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THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

KIRBY P

TUESDAY 7 DECEMBER 1993

ANNOUNCEMENT OF THE APPOINTMENT OF SENIOR COUNSEL

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MICHAEL JOHN SWEENEY

MR SWEENEY: May it please the Court. I have the honour to announce that I have been appointed Senior Counsel for the State of New South Wales taking rank and precedence next after my learned friend Mr Richard John Stanley.

KIRBY P: Mr Sweeney, your life and mine have been intertwined over, I suppose, more than thirty years. I remember the very first time that you, a young solicitor, took me, a young barrister, reluctantly, into the Industrial Commission. That fine judge, Sheppard J was then sitting.

I was reluctant because I had never been to that strange place. But when I entered it, with you, I found how fascinating, interesting and important its work was. That work took me, in due course, into contact with your father who previously wore the silken robe which you now wear. It took you, in due course, to a period of judicial service.

I always resented people assuming that my father was Sir Richard Kirby, which he was not. Therefore, I am always cautious about speaking about people's fathers. However, your father was a very special man. He was, for a long time, a leader of the Bar. He was a man of tremendous integrity and great intelligence. He became a fine judge.

It was your father who, nineteen years ago exactly, asked me whether I would "entertain" - the word he used - an approach to be appointed to the Bench. So many years ago, I said I would. Here I still am. I, therefore, feel a special link with the Sweeney family and with you.

I congratulate you on this new step in your life. I hope we will see a lot of you in this Court. Mr Sweeney, do you move?

GEOFFREY ALAN FLICK

DR FLICK: I have the honour to announce my appointment as Senior Counsel in the State of New South Wales taking rank and precedence next after my learned friend Michael John Sweeney.

KIRBY P: Dr Flick, your life and mine have also been interconnected over the years. I remember so vividly that it only seems yesterday the time that we were battling together in the Administrative Review Council to design what is now the New Administrative Law of the Commonwealth. They were really heady days: working with wonderful people, led by Sir Gerard Brennan, performing labours of very great importance, which are still trail blazing throughout the common law world. You took a very important part in that work, as research director. We have also seen you often at this table. Not as often as I would like. I hope that, in your new rôle, we will see a lot of you in the Court of Appeal.

My only complaint about you, in fact, is that reading your book on *Natural Justice* led me into error in *Osmond v The Public Service Board of New South Wales* [1984] 3 NSWLR 477 (CA). It was an error which was quickly corrected in the High Court of Australia. See *ibid*, (1986) 159 CLR 656. I still cherish the hope that I will

live to see the day when my error is recognised as truth and upheld. Dutifully in the meantime, I will follow the High Court's decision. I look forward to your continuing your work both in the Court and in influential legal writing of the kind I have mentioned.

Some judges, mostly undoctored, do not call counsel doctor, whatever their degree. But if they have been admitted a doctor by a university of repute, so far as I am concerned, they will be called "doctor" by me. So I congratulate you on your appointment and I wish you well. Dr Flick, do you move?

ANDREW STEWART MORRISON

DR MORRISON: May it please the Court, I have the honour to announce that I have been appointed Senior Counsel for the State of New South Wales taking rank and precedence next after my learned friend Geoffrey Alan Flick.

KIRBY P: Dr Morrison, we have had a great deal of assistance from you in this room. You are an outstanding and painstaking advocate. My only complaint today is you are not making your bows today in your kilt. The wearing of the kilt would, in my view, be entirely appropriate to such a formal occasion.

It is said of you that you are the only person who, in an earlier life, saw more of Africa than Einfeld J has seen of it in recent times. You are such a skilful advocate that in your last encounter with the Court of Appeal you drove Meagher JA and me to a joint concurring judgment and Mahoney JA into a dissent. I think that concurring judgments with Meagher JA are to be encouraged. For that reason alone (but many more as well) I hope we will see a great deal of you in the Court. Dr Morrison, do you move?

CLIVE STEIRN

MR STEIRN: I have the honour to announce I have been appointed Senior Counsel for the State of New South Wales taking rank and precedence next after my learned friend Geoffrey Stephen Hilton.

KIRBY P: You confirmed this morning, on my inquiry, that not only did you come from a beginning in the law in the Police Service, which is a badge of honour, but that you are one of five Senior Counsel of this State who commenced their service in the Police Force.

I have had the great pleasure of hearing you as an advocate in the Court of Criminal Appeal. There was an unhappy time when the Judges of Appeal did not sit in the Court of Criminal Appeal. Fortunately, that is now behind us, under the leadership of Gleeson CJ.

The criminal law is, I believe, the most important branch of the law. Most members of the Bar would probably not agree with that opinion. However, it is what citizens think because they recognise that criminal law is the crucible in which our liberties are, ultimately, determined.

