk to you now', they say, 'I'm on the Tobias Weight Loss Programme'." Your attention to detail meant that no stone was left unturned.

39 Your wife, Colleen, has been a huge support and a great partner in all your work. I note that it was to her to whom you looked for editorial comment on your speech made in February of this year and she should share in the importance of today.

40 Your Honour now seeks to complete a full productive life by service to the community from the Bench. You continue your dedication to public good and you do so with the warmest best wishes from the solicitors of this State. It may be apposite to consider your Honour's own words, spoken when you were the President of the Bar Association, at the time of the retirement from the bench of Chief Justice Anthony Mason. On that occasion you said:

"...When listening to the other speakers and sitting in my place, I suddenly appreciated that this would be the first time, when I have in the past or will in the future have the opportunity of putting submissions to this Court which will be received with universal acclaim, with no questions or criticisms, without the necessity of a reserve judgment but of immediate order that the plaintiff win."

41 Your Honour, that time seems to have come again. We wish you every success in your term of office.

42 As the court pleases.

43 **TOBIAS JA:** Chief Justice, your Honours, Mr Walker, Mr Benjamin, my wife and family, members of the profession, ladies and gentlemen.

44 I have always dreaded the moment, if ever appointed to this Court, of entering this vast courtroom and seeing nothing but rows and rows of empty seats. In fact when I voiced this concern to my family, my wife and children graciously offered to stand in Phillip Street and sell tickets. However, I advised them that they would need not only to give the tickets away but also to offer a lucky door prize! Needless to say, by your attendance here today, you do me great honour and mere words cannot express my deep gratitude (and relief) that you have taken time from your other commitments to relieve me of my worst fears. I am particularly grateful that Chief Justice Gleeson and other justices of the High Court, justices of the Federal Court, Chief Judge Pearlman and judges of the Land and Environment Court before whom I spent so much of my career have honoured me with their presence today.

45 Mr Walker and Mr Benjamin, I thank you most sincerely for your very kind, generous and exaggerated remarks. I suppose an occasion such as this is the only time when a judge is prepared to tolerate, perhaps even encourage, remarks from the advocates which he or she knows are full of factual errors and flawed reasoning. Needless to say, you have both been most gracious in your comments and I greatly appreciate the sincerity with which you have expressed them.

46 I am very conscious of my faults with respect to speeches of this kind. Only two months ago I stood before this Court to welcome Justice Nicholas on behalf of the Bar. I am aware that that speech was criticised as too long. Indeed, Justice Bryson was heard to remark with his usual droll but incisive wit that the only thing I omitted was his Honour's dental records. I can assure Justice Bryson that, notwithstanding some difficulty in extracting them, I am now in a position to remedy that omission which he so kindly identified.

47 It is both traditional and appropriate on occasions such as this to publicly acknowledge the support and generosity of those who have contributed to the appointee's career as a barrister. There are many to whom I owe a great debt of gratitude in this regard but time to mention but a few. First and foremost, are my late parents. I was fortunate enough to grow up in a close, loving and supporting family. My decision to enter the law was influenced, although not overtly, by the fact that my late father was a highly respected solicitor of this Court. Indeed, he was a solicitor for fifty-eight years: from 12 March 1937 when he was admitted to 12 March 1995 when he surrendered his practising certificate in his eighty-sixth year. He had always said that he would not retire until he had, health permitting, reached the top of the list of solicitors in the Law Almanac. He was constantly frustrated in this objective by the late Vincent Pike, a solicitor of great wisdom and longevity. Eventually, my father decided he could no longer outstay Vincent so he called it a day.

48 My father was a great role model for myself and my brother Robert, also a solicitor. He was wise, worldly, gentle and generous with his time to all who sought his counsel. He had a penetrating grasp of legal principle. He eschewed the modern tendency of some solicitors to indulge in lengthy and inevitably expensive correspondence during the course of litigation containing extensive allegations and counter allegations and sometimes worse. His idea of responding to such a letter was to do so in two sentences:

"Thank you for your letter of such-and-such a date. Our client respectfully denies the allegations and contentions contained therein. Yours faithfully."

