

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

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

**Monday 3 June 2013**

**SWEARING IN CEREMONY OF  
THE HONOURABLE JUSTICE MARK JAMES LEEMING SC  
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES  
AND AS A JUDGE OF APPEAL**

1 **LEEMING 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.

(Commissions read)

(Oaths of office taken)

2 **BATHURST CJ:** Justice Leeming, congratulations and welcome. On behalf of all the members of the Court, we are delighted that you have joined us. We hope you have a long and fulfilling career on the Bench.

3 **THE HONOURABLE GREG SMITH SC MP ATTORNEY GENERAL OF NEW SOUTH WALES:** Your Honour, on behalf of the State of New South Wales and New South Wales Bar, it is my great pleasure to congratulate you on your appointment to the Bench of the Supreme Court and your appointment as a Judge of Appeal.

4 I also extend my congratulations to your wife, Anne, and your son, James.

- 5 Also here today to enjoy what must be a proud moment for the entire family, I understand, are your parents, Gay and Jim, sister Michele and brother Andrew, their respective partners and your sister-in-law, Margaret.
- 6 Your colleagues at 8th Selborne described you as, “a model of what the public of New South Wales might want and hope for in a judge”. This is high praise indeed but it is not difficult to see how they might have formed this view. Your Honour has contributed much to the law in a stellar legal career that already spans twenty years.
- 7 After graduating from Sydney University with first class honours in law in 1992, you began your career as an associate, first with the Honourable William Gummow J and then with the Honourable Sir Anthony Mason. You were called to the Bar in 1995 and took up residence at 8th Selborne. You have remained there ever since taking silk in 2006.
- 8 One would think that the demands placed on a newly admitted barrister would not leave you with much time for other interests but I think it is safe to say that you have thrived in the new environment. Your early years at the Bar saw you produce a number of scholarly articles on wide ranging topics, ranging from constitutional law, competition law and the appellate system.
- 9 You were also an updated author for a range of journals and a reporter for the Federal Court Reports and Federal Law Reports until 1997.
- 10 Somehow you also found time to complete a PhD in pure mathematics. Pure mathematics is of course, the branch of mathematics driven by the study of abstract concepts, particularly those arising from relativity and quantum mechanics. I know - I googled it - and like your academic interests, Your Honour’s interest in the law is also wide ranging.

- 11 Your career at 8th Selborne has seen you practise in constitutional and administrative law, commercial and consumer law, equity and intellectual property.
- 12 You have appeared in a number of high profile cases, including the landmark High Court case of *Pape v Commissioner of Taxation* which concerned the validity of the \$900 bonus paid under the *Tax Bonus for Working Australians Act*. I am sure a number of Australians were pleased with the outcome of that case.
- 13 Your colleagues speak highly of your efficiency and diligence when preparing for court. They also reflect on your immense capacity for work and your uncanny ability to cite authorities off the top of your head. These traits will serve you well on the Bench. They are also traits that give fair warning to any practitioner required to appear before your court - be on time and be prepared.
- 14 You are also described as unfailingly polite and respectful, patient and unflappable. Again, these are skills that make for a fine judge.
- 15 Your Honour has also demonstrated a passion for sharing your knowledge of the law with others. Your early interest in writing case notes, book reviews and publications has continued apace. You now have a wealth of legal publications to your name.
- 16 While you may not quite match the authoring efforts of your wife, the famous Professor Anne Twomey, many in the legal profession will have regularly turned to your edition of *Jacob's Law on Trusts* for assistance which you co-authored with Dyson Heydon J. You also co-authored another leading book on equity that many here today might know well, Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies*.
- 17 You have been a member of the Editorial Board of the *Journal of Equity* since 2005 and last year joined the Editorial Board of the *Australian Bar*

*Review.* You are also currently a member of the Council of Law Reporting, and you were appointed a Director of Federation Press in 2011.

- 18 As I said, it is not difficult to see why you have gained a reputation for industriousness. Your passion for the law also extends into the realm of teaching. You have held the Professor of Challis Lecturer in Equity at the University of Sydney since 2004, a position that you have clearly enjoyed. In fact, you have been quoted as saying that you have learned more than your students from the experience. Given that you have literally written the textbooks your students used, I am quite sure they have learned a thing or two as well.
- 19 What this shows is that despite your learning and experience, your Honour is at heart a humble and down-to-earth person. Asked why you enjoy taking a break from court work to teach, your Honour answered that there is nothing worse than being in court all day, then talking about court, and then preparing for court the following day.
- 20 You have a number of interests outside the law. I understand that you thoroughly enjoy riding your bike, even if you end up riding it to work and parking it in chambers. You are also a fan of classical music and regularly attend concerts with your wife, Anne. I understand that you may even learn to play the cello although none of your colleagues would comment on your proficiency. We will audition you for next year's St Patrick's Day, if you like.
- 21 However, one thing your colleagues are not shy about is revealing that everyone at 8th Selborne, from the most junior of staff to your fellow Silks, will be deeply sorry to see you go. They describe you as an excellent companion, cheerful, pleasant and a lot of fun to have around. They are delighted to see you receive this great honour. I am not surprised. I am confident you will make a marvellous addition to the Supreme Court and so does the former eminent Bill Priestley, who came up in the lift with me.