I, therefore, appreciate the assistance which you, and others like you, give to the Court of Criminal Appeal. It is very important work. You know it. And I know it. And it is a message we should try to pass on to other members of the legal profession.

I understand that you are an expert, like certain others, in very long cases and inquiries. It is even said that you have a sort of permanent retainer before Slattery J. I hope, if that is so, that will not prevent your appearing from time to time in the Court of Appeal and that we will see a lot of you in this courtroom and in the Court of Criminal Appeal.

- I congratulate you on this new move in your career. Mr Steirn, do you move?

JOHN CHARLES KELLY

MR KELLY: I have the honour to announce that I have been appointed Senior Counsel for the State of New South Wales taking rank and precedence next after my learned friend Clive Steirn.

KIRBY P: Mr Kelly, because of the nature of your practice we also see a lot of you in the Court of Appeal. I remember a recent case in which you took us into

every nook and cranny and by-way of the law of bailment. You did so with great assurance. We look forward to a lot of help from you in the future.

McHugh JA, when a Judge of Appeal, always spoke most warmly of you. He is not a man to bestow his compliments lightly. You told me this morning that you are presently appearing before Hodgson J in a case which will last nine months. I pray that you will get that case right at trial so that we will not one day sit in this Court with nine months of appeal books to pour over. However, if it so transpires we will look forward to it, I suppose, and do our duty.

I congratulate you on this new move and wish you well in the future. Mr Kelly, do you move?

PETER WILLIAM TAYLOR

MR TAYLOR: May it please the Court. I have the honour to announce that I have been appointed Senior Counsel for the State of New South Wales taking rank and precedence next after my learned friend John Charles Kelly.

KIRBY P: Mr Taylor, you were there, I think shortly before Dr Flick came to the Administrative Review Council. But in your case, it was in the guise of Legal Associate to Brennan J. He is surely one of the great judges of our country: a man of such tremendous depth of learning and depth of soul.

He is a person with whom I worked in the Law Reform Commission. It was also in that mode, and in the Administrative Review Council, that I met you. We both are enriched, as lawyers and as human beings, by our association with Sir Gerard Brennan. You told me earlier that you are wearing his Bar jacket. I cannot think of a prouder jacket for you to wear in this Court and in the life ahead of you.

I hope we see a lot of you here. We are with you, in our minds, every day of our lives on the bench because of your important work on the *Supreme Court Practice*. I hope that you will continue your association with that vital text.

I congratulate you on this new step in your career. Mr Taylor, do you move?

BRET WILLIAM WALKER

MR WALKER: May it please the Court I have the honour to announce that I have been appointed Senior Counsel for the State of New South Wales taking rank and precedence next after my learned friend Peter William Taylor.

KIRBY P: Mr Walker, again by reason of the nature of your practice, you are very often here. I hope that in this new rôle we will see even more of you. Like myself, you originated from Concord. No doubt, like myself when you heard from the *Prayer Book* every Sunday that the Lord was the "author of peace and lover of Concord" you may have thought that the Lord had a special place of you. Almost certainly, He does.

It is unkindly said of you that you were a permanent junior to the Chief Judge of the Commercial Division. Upon his retirement it was fully expected that you would inherit all his frequent flier points. I hope that, if that happens, it will not be to the cost of your appearances in the Court of Appeal.

I congratulate you on this new stage in your distinguished career. Mr Walker, do you move?

JOHN NEIL GALLAGHER

MR GALLAGHER: May it please the Court, I have the honour to announce that I have been appointed Senior Counsel for the State of New South Wales taking rank and precedence next after my learned friend Brett William Walker.

KIRBY P: Mr Gallagher, you, like Mr Sweeney, have a great expertise in Industrial Law. From time to time we see that area of the law in this Court. When I was appointed to the Arbitration Commission in 1974 a lot of people, including the now McHugh J, said, "Why would you ever want to go into that area?" Yet in terms of human interest, and let it be said, in terms of impact on our society and sheer power, the industrial field is one of the areas of the law of greatest importance in our community. This is so, given the way in which our *Constitution* is worded, our laws

are drafted and our society has developed. It is an area of great significance. It is also one where a lot of fine lawyers work.

When at the Bar, I sometimes thought that the intricacies of legal argument in industrial cases were matched only by the Chancery Division in England in the 19th century, as described by Dickens. I wish you well in your endeavours which will doubtless sometimes be along this line. I hear there is to be a new Industrial Court in the Federal sphere with, no doubt, more work to keep you busy. If that be so I congratulate you. But I hope that it will not deprive us of your assistance in the Court of Appeal. Mr Gallagher, do you move?

STEVEN RARES

MR RARES: May it please the Court, I have the honour to announce that I have been appointed Senior Counsel for the State of New South Wales taking rank and precedence next after my learned friend John Neil Gallagher.