49 The prospect of traversing for page after page unnecessary and inevitably irrelevant allegations at his client's expense was anathema to him. Whatever knowledge of legal principle, ethical standards and common sense that I might exhibit is very much due to his influence. My only regret is that my parents, and particularly my father, are not here to witness this ceremony.

50 I was fortunate to be articled to the late John Smithers, senior partner of Smithers, Warren & Lyons (now incorporated into Phillips Fox). He taught me much and I remember my years as an articled clerk as being some of the most enjoyable I have experienced in the profession. The lunchtime cricket matches in the long hall of the eleventh floor of the old Masonic building in Castlereagh Street were great fun and involved a degree of camaraderie amongst the solicitors and articled clerks which, regrettably, no longer exists today. My association with Ken Astridge, Ken Austin, Grahame Ireland and Bill Orme, partners of the firm at the time, I shall always treasure.

51 As you have heard, I came to the Bar in October 1964. Phillip Twigg (now his Honour Judge Twigg) was generous enough to offer me a secretary's desk in the corner of his chambers on third floor Wentworth so I had a place to park my one and only brief. My master solicitor had, on the day of my admission to the Bar, briefed me as second junior to Dennis Mahoney QC (as the former President then was) in the case of *Tooth & Co v Lane Cove Council* which was a rating case heard by Else-Mitchell J in the Land & Valuation Court.

52 Our opponent was Doug Milne. Given my rank experience, I am sure that I was completely useless to my leaders, a fact which would have been obvious to Milne. So it was indeed a surprise when Doug invited me in January 1965 to join the sixth floor Selborne to occupy the chambers of Reg Marr QC who had just been appointed New South Wales Solicitor-General. So commenced a long and highly productive association (certainly from my point of view) with Milne. Doug was a great barrister in every sense. He was without peer as a lawyer and tactician and was an uncompromising cross-examiner: yet he exhibited and insisted upon the highest ethical standards. It was he who introduced me to what was then known as local government law and practice as he and Trevor Morling really had a monopoly on the work in that area. *Cooney v Ku Ring Gai Council* had recently been decided by the High Court which expanded the jurisdiction of this Court in its Equity Division to grant injunctions at the suit of a council to restrain breaches of the planning laws whereas, until then, the accepted wisdom was that such injunctions could only be sought in a relator suit on the fiat of the Attorney-General which he rarely granted. Cooney's case resulted in a huge increase in the work of those practising in the area of local government of which I was a fortunate beneficiary. They were fun days I can assure you!

53 My pupil master was John Kearney (as his Honour then was). I was fortunate enough to be able to split my time between he and Milne. He and Bob Henderson were the leaders of the junior equity bar and both were remarkable equity practitioners of the highest order. I learnt much from John and I will always be grateful for the time he always gave me notwithstanding his incredibly busy practice.

54 Two other members of the Bar I wish to mention. The first is the Honourable Trevor Morling QC. I had the good fortune to be his junior, after he took silk, on many occasions. I also remember that my first case on my own in the Land & Valuation Court (Milne who had been briefed in the matter had become jammed and was generous and reckless enough to recommend me to his instructing solicitor as a last minute substitute) was that of *Pioneer Concrete v Lane Cove Municipal Council* heard before Hardie J. Trevor appeared for the appellant and I for the council. It was an appeal against the refusal of the council to approve a concrete batching plant on the shores of Burns Bay. The major objector was Tuta Laboratories Pty Limited who occupied a site close by and who manufactured blood transfusion equipment which required extremely sterile conditions. A significant issue was the effect of cement dust on their activities. All sorts of professors were called and, despite my feeble efforts in attempting to cross-examine them, I won. Of course, the only reason I did so was because in those days, courtesy of the infamous and now long discarded decision in *Coty (Australia) Pty Limited v Sydney City Council*, appellants invariably lost and councils invariably won. Regrettably, I can hardly take credit for the victory which ensued.

55 The second person from whose skill and experience I profited was the late the Honourable Ted Lusher QC. He was a tough, unforgiving but fair barrister and a relentless cross-examiner. After all, he had learnt that art from J W Smythe QC, the undisputed master cross-examiner. I was Ted's junior on numerous occasions and it was an eye-opening but highly beneficial experience. I owe him much.