- 22 Your vast knowledge, your desire to contribute to the development of the law, your even temper and your reputation for integrity, are the hallmarks of a fine judge. You are indeed a model of what the people of New South Wales might hope for in a judge. The New South Wales Bar and the New South Wales Government is convinced your Honour will serve the State of New South Wales well.
- 23 I wish you all the best for the next stage of your career and I wish your family all the best for the future.
- 24 **MR JOHN DOBSON PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** I begin by expressing my immense pleasure in welcoming a fellow Shire resident to the Supreme Court Bench. I might also add that I stand in total awe of anyone who could produce a doctoral thesis entitled, “Computing left Kan extensions using generalizations of the Todd-Coxeter procedure”, and I struggle with pronouncing it - but enough about me.
- 25 Today, I represent 26,000 lawyers of New South Wales in congratulating your Honour on your well earned appointment to the judiciary and in wishing you every success on the Court of Appeal Bench.
- 26 I believe you are one of the youngest to go straight to the Court of Appeal, if not the youngest. While this may present a learning curve, perhaps the bigger impediment to finding your feet, will be adapting to a commercial word processing product acceptable to the Court. I understand your Honour’s propensity for freeware has resulted in a total ban being imposed on your endeavours to amend submissions electronically for fear that you may corrupt the files. Being a late convert to the benefits of a mobile phone, one trusts your Honour will embrace this new technology with similar enthusiasm.
- 27 The eldest of three children, your Honour grew up in Woollooware and attended Sydney Grammar School where you showed considerable academic achievement and musical ability. Described as more than a

model student, your Honour won several prizes in your final year, including ones for oratory, Greek and chemistry. You were also equal dux of the year, a prefect and senior editor of the school magazine. A member of the school choir, your Honour joined Old Sydneians choir this year for a farewell concert in honour of the retirement of your former music teacher, Tod Piekos.

- 28 Your early mentors, former High Court Chief Justice, Sir Anthony Mason and High Court Justice, Bill Gummow, were also a product of Sydney Grammar where I understand your son, James, now attends. Sir Anthony was also one of the lecturers at Sydney University and incidentally, also taught Bill Gummow.
- 29 As already noted, your Honour excelled in your tertiary studies with first class honours in Arts and Law and then a PhD in pure mathematics. Hence my earlier reference to the doctoral thesis. While the latter endeavour may appear to have little bearing on a courtroom, I am told that actuaries facing our cross-examination find it particularly daunting when it seems you know more than they do. Such was your fame in your early days at the Bar, that you would often find yourself given the task of completing the maths homework for the children of your colleagues but perhaps it was arithmetic and not maths, as you advised a colleague recently, when he referred to someone's inability to add up properly, as having poor maths skills.
- 30 In 1995, your Honour went to the Bar and joined the 8th floor of Selborne Chambers, Bill Gummow's former chambers, where you have become a much loved and respected member who will be greatly missed. Floor members describe you as an absolute genius, one of nature's true gentlemen, possessing a friendly, unassuming, easygoing manner who will go out of his way to give juniors a go at cases. This reputation is backed by your appointment to Silk in 2006 and Chambers and Partners ranking where you were described as a real guru in equity and trust areas, as well as being skilled in administrative, competition and IP issues.

