

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

**BELL CJ
AND THE JUSTICES OF THE
SUPREME COURT**

THURSDAY 1 FEBRUARY 2024

**SWEARING IN CEREMONY OF JAMES HMELNITSKY SC AS A JUDGE OF THE
SUPREME COURT OF NEW SOUTH WALES**

1 **HMELNITSKY 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.

(Commission read)

(Affirmations taken)

2 **BELL CJ:** Justice Hmelnitsky, I am absolutely delighted that your decision to accept the call for public service and to accept an appointment on this Court. You are hugely respected for not only your technical legal brilliance and excellence but also the great warmth of your personality and your values. I see that you have already attracted a majority of the High Court to support your appointment and that all is very well. On my own behalf and your new colleagues and mine, I welcome you to the Court and wish you well.

3 **HMELNITSKY J:** Thank you, Chief Justice.

4 **ATTORNEY GENERAL:** Thank you, your Honour. May it please the Court. I acknowledge the traditional custodians of the land, the Gadigal of the Eora Nation and I pay my respects to elders, past, present and future. I acknowledge our Aboriginal friends and colleagues here this morning.

5 Your Honour, Justice Hmelnitsky on behalf of the bar and the people of New South Wales it is my very great pleasure indeed to congratulate you on your appointment to the Supreme Court of New South Wales.

- 6 I acknowledge some special guests here this morning, firstly your wife Kate O'Rourke your children Anna, Sasha and Nicholas. Also celebrating with you today, your mother Helen, step-father Peter Moore and your sister Lucy. Sadly missing from this ceremony is your father Oleg, I am sure he would be extremely proud of you today, I am sure he is watching.
- 7 There are many friends and colleagues present or watching online. They along with your family have contributed stories and opinions to help tell the vivid story of your life up to this moment.
- 8 Your Honour was born in 1969 in Sydney and lived in Coogee until you were 12. You were the second born boy with your little sister following a year later. Your mother Helen is Irish, your father Oleg was Russian, and together they created an amazing family culture that continues today despite the fact that your father passed when you were just one year old.
- 9 Your mother was a nurse and your father was a music teacher who came from a long line of Russian musicians. As a child you have said that you loved staying home because there was always something going on in the house. Your tendency to homeliness also had something to do with your self-confessed shyness and the fact that you hated school. You went to St Brigid's in Coogee for primary school then Waverly College for high school. You were bookish and loved learning but did not really engage in your early years at school.
- 10 Life changed significantly for you and your family when your mother married your step-father Peter Moore. Three more children were born which created an even bigger and busier household. The family then moved to Cronulla. You loved it there. You attended De La Salle College where you excelled and made many lifelong friends. Moving to Sutherland Shire also encouraged your love of the outdoors. You loved fishing, swimming and the Royal National Park became your playground.
- 11 For a long time you wanted to be a doctor, but upon graduation you decided to study arts and law at the University of Sydney. You said that you loved that

time. You strived in every aspect of university life. You made lifelong friends, met your future wife and enjoyed learning. On the arts side you studied German, you adored the language but more significantly for you, you developed a lifelong love of German baking. I did not know there was such a thing.

12 On the law side you have said that it captured your attention, you were instantly engaged. Your university friends remember you fondly, they recognised early on that you were a natural when it came to studying law and that you would in time become a wonderful lawyer. They were right.

13 They recall attending your family roast chicken dinners and that you loved to host and entertain your friends and, of course, Kate. You graduated in 1994 with first class honours and started your career as an associate to the Honourable Justice Munro. His focus was on industrial law and you said that he was terrific to work with, your great first mentor.

14 In 1995 you moved onto Rosenblum & Partners to practise as a solicitor and by this time, of course, you were an aspiring litigator. Joining the small firm of Rosenblum & Partners was a surprising move to many colleagues but it turned out to be an inspired choice. Being one of only four litigators meant you were busy and always in Court, your favourite place to be as a lawyer.

15 By the time the firm merged with the much larger Blake Dawson & Waldron you were operating at a level well beyond your years of experience. In 1998 you and Kate undertook a personal and professional adventure, you moved to New York. Kate went on to study a Masters of Law and you secured a role as an attorney at the US headquarters of Shearman & Sterling. To attain this role you had to succeed in the notoriously difficult New York Bar exam. With little more than one week's preparation they say and no outside tutoring you did it. It would also be remiss of me not to mention that Kate got the same result with the same preparation. This is still the stuff of legend amongst your friend and colleagues.