56 Finally, there is one other person I would wish to single out and that is Ms Barbara Holborrow, an outspoken former Children's Court magistrate and now a successful author. She was one of the first persons to brief me when I was struggling for work. At that time, she was a clerk in the office of Clem Mitchelmore & Co, solicitors of Burwood. Over a period of years after my admission she generously, albeit unwisely, briefed me in numerous cases of some diversity. I am most grateful for the support she gave me at that time and our continued friendship since.

57 To my colleagues on the sixth floor, to my juniors over the past twenty-two years who have stoically endured my panic attacks and temper tantrums, to those with whom I was privileged to serve on the Bar Council over many years and to all those solicitors who entrusted to me their clients' cases, you all have my deep and abiding gratitude for your support, loyalty and, most importantly, friendship. To my clerks over thirty-eight and a half years, particularly Les O'Brien and more recently Sarah Barnes, thank you for your assistance and loyalty. I am especially grateful to Lucy McCallum for agreeing to our current secretary, Eva Adams, becoming my associate and to Eva for agreeing to

undertake that role and continuing to endure my idiosyncrasies.

58 I appreciate that every member of the Bar who is elevated to the bench praises the Bar as an institution and that praise is, despite the views of some journalists to the contrary, well deserved but, regrettably, not well understood. The Bar's role is, of course, that of the primary advocates before the courts and, in particular, the superior courts. In this regard, one of the most, if not the most, essential ingredient in the efficient and effective administration of justice in the courts is the relationship between the Bar and, for that matter, all advocates, and the bench. That relationship is predicated upon complete trust between bar and bench. Without it, the system will inevitably fail.

59 When I visited the United States at the end of 1994 as President of the Bar Association, I met with officers of the American Bar Association at their headquarters in Chicago. They acknowledged that one of the greatest problems with the American system of justice was the breakdown in trust between the attorneys appearing before the courts and the bench as well as between the opposing attorneys themselves and even between attorneys in the same firm competing against each other to make partner. Given the significant workloads of all courts in this State, the maintenance of trust between bar and bench is essential and must be guarded and maintained with constant vigilance. My experience over the last ten years or so is that, to some degree, that trust is starting to break down. Maybe it can be blamed on economic rationalism with its imperative on competition which tends to give rise, regrettably, to the desire, if not the necessity, to win at all costs.

60 However, the most valuable asset any barrister has is his or her integrity and the reputation of being totally intellectually honest with the bench. That requires the jettisoning of arguments and submissions which are likely to fail or which cannot be reasonably advanced. It requires the issues, both factual and legal, to be refined between the parties which, in turn, demands greater cooperation between the legal representatives on both sides of the litigation to ensure that the judge is only required to decide the essential issues. It further requires that the evidence, particularly documentary, tendered to the court is pared back to only that which is truly relevant. How often have we all been guilty of tendering many lever arch folders of documents only to refer to but a few: to the filing of many volumes of appeal books when reference is made to but a small proportion of their contents. If nothing else, think of the trees that have to be destroyed to generate all that waste paper! I am conscious that these remarks have been echoed time and again elsewhere but I believe that they bear repeating on an occasion such as this.

61 Finally, and most importantly, I wish to acknowledge the love and support of my wife, Colleen, and my children, Belinda, Bradley, Luke and Gabrielle, my grandchildren Thomas, Harry and Olivia, my daughter-in-law Deborah and my sons-in-law Christopher and James. My wife is my rock. Her common sense, wisdom, patience, sense of humour and gentleness have been the tempering influence upon my life both within and without the law. To her I am forever indebted. To my children and grandchildren, you also are the light of my life. You have all made me a very proud father and grandfather and you have brought me much joy.

62 I must not go on lest, after the ceremony, I attract the ire of my brother Bryson. So I shall end. Thank you again Mr Walker and Mr Benjamin for your kind and generous remarks. Thank you all for taking the time to honour me with your presence. It is, indeed, a humbling experience and one which I shall always treasure.