- 31 A man of simple tastes, your overseas travel requires no more than hand luggage. Your healthy lifestyle sees you indulge in no more than an occasional half piece of dark chocolate.
- 32 Your Honour's approach in the courtroom has been likened to Peter Hely, former Federal Court judge, once described as the 'intellectual powerhouse' of the Bar and Federal Court. Bright, able with a very good analytical brain, your Honour is described as a great advocate in court without stooping to the theatric mutterings of some, and whose very personable way makes your presentations almost a discussion with the Bench, as opposed to a submission. Your Honour is reputed to be succinct, utterly honest and fair in both your written advice and submissions, with a breadth of experience in equity, administrative, commercial and constitutional law, across a range of high profile cases. These include the landmark constitutional law case *Pape v Commissioner of Taxation*, *Roadshow Films Pty Limited v iiNet*, the Independent Commission Against Corruption's current investigations into mining exploration licences, and the case that has been active for the life of your career at the Bar in which the High Court recently reserved its decision, *The State of New South Wales v Kable*.
- 33 During your time as an associate to Sir Anthony Mason, your Honour met your future wife, Anne Twomey, who was then a senior research officer at the High Court. Admitted to practice as a solicitor, she is currently Professor of Constitutional Law at Sydney University and widely published in the area of constitutional law and public law generally.
- 34 Your Honour's own published works are far too numerous to name but the most widely read works would include, *Resolving Conflicts of Law*, your co-authorship of *Jacob's Law of Trusts*, of Meagher, Gummow and Lehane's *Equity, Doctrines and Remedies*, and *Cases and Materials on Equity and Trusts*. As of November last year, your Honour's work, *Authority to Decide - the Law of Jurisdiction*, was published.

- 35 Since 1995, your Honour has gone from a part-time lecturer to Challis Lecturer in Equity at Sydney University, where students continue to benefit from the enthusiasm and love of learning you bring to the classroom and the additional care, mentoring and career support you provide. Your Honour believes your understanding of law is the richer for teaching undergraduates as much as your academic life and courtroom experience. 'I am still learning from equity', you are quoted as saying, 'and equity is the vehicle for my teaching -the person who learns most in that room is me'.
- 36 As a devoted family man, author of countless texts, university lecturer, and a busy commercial practice, it is obvious that we breed them tough in The Shire.
- 37 Living in God's country, your Honour can attest to the fact that the short-lived TV series, 'The Shire', was also short on drama and reality. The TV series, 'Crownies', on the other hand, provided some entertainment if only by virtue of the starring role of your young nephew in one of the episodes.
- 38 While your preference for riding a bike may not be in keeping with star quality, or provide competition for some of the other garish modes of transport favoured by some, there is no doubt that this Court is indeed fortunate to have your skills and learning on the Bench.
- 39 The solicitors of New South Wales wish you well in your judicial role. As the Court pleases.
- 40 **LEEMING JA:** Chief Justice, Mr Attorney, Mr Solicitor, Judges and former Judges of this and other courts, colleagues, ladies and gentlemen, thank you all for the honour you do to the Court and to me by your presence here today. I am grateful to the kind words of the Attorney and Mr Solicitor. There is some resemblance between what both of you have said and the neophyte judge you have been describing, but you have both focussed on



the truth and nothing but the truth and have been less than scrupulous when it came to telling the whole truth. For that I am very grateful.

41 As for the truth and I say this with deference, Mr Attorney, Google is not always reliable. Mr Solicitor, there is a person present in this Court today who was appointed younger to this Court, and I had the pleasure of working with him in 1993 and 1994, and with the express permission of the extremely helpful court staff, an open source word processing program was installed on the computers on the weekend, on which this speech was written.

42 Mr Attorney, your office and its federal counterpart have had a formative influence on me. I have often appeared for the Attorney General, more recently on my feet but for many years, being led by three State Solicitors-General, Michael Sexton, who was the first to congratulate me last Wednesday, Leslie Katz, and once by Keith Mason, in my first year at the Bar, as well as by their Commonwealth counterparts, Gavan Griffith and David Bennett. I was very fortunate to learn from each of them something about appellate advocacy and appellate courts. Some of those occasions saw Australian governments aligned against a private party but just as often they were implacably opposed to each other. It is a remarkable thing about our Federation that questions of power are ultimately determined by its constituent organs advancing arguments which are resolved by courts according to law.

43 To you, Mr Solicitor, I have an apology to make. It is fair to say that I did not give the solicitors' branch of the profession much of a chance. Indeed, I think I was one of the last two people admitted as barristers to this Court in 1993, before everyone became legal practitioners, but I did spend a couple of years working part-time for the firms then known as Mallesons Stephen Jacques and Freehill Hollingdale and Page, and I had the great good fortune to work with two of the finest solicitors at those firms, Professor John Stumbles, as he now is, and the late Kim Santow, and I am tremendously pleased that John, and Lee, Simon and Edward are here

today. Eighteen years at the Bar have made me appreciate how vital is the role of solicitor. I have learned immensely both as to the law and as to facts and also as to human nature, from solicitors who were some of the ablest lawyers I have met during the course of litigation, particularly long running litigation, by which I mean any trial that lasts a fortnight or more. I do not propose to embarrass any of them by naming them. Many are present here today. They know who they are.