16 Your work at Shearman & Sterling took you away from litigation. You worked as a transactional lawyer in the field of banking and finance. A lesser person

may have come unstuck with such a change but you did not. Your colleagues recall that you were able to deploy your legal instincts, personal charm and a passing resemblance to George Clooney to such great effect that none of them knows that you had no prior experience in that area.

17 You went on to establish yourself as a capable deal lawyer and a sought-after specialist for distressed financial transactions and you and Kate absolutely loved New York. It was exciting, intellectually stimulating, fun and rewarding. It also gave you the opportunity to hike and camp upstate and beyond. There is no doubt that you could have stayed in New York and achieved a glittering career but thankfully for all of us Sydney was calling.

18 By the time you left to come home in 2001 you and Kate had married and little Anna had arrived. You were called to the bar on your return to Australia and became a member of the Sixth Floor Selbourne/Wentworth Chambers. You said yourself that you turned up and said “yes” to everything. Your reward has been a varied career full of exceptional work. You have represented a wide range of corporate, private and government clients in revenue, commercial and administrative law matters. You have also appeared for media organisations and individuals and several high-profile defamation and media disputes.

19 You were made Senior Counsel in 2013 and are universally popular and admired by your colleagues. They have seen your piercing intellect and uncanny professional nous deliver on many occasions for your clients. This is complicated they say by your calming manner. At all the sixth floor will miss you but are excited by your next opportunity. All of your colleagues right across the profession are proud of your achievements and know that you will be a fine judge. They are excited about your next venture as are your family.

20 Kate has walked side by side with you since meeting at university. Your unwavering love and support for each other has resulted in two remarkably successful careers. Most importantly you have cultivated an amazing life together and of course, together with Anna, Sasha and Nicholas. You live in Coogee just over the hill from my beloved Maroubra your Honour and one of

your favourite to be is Wiley's Baths and so should it be. Your love of the water and that community builds.

- 21 You have been described as a dedicated father and you are. You love spending time with your children and you enjoy watching them reach their potential. This is best summed up when the kids were taking music lessons, you were keen for them to learn and succeed due to your father's background and other factors but instead of merely watching from the sidelines you decided to take lessons with them as well.
- 22 Alongside of your love of music is your sense of adventure. You love camping, hiking and sailing. This has taken you across the world and this brings me your Honour to a point on which I might conclude. On Tuesday this week at the morning tea following the swearing in of his Honour Justice Pike I was approached by a gentleman of Senior Counsel, certain fame who volunteered that he was a close friend of yours, indeed had known you for a very long time. He was kind enough to enquire as to whether I would appreciate an anecdote or two by way of assistance for this speech. I responded, of course, that I would be most grateful.
- 23 When his sought contribution was received yesterday I enjoyed it so much I decided to conclude with his words unedited and so I make no warranties as to their veracity. He says,

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He has had to live with people misspelling his name his whole life except once when travelling with a mate in the early 1990s. They were trying to check in at a youth hostel in Kiev. The man behind the desk was having a lot of trouble with James' mate's name, something like Smith. When it came James turn to check in he began as usual to spell out his name. The man stopped him and said with contempt, "What you think I'm a peasant, you think I can't spell Hmelnitsky".

He met his partner Kate O'Rourke at a come as your favourite dead person party.

He loves acquiring skills. He's fluent in German, an outstanding cook and very capable in the dark room.

He loves cross-country skiing and bushwalking. He built canoes in his backyard.

In the last few years he's got himself a sailing boat which has become something of a passion. He has high standards as a skipper. He bakes bread every day on board and feels it's a slippery slope once you start trimming the sails but he did recently run aground briefly in Laurieton, south of Port Macquarie and he hasn't ruled out holding directions hearings by zoom from the bridge of his boat.

He's devoted to Kate and their children. On weekends you'll see him and Kate on a tandem bike tearing around Coogee on their way to the bakery for pastries."

24 I thank my anonymous contributor. Your Honour my warmest congratulations. Thank you for choosing to serve. May it please the Court.

25 **BELL CJ:** Thank you Mr Attorney. Mr McGrath, President of the Law Society of New South Wales.

26 **MCGRATH:** May it please the Court. I too acknowledge the traditional owners of the land on which the Court stands, the Gadigal of the Eora Nation and pay my respects to their elders past and present. I extend my respects and welcome to all Aboriginal and Torres Strait Islander peoples here today.

