

FAREWELL CEREMONIAL SITTING ON THE OCCASION OF THE RETIREMENT OF JUSTICE PAUL BRERETON AM RFD

Banco Court

The Hon A S Bell, Chief Justice of New South Wales

30 May 2023

- 1 I begin, as is now customary and appropriate, by paying the Court's sincere respects to the Gadigal of the Eora Nation, the traditional custodians of the land on which we meet, and to their elders, past and present.
- 2 This morning we sit ceremonially to mark the end of almost 18 years of distinguished service on this Court by the Hon. Justice Paul Brereton AM RFD, and to wish his Honour well as he assumes leadership of the National Anti-Corruption Commission, a most significant responsibility for which he is exceptionally well-equipped.
- 3 I acknowledge the presence of Justices Gageler, Gleeson and Jagot of the High Court; former justices of the High Court; former Chief Justice Bathurst; the Chief Justice of the Federal Circuit and Family Court of Australia; the Chief Judge of the Land and Environment Court; the Chief Magistrate and other current and former judicial officers from a range of courts including the Federal and Supreme Courts, and many other distinguished guests.
- 4 I also formally note the apologies of former Chief Justices Gleeson and Spigelman, the Chief of the Defence Force, General Angus Campbell AO DSC and the President of the Defence Force Disciplinary Tribunal, Justice John Logan RFD.
- 5 I single out for special welcome: Justice Brereton's wife, Sue on the AVL link, their daughters, Josephine and Catherine and their partners Scott and Daniel;

his Honour's brother, Dr John Brereton and his family, and his aunt, Mrs Robin Stevenson.

- 6 I also acknowledge the presence here today of a number of distinguished serving and retired Senior Officers of the permanent and reserved forces.
- 7 Finally, in terms of acknowledgements, his Honour's long-time Associate, Ms Julianne Reid is sitting on the Associate's Bench today, and I thank her for her dedicated service to the Court over many years.
- 8 Justice Paul le Gay Brereton marched on to the Supreme Court on 15 August 2005, bringing with him the reputation as one of the most versatile and able barristers of his generation, a counsel of extraordinary tenacity, indefatigable, with vast reserves of energy and of the utmost integrity.
- 9 At the time of his appointment, he was equally at home in a murder trial, in a probate suit, claims alleging professional negligence when he was counsel of choice for the Medical Defence Union, in professional disciplinary tribunals and before the Court of Appeal and the High Court.
- 10 He was, rather remarkably, also one of the country's leading and most respected family lawyers who, in many people's eyes, would have made an outstanding Chief Justice of the Family Court of Australia.
- 11 Three current members of this Court, Justice Meek, Weinstein and I, each had the good fortune to read with his Honour when he was a senior junior. We learned many things including the fact that Brereton was not a morning person, principally because he would be up until the early hours finalising advices, polishing submissions and plotting incisive cross-examinations. It was never entirely clear as to whether he would arrive before or after the case was called on for hearing of a morning so it was extremely stimulating to be his junior, to say the least.

- 12 In terms of punctuality, while it would be an exaggeration and unfair to say that nothing much has changed over the last 18 years, I am delighted that his Honour was able to make this ceremony on time today!
- 13 The extraordinary versatility which pervaded his Honour's career at the Bar continued during his judicial career and, although appointed to the Equity Division, in his early years he regularly sat for a month or two each year in the Common Law Division. That versatility, and the breadth of his experience and expertise, has also been hugely beneficial during his time on the Court of Appeal, to which he was appointed in 2018.
- 14 Of course, the versatility of which I have spoken has been underpinned by a deep legal knowledge, great technical ability and, I should add, a never to be underestimated mastery of practice and procedure. This was especially in evidence during his Honour's service as Corporations List Judge as well as in duty lists.
- 15 Some of his Honour's perhaps less heralded work, but of immense importance, has been in the area of adoptions as well as in the Court's *parens patriae* jurisdiction. Insofar as adoption matters are concerned, Justice Brereton delivered judgments in some 65 adoption matters which gave important and sensitive guidance in this area. Those decisions included:
- (1) *Adoption of NG (No 2)* [2014] NSWSC 680, a much-cited judgment concerning the effects of adoption, and their role in determining whether adoption is clearly preferable in the child's best interests;
 - (2) *Adoption of JLK and CRK* [2017] NSWSC 7, concerning the preferable approach to s 67(1)(d) of the *Adoption Act 2000* (NSW), dealing with the dispensing of consent of biological parents where the proposed adoptive parents are already authorised carers or guardians for the child; and