44 To all of you, whose presence today honours this Court as well as me, I wish to say three things: something about the Court and what it means to me, something about what led me to be here and something about debts that I owe. There is an overlap between all those things and it is especially hard to separate the debts I owe from what led me to be here, but I find it impossible to sit next to the Chief Justice and frame my language without referring to three things.

45 This Court was created 190 years ago this October by an exercise of executive power by the King pursuant to an 1823 *Imperial Act*. There followed three imperial laws, in 1828, 1855 and 1900, all of which were substantially drafted in Sydney although enacted in Westminster. The *Australian Courts Act* 1828 was largely drafted by Sir Francis Forbes, the first Chief Justice of this Court, who had been involved in the 1823 Act as well. The second was the 1855 New South Wales Constitution, granting responsible government. The third was the 1900 Commonwealth Constitution, largely drafted on a working pleasure cruise on the Hawkesbury River, whose new legal order recognised this Court by providing for the investment of federal jurisdiction and by creating new rights of appeal. Since then, this Court exercises federal jurisdiction daily. More recently, it was given jurisdiction by all the other States. It also administers a late twentieth century creation, the common law of Australia, and it has an important, entrenched supervisory jurisdiction over exercises of public power.

- 46 If you think about it, that short history reflects the growth of this country from colony to nation in an increasingly entwined national legal environment. It is also a history of legal continuity notwithstanding extraordinary economic, political and legal change. That is a story of success and for my part, I see no reason to be self-effacing about it. This is a very fine court indeed. It is old, but age by itself means little. Its first Chief Justice arrived having practised in Bermuda and having sat in Newfoundland before even older courts. Its reputation is partly a product of legal continuity but mostly because generations of lawyers, the court's judges and other officers, and the practitioners appearing before them have worked, independently, transparently and fairly, and within a continuous legal tradition, to solve particular disputes that litigants have brought to court amidst a constantly changing legal and political and economic environment.
- 47 The reason for this excursion is twofold. First, to observe that in this not so young country there are things of which we should be proud. This Court is one of them. Secondly, to say that I will do my best not to lessen its reputation.
- 48 Next, the debts and what has brought me to here. I must at the outset, express my love and gratitude to my family - to my parents, Gay and Jim, who supported and encouraged their oldest son, to my sister, Michele, and my brother, Andrew, who as police officers, have also sworn to execute the law, and most of all to my wife, Anne, and our son, James, whose tolerance, indulgence and commonsense have helped me time and time again.
- 49 I am a product of an education system that fostered talent, in local and selective public schools, in a private high school, which was and is essentially free from government and ecclesiastical control, and in a public university at which I attended an Anglican college. Throughout that process, I had teachers who made it clear, mostly without saying so expressly, that the most important things were transcendent - academic

things like mathematics, the classics and literature, and moral things like candour and straightforwardness. I was taught at Sutherland Primary School, where my mother and grandmother had attended, by Alan Duncan, who encouraged a breadth of interests from which I have benefited ever since. Then I was a beneficiary of the civilising influence upon Sydney Grammar School of Alastair Mackerras, twelve years into his tenure. One of my most powerful memories occurred in first form at the end of first term, when a boys' choir sang St Matthew's Passion under Peter Seymour in the Town Hall. For a twelve year old boy from the Shire, who had never been exposed to classical music, to be immersed in that supreme achievement was overwhelming. I have a message for James Leeming, who is now a few months older than I was then and has started to sing in the same choir. Choir can be cool - although I certainly would not have said so to my friends at the time.

- 50 At Law School, I had the enormous good fortune to be taught by Austin, Emmett, Gleeson, Gummow, Lehane and Meagher JJ, reflecting Sydney University's unique links with the practising branch of the profession. I cannot think of a court elsewhere in the world where the most junior Judge of Appeal was taught Insolvency and Roman Law by its second and third most recent recruits, or a university elsewhere in the world where that or anything like it could be true. One of Sydney University's strengths, throughout the tenures of many Deans, has been fostering that relationship between the academic and practising branches of the profession, ensuring that it is symbiotic rather than polarising. It is almost always better to do what you think is right, rather than merely to talk about it, and so far as I can see, the best way to acknowledge and maintain those links is to continue to teach there, and as has been noted, the person who learns most in those undergraduate Equity classes, in my view, is me. That has been true for the last eighteen years. I do not see it changing any time soon and that is so even though the principles remain fairly constant. There is one change though, the students - they are becoming younger, or so it seems.