27 Your Honour it is privilege to come before this Court on behalf of the solicitors of New South Wales to congratulate you on your appointment. Your Honours has been described by many who have worked alongside you as one of the best, if not the best tax silk in the country. Understanding the workings of something from its very foundation is a hallmark of your character. Those who have worked with your Honour closely revealed to us one of your lesser known hobbies and talents building furniture as a mean of relaxation. Now I am not referring to the flatpack variety, we are talking about the serious beautiful woodcut furniture often in a Scandinavian design. One colleague still remembers receiving a photo of some beautiful wooden chairs your Honour had made to unwind in after some stressful weeks at the bar table.

28 Though your Honour's expertise and accomplished advocacy your Honour is no stranger to making an impression inside the courtroom. In fact, one of your

most memorable appearances was in the nation's highest Court. We have heard this story from two very reliable sources. Your Honour was appearing in *MBI Properties Pty Ltd v Commissioner of Taxation*, one of the most significant and critical cases before the Court at the time in terms of determining the operations of the GST. Ever the hard and diligent work your Honour had been working through a nasty flu-type virus picked up from one of your children. Your submissions were underway when the fever took hold and your Honour collapsed in the courtroom. Whilst deeply concerned for your health your junior David Hume was also gripped by panic. As a brand new barrister, he had attended the Court at your Honour's suggestion so that he could get some High Court experience even though in his words, he knew nothing about the GST.

29 Protocol, of course, stipulates that when the silk is incapacitated the junior must take over. However, ever a creative problem solver your Honour proposed that Mr Hume who had only been at the bar for a mere few months accompany you to the hospital instead, the result being that he did not make the submissions in your place. To this day he remains grateful for your quick thinking even when ailed by fever and flu.

30 Defamation has also played a great part in your practice prior to this appointment and two cases spring out from the well of such matters in which your Honour has acted. Your Honour appeared in one of Australia's most celebrated media victories in a defamation case in 2009 when your Honour appeared for the Australian Newspaper and helped turn this Court into a de facto war crimes trial of Serbian paramilitary leader Dragan Vasiljkovic, also known as Daniel Sneddon.

31 He had sued News Corp Limited for defamation based on an article that published accusing him of war crimes. In the case your Honour relied on a defence of truth. In preparation your Honour had to speak to witnesses in Croatia and Bosnia and bring them over to give evidence in the matter amongst many other aspect of the case. Thanks to your Honour's work and the legal team who were part of the case the newspaper succeeded. The New South Wales Supreme Court found that Mr Vasiljkovic had committed the war crimes

of torture and rape and had admitted to a massacre. The Australian government later extradited him to Croatia where he was found guilty of war crimes by the Croatian authorities and imprisoned.

32 Your Honour was also successful as a silk in gaining a permanent stay of proceedings against a notorious Holocaust denier. He was essentially trying to litigate the validity of the Holocaust via defamation. Despite having to read his writings to make out the case your Honour's sound dismantling of his odious and myopic defence was thorough, swift and successful. It added a legally interesting and satisfying case to your Honour's experience and one also in the public interest.

33 As a balance to such things your Honour is also an accomplished sailor as we have heard from the Attorney General who is known for your love of being out on the water. Some colleagues have recalled popping into your office and noticing a string of tabs open on your web browser tracking the water conditions in a range of obscure locations across the eastern seaboard.

34 Your assistant, Meredith, has become highly skilled in communicating your occasional moments of unavailability without disclosing that your present whereabouts was not in a Court or a meeting as they might presume but in fact, somewhere off the coast and thanks to an innovative viewer of virtual Court proceedings during the pandemic a candidate has already been suggested for the leading role in a cinematic betrayal of your Honour's life and it was not George Clooney. This potential depiction materialised when your Honour appeared in a defamation proceedings involving Google and former New South Wales Premier, John Barilaro regarding videos posted on the News Tube channel of comedian Jordan Shanks known as friendlyjordies.

35 Due to the profile of the parties the case attracted a high level of publicity. On some days hundreds of viewers were dialling in to watch the live stream. Your Honour had Covid at the time and was appearing virtually from your home office when an opportunistic viewer decided to take a screen shot of the Court whilst you were cross-examining Mr Barilaro. Not content with the faces of those

appearing in the case this person then swapped out the images in a shot with the faces of other famous people. The choice for your Honour was comedian Shawn Micallef. A suitable choice perhaps but not because your Honour is regarded as being mad as hell in any intrinsic way. In fact, quite the opposite.

36 One colleague who has briefed you many times over many years described your Honour as patient, kind and caring, someone who meaningfully considers both your colleagues and your clients, this colleague who has observed you giving a level of attention to clients that is not typically expected of silks of your Honour's seniority including taking them out for coffee after a hearing and making sure they are comfortable and completely across the proceedings.