KIRBY P: Mr Rares, you are very often in this Court before us. You name was not blessed at that time when you invented, almost single-handed it is alleged, the abuse of process jurisdiction of the Court. It swept through the District Court very rapidly to this Court like a summer storm. We had to set aside whole listings and sittings in order to deal with what we called at the time the "Rares List". It is one which Parliament, in its wisdom, soon took away from us. But it was a mark of your originality of research and mind that the jurisdiction was revived. It illustrated your insight into the fact that so much of our legal writing and principle depends upon legal history.

McHugh JA in this Court was also a great advocate of the importance of legal history for legal principle. Before him, Windeyer J, of the High Court, taught the same lesson. A lot of people nowadays disdain our long legal history. Yet original ideas can often be found by looking at what was done in the past and applying it to the present and the future.

I have had a long association with your father. He is a most distinguished citizen. I know how proud he is to be here with you today. I wish unreservedly to say how pleased I am to note your appointment. Mr Rares do you move?

REMARKS BY THE PRESIDENT

Gentlemen, for unfortunately there are no ladies present, I now say a few passing words. It is difficult not to be banal on an occasion such as this. What I say is subject, of course, to any requirements of law - and in particular subject to any obligations for the future which Parliament, in its wisdom, may enact and require. I express only my personal opinions which must submit to the law.

I did not favour the abolition of the rank of Queen's Counsel. I said so at the time. I did not believe that the profession should remain silent or that the judges should remain silent upon such an unheralded change.

What has been achieved by the abolition? We now have Senior Counsel who wear the same vestments. They wear the same wigs. They proceed in the same way. All that we have achieved is the removal of the Queen's name from the commission, the abolition, apparently on a whim, of an office in the law with a rank which has a proud tradition of centuries and the removal of the elected Government from a say in the selection of the leaders of the legal profession. Almost invariably leading advocates go on, if not to become members of the courts and tribunals, at least, as Brennan J once said, to be the ministers of justice: assisting the courts in the development and exposition of the law.

So I did not support, and I still do not support, the abolition of the rank of Queen's Counsel. However, as it has happened (and as it seems likely, in the way of the world, that it will not be reversed) I think we have done, in this State, what is the next best thing. I am glad that the best traditions of the Inner Bar will, in effect, be kept in this State. The residual restrictive practices associated with the office were long ago abolished.

The motto of The University of Sydney, as we all know, is *sidere mens eadem mutato*. It calls us to continue, under our different stars, the good traditions of the past. You should live by that motto. You are now the bearers of the responsibility of maintaining the good traditions of the past. I am sure that you will do so.

There are two good traditions which I would specially call to your notice this week which is Human Rights Week. Friday, 10 December 1993, is Human Rights Day, the forty-fifth anniversary of the signature of the *Universal Declaration of Human Rights* in 1948.

Human rights are not something we should treat with disdain in our busy lives. We should live them out, day by day, in our lives as lawyers. The international instruments of human rights were largely written by Anglo-American lawyers of the common law. They have a profound influence which is spreading and deepening in all the legal systems throughout the world.

We can practise human rights at home by bringing the principles into our daily work as lawyers. It was done by the High Court in *Mabo*. It can be done in many cases large and small. Please do not be embarrassed, at least if ever I am sitting, to bring the Court back to the fundamental principles of basic rights. I am confident that this is an important way of the future for our legal profession. Observe it.

I hope that the same fundamental principles will lead you into what used to be the very essence of the leadership of the Bar. That was *pro bono* work of a high level. This is not to say that you are not expected to make an appropriate income as leading counsel. But that you should give a little of your lives for the very important cases of people who could otherwise not afford senior counsel. That is one of the obligations that now comes with your silken robe.

Secondly, you should take an interest in international matters. I will shortly be going to Cambodia. I now have an appointment there from the Secretary General of the United Nations. I will be striving to make a little contribution to that country, which has suffered so terribly. I will seek to contribute to the building of the

infrastructure of their legal profession, which we take for granted, but which is vitally important for the defence of human rights.

There is a need for lawyers in Australia to spend a little part of their lives helping people in countries like Cambodia. The Minister of Justice of Cambodia told me earlier this year: We cannot have judges sitting with white faces on our Bench. But if we had lawyers from Australia and other lands around our judicial chambers, even for a matter of weeks, able to assist and talk with our judges and lawyers and to explain what it is to have an independent judiciary, what it is to have a rule of law society, then these will be the foundations on which we can build a secure future for the democracy of Cambodia.

I hope some of you, in your careers, will spend a little of your time not just talking about how Australia must make links with Asia. But doing something about it for people less fortunate than we are.

So, on an occasion where you have the external trappings of great privilege, it is appropriate to remind ourselves, all of us including myself, of the obligations that go with the privileges within our profession.

I congratulate you all individually and collectively on your appointments announced on this historic occasion. I wish you will. I look forward to seeing a lot of you in this Court in the years to come.