51 It is also true that I took up postgraduate mathematical studies while at Law School. James Crawford had issued a decree that students must not work in law firms because they should devote all their time to their studies. Since then I have learnt much about what is very simplistically called literal and purposive approaches to construction, but rightly or wrongly I took the view that the decree did not in its terms preclude full-time postgraduate studies in another faculty. That was literalism at its highest. I think it is unlikely that Dean Crawford would have agreed with the construction that I gave to his words, but I am sure I was the better for doing what I did, one aspect of which was, cycling from Phillip Street at 9.45 after Equity, to attend a 10am seminar in the Carslaw building. Today it would be easier to do that. I am very grateful to Professor Robert Walters who took on his charge knowing it was unlikely there would be much long term mathematical collaboration. I now have some good news. I am not going to try to explain Godel's theorem or category theory, or say anything about mathematics, except that I think that there are few things one can improve upon as a preparation for the practice of law than university studies in pure mathematics.

52 As you have heard, I have had the great good fortune to work in this building before, as an associate to Gummow J in the Federal Court, and to Mason CJ. I am very pleased that both have been able to attend today. Both taught through example. Both were also great fun. Both of them taught me that it was not enough merely to be quick on the uptake but also that most things worth doing required hard work. It is no great surprise to me, nor should it be to you, that one taught the other at the University of Sydney. Through Gummow J, I was invited to assist in a new addition of that book, known as Meagher, Gummow and Lehane, and of which I still stand in admiration. To write a large, new and formidably learned book where there was none before, and while in professional practice, truly is a remarkable achievement. Funnily enough, Chris Holt, who is here today, and for the last twenty-five years has been the publisher of the Federation Press, was involved in the first edition of MGL. It seems not to be very well known but he tells me that Roddy Meagher used to ring weekly, after

the book had been published, with one question, asked in an anxious voice, "How are the sales going?". Chris always said, "Very pleasing". I am very pleased to have a continuing professional relationship with him and the Federation Press.

- 53 I read with Stephen Gageler, Noel Hutley and Ian Jackman. None ever complained that he had a young reader with no practical experience of litigation, although each would have been well entitled to do so. Each equipped me with the skills needed to run a practice. In particular, Ian Jackman went out of his way to put me in the path of solicitors bearing briefs, for which I shall be always grateful.
- 54 My entire professional life has been, as you have heard, on the 8th Floor of Selborne Chambers. Until last Thursday, the most exciting moves I had ever made were from the reader's room, which was really a small broom cupboard, now demolished, opposite Dyson Heydon's room, to part of Roddy Meagher's room facing Phillip Street, and then across the corridor to a room looking into the light-well. For the first time in two decades, I arrived at work this morning, got out of the lifts and turned left - I would not read too much into that. Now eight in Cantonese is a very lucky number and the 8th Floor brand has proved to be so for me. The nature of our profession is that our work colleagues become our friends, and that is where many of mine are.
- 55 The political structure of the 8th Floor in 1995 when I arrived was a benevolent dictatorship. The dictator was Dyson Heydon, working with the floor's original clerk, Bill McMahon, who was capably succeeded by Di Strathdee and Simon Walker. It was an extraordinary thing, but Dyson's door truly was always open. I remember asking him, in a case where it was plain that my client, a public servant, had badly misunderstood the particular law she had relied on but had come to the right decision, which was defensible, whether there were some decisions that might assist. He said, "Mahla Pearlman, Sir Nigel, something by Dixon - give me a minute", and promptly returned to my room with the

whole line of authority. There were no computers then. It was and is a privilege working with him as a barrister and as an author and it is an honour to have him rejoin the floor and return to practice. It is mostly his stories and those of Roddy Meagher, who would join him in the late 1990's in the afternoon after court, most days of the week, which told me something of the cultural inheritance I had stumbled upon, of the old days of this Court before Michael Kirby's "remorseless courteousness", as Bill Priestley has put it to me, and of the ghosts whom I never knew, especially Harold Glass and Jack Kenny, which are a very important aspect of our profession, not least on occasions like this.

56 I wish to mention Smart J, before whom I appeared in various matters, including one heavy trial against McClintock. One could not hope to appear before a judge who was more courteous or more obviously fair-minded and I am glad that I had the opportunity to do so.

57 Earlier this year, Allsop CJ said of this Court's work that it was unremitting and potentially exhausting but fascinating, and I have no reason to doubt him. Hard work I believe I can do and I have always been able to find legal problems and legal challenges fascinating. Ultimately, I have never been able to say no to Bathurst CJ and I am most deeply grateful for the honour and the trust that he, and the Attorney, and all of you attending today, have given to me.

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