37 "He truly cares about them as people" was this person's assessment of your Honour but just like Mr Micallef your Honour is also known for your wit and dry sense of humour. This same colleague recalled one example of your Honour's droll side witnessed at the bar table, perhaps an unlikely spot for comedy. Your Honour had spent a few very testy days in Court with a particular matter appearing against a colleague who was, to say the least, losing his cool and getting slightly testy with some of the witnesses.

38 This is the opposite of your Honour who is known for always keeping your cool. The day after one of these heightened courtroom exchanges your Honour arrived at the Court with a Snickers bar which you placed on the bar table almost like an aide memoir. The reason for this choice of confectionary was the Snickers ad quipped, "You're not you when you're hungry". The Snickers was never directly offered nor taken by your Honour's learned friend at the bar table but your colleagues still recall the snack with a smile.

39 Your Honour already booked in to appear in a series of complex matters this year, informed colleagues of your move to the bench in a lowkey manner by emailing them to say, "Sorry to make your life difficult". But while they are sad to lose a person that they see as incredibly important resource in taxation law, they are thrilled for you in what they recognise as a fantastic appointment for the people of New South Wales.

- 40 One colleague remarked upon your Honour's exceptional eye for detail, that you want to understand exactly how everything works and in his words, "dive into the nitty gritty". The speed in which you pick things up, even the most complex matters of tax law is extraordinary. Your Honour takes great pride in your work. Colleagues say they can spot a twinkle in your eye when you know you have landed a good result in Court and there is a tiny twinge of a stretch of a smile, a small tell of professional accomplishment.
- 41 But your Honour is also known as someone who cares deeply about life outside of work and prioritises your family. You are a great role model for barristers as you and Kate, Commissioner at ASIC, have balanced very busy and demanding roles with raising three wonderful children.
- 42 Your Honour, I have no doubt that your breadth of experience and ability to navigate even the most complex or tempestuous matters with ease will see you charter smooth course in your journey to the bench.
- 43 On behalf of the solicitors of New South Wales, we congratulate your Honour on this outstanding appointment and wish your fair winds and following seas. As the Court pleases.
- 44 **HMELNITSKY J:** Chief Justice, fellow judges, your excellency, Mr Attorney, distinguished guests, colleagues, friends and family, I also acknowledge the Gadigal people, the traditional custodians of the land on which we meet and pay my respects to their elders, past, present and emerging.
- 45 Mr Attorney and Mr McGrath, thank you for your very generous remarks. As someone who has spent most of the last 23 years trying to flatter judges for a living, I can say you are both complete naturals. And Mr Attorney, as to any passing resemblance to George Clooney, I am afraid it's long since gone. He's lost it.
- 46 Like so many before me, I arrive at this Court having had a series of jobs that I have loved, doing work that I have found both challenging and rewarding and

having worked with countless individuals who have been almost without exception, smart and engaging. To reach such a point in one's career and to be able to make that claim is, I think, a remarkable thing. It sounds like a boast but it says for more about the legal profession generally than it says about me.

47 I am conscious of the privileges I have enjoyed as a member of this profession and I am grateful for the opportunities it has given me and continues to provide.

48 As you have heard, my first job after law school was working with Justice Paul Munro, Senior Deputy President of the Australian Industrial Relations Commission. But I also had odd jobs in the law during my law school years and one of those was as an assistant to a young Geoffrey Watson, whom many of you would recognise from the television. Working with Geoffrey was, as I am sure you can all imagine, endless good fun, I occasionally followed him to Court to see what I could learn.

49 I was unfortunately not there the day that the witness he was cross-examining jumped out of the witness box, leapt across the bar table, grabbed him by the neck and tried to strangle him. But even so, working with Jeffrey did lead me to conclude that if I was going to be a lawyer, then the bar was clearly where the action would be.

50 Like many aspiring litigators, I took a job as an associate largely because it seemed to be so much fun. In my case, I worked at the Australian Industrial Relations Commission with Justice Munro. I had loved industrial relations and employment law at law school. We travelled constantly, mostly to Melbourne to deal with teachers trying to escape the state industrial system at that time. I loved the law and I love the politics of it. Justice Munro was a skilled hand at all of it and I am enormously grateful for his patience and generosity towards me at what was, in retrospect, a turbulent time for the commission as a whole. I am honoured by his attendance here today.

51 But industrial relations was not really for me. In 1994, Rosenblum & Partners was known, at least amongst my fellow graduates, for two things:

- (a) It was a specialist tax firm.
- (b) It had published a dress code for junior solicitors.