- (3) *Adoption of BR* [2018] NSWSC 1009, the first judgment concerning the application of the Aboriginal Child Placement Principles in s 35 of the *Adoption Act*.
- 16 These examples of Justice Brereton's work in this area were supplemented by important contributions to the Court's *parens patriae* jurisdiction, and more broadly the Court's protective function. The Court's website lists many extrajudicial speeches of his Honour including on the topics of:
- (1) *Children's Issues in the Supreme Court*, given at the Children's Court of New South Wales Meeting, addressing the Court's *parens patriae* jurisdiction generally, secure accommodation orders, and out-of-home-care adoptions;
- (2) *Acting for the Incapable – A Delicate Balance*, given to the Law Society of NSW and Carers NSW CLE Breakfast, addressing issues concerning the role of solicitors in the context of an aging population;
- (3) *The Origins and Evolution of the Parens Patriae Jurisdiction*, an historical lecture given at Sydney Law School; and
- (4) *The High Court and Family Law – Two Recent Excursions*, an address to the Family Court and Federal Magistrates Court Concurrent Conference, considering the decisions of the High Court in *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 and *Bookhurst v Bookhurst, SJB v SRB* [2010] HCATrans 196.
- 17 Added to these contributions is the decision of *Re Elm* (2006) 69 NSWLR 145; [2006] NSWSC 1137, concerning an expectant mother who had HIV, and did not propose to take steps to protect the child from contracting HIV. In that case, Justice Brereton explained the relevant principles for the authorisation of medical treatment following the assumption of parental responsibility by the Director-General of the Department of Community Services. So too the case of *Re Justice Health* (2011) 80 NSWLR 354; [2011] NSWSC 432, concerning

the lawfulness of the discontinuation of all life sustaining treatment in a prison context.

- 18 Another important chapter in his Honour's extensive judicial contribution lies in the field of corporations law. The Australian Corporations and Securities Reports are replete with his decisions, many delivered either *ex tempore* or with great expedition but always with close attention to detail, characteristics of this Court's Corporations List which have continued under the strong leadership of Justice Ashley Black.
- 19 Some of Justice Brereton's leading decisions in the corporations field include:
 - (1) *ASIC v Maxwell* (2006) 59 ACSR 373; [2006] NSWSC 1052, a commonly cited judgment on directors' duties and shareholder ratification, as well as misleading and deceptive conduct;
 - (2) *Re HIH Insurance Ltd (in liq)* (2016) 113 ACSR 318; [2016] NSWSC 482, concerning the accessorial liability of subsidiary companies and the test for causation when considering the loss that arises from misleading and deceptive conduct;
 - (3) *Re Struthers (liq of Project Management, Architecture and Construction Interior Pty Ltd) (No 3)* (2005) 56 ACSR 238; [2005] NSWSC 1113, concerning the interaction of the costs provisions in s 1335 of the *Corporations Act 2001* (Cth) and r 42.27 of the *UCPR*;
 - (4) *Chahwan v Euphoric Pty Ltd* (2009) 73 ACSR 252; [2009] NSWSC 805, considering the threshold of 'exceptional circumstances' in equity where a beneficiary seeks to enforce the trustee's right of action against a third party;
 - (5) *Re ERB International Pty Ltd (deregistered)* (2014) 98 ACSR 124; [2014] NSWSC 200, analysing the test of whether it would be 'just' for a

company to be reinstated, and whether a former liquidator does and should resume office in those circumstances;

- (6) *Hancock v Rinehart* (2015) 106 ACSR 207; [2015] NSWSC 646, a very complex trusts case involving issues of fraud on a power, replacement of trustees and the taking of an account;
- (7) *Mopeke Pty Ltd & Ors v Airport Fine Foods Pty Ltd & Ors* (2007) 61 ACSR 395; [2007] NSWSC 153, holding that the denial of a 'legitimate expectation' is sufficient to ground a claim for relief from oppression under ss 232-233 of the *Corporations Act*;
- (8) *Re One.tel Ltd* (2014) 99 ACSR 247; [2014] NSWSC 457, an application in the long-running One.tel saga setting out the applicable principles for the approval of deeds of settlement by liquidators and the giving of judicial advice in those circumstances; and
- (9) *Re Stansfield DIY Wealth Pty Ltd (in liq) & Anor* (2014) 103 ACSR 401; [2014] NSWSC 1484, regarding whether "property of the company" for the purposes of liquidation extends to property of which the company was the legal owner but holds on trust, and in which it also has an equitable interest as chargee to secure its right of indemnity.

20 In his Honour's 13 years as a divisional judge prior to his elevation to the Court of Appeal in 2018, Caselaw NSW searches indicate that his Honour delivered over 1500 decisions, averaging approximately 120 decisions a year. That is a phenomenal output but sheer numbers, however impressive, do not and cannot do justice to the invariable quality of those judgments, many of which related to hearings over multiple days or weeks.

21 As every judge and practitioner in this court room knows, those judgments are full of learning and clear distillation of principle. His Honour's decisions are regularly cited not only at first instance but in appellate courts throughout the country.

22 Other general equity decisions of note, reported in the New South Wales Law Reports, include:

- (1) *Kallinicos v Hunt* (2005) 64 NSWLR 561; [2005] NSWSC 1181, concerning the relevant test to be applied in the Court's inherent jurisdiction in applications to restrain a solicitor from acting for parties in a matter where the solicitor may be a material witness in the matter;
- (2) *