The combination of those things gave it the reputation of being the epicentre of reactionary conservatism. I think my friends thought I was entering the belly of the beast, but that reputation could not have been further from the reality. It was just about the most diverse and tolerant law firm imaginable.

- 52 I had the very good fortune to be employed in the litigation group working for Kenneth Raphael. Ken was smart, decisive and efficient and he therefore had an excellent general commercial practice. I am delighted that he is able to be here today. Ken's only failing was that he was very trusting of me. From my first days at Rosenblums, I had, or at least it felt like I had, the day to day carriage of matters in this Court, the Federal Court, the District Court and the Local Court. I did countless mentions and directions hearings, conducted case management conferences, argued the occasional interlocutory application, instructed counsel in trials and appeals and even did the occasional plea in the Local Court. I could not have wished for a better introduction to litigation as a solicitor. It was in retrospect, excellent preparation for life at the bar.
- 53 My decision to go to the bar was really a product of circumstance. When I returned from New York in 2001 I could not imagine going back to a law firm that was not Rosenblums, so I decided to go the bar. I had briefed several members of the Sixth Floor, especially Neil Williams, and so it seemed like a sensible place to start and as it turned out, it was the only home I ever had a barrister.
- 54 I have many people to acknowledge and thank for their friendships, support and encouragement over my years at the bar. I had outstanding tutors in Chief Justice Bell and Neil Williams, both of whom were generous with their time and their knowledge, each in their own way. The Sixth Floor is in fact the best chambers, at least according to a strong plurality in the Court of Appeal.

- 55 In my first several years of practice on the Sixth Floor, I worked with some of the best tax, commercial, defamation and public law silks in the country, all of them members of my own floor. I made deep and lasting friendships and I have greatly valued the floor's ongoing policy of securing affordable accommodation for young practitioners in the annex. My clerk for the whole time as a silk has been Lisa Stewart who has managed chambers and staff with great skill and my personal assistant for the past 17 years has been Meredith Burns, who has not only managed my life but done so with endless good humour. I am very grateful to them both.
- 56 I will miss the bar especially the very excellent juniors with whom I have worked, many of whom have become good friends. The demands on junior counsel can be enormous and I wish to acknowledge and thank them all for their patience and hard work, most of it devoted to making sure I did not look stupid.
- 57 In the past ten years or so, I have had an increasingly interstate practice. Working with talented solicitors and junior counsel in other jurisdictions, most especially Melbourne, has been one of the real pleasures of my time at the bar. I will miss my interstate colleagues and I am delighted to see several of them here today.
- 58 I wish to acknowledge and thank my family. My mother, as you have heard, suffered the trauma of losing her husband, my father, at a time that really could not have been worse. When he died suddenly and unexpectedly in 1971, my mother was in her 20s, had two toddlers and was six months pregnant with my little sister, Lucy. It was by any measure, a catastrophe. But it is a great testament to my mother's strength of character and to the constancy which she and later Peter, my stepfather, brought to all our lives, that I at least grew up thinking that despite everything that happened, things were actually pretty normal. Had it been otherwise, I am quite sure I would not be sitting here today.
- 59 I also wish to acknowledge and thank my wife Kate. I do not really know how anyone can live with a barrister, you can be a rather a moody bunch. But Kate has been nothing but loving and supportive. No less importantly, she has

demonstrated throughout her own career the significant personal and professional rewards that can come from a dedication to public service. She is a role model for a generation of, dare I say it, younger public servants around the country who have had the benefit of working with her at ASIC and over the last several years in particular, at the Commonwealth Treasury.

60 Our whole family can attest to Kate's enthusiasm for regulatory policy. I fondly recall her attempts to explain chapter six of the *Corporations Act* and the *Eggleston Principles* to the children over dinner when they were all still in primary school. I am enormously proud of our children, Anna, Sasha and Niko and not just for their grasp of regulatory policy. They have brought me nothing but joy.

61 This appointment comes at something of an inflection point for all of us as a family. In the last few months, each of us has embarked on a new and different professional or academic path. There has never been a more exciting time to be an Ohnitsky. But what will remain constant for me as much as for Kate is that our children will continue to be the centre of our world.

62 Thank you to the judges and staff of the Court who have made me feel so welcome in recent weeks and days. I have been extremely encouraged by the warmth of the reception that I have received.

63 The community places a huge amount of trust in the judges of this Court. I will do my very best to ensure that that trust is justified and to meet the intimidatingly high standards set by my new colleagues. I thank you all again for your attendance.

64 **BELL CJ:** The Court will now adjourn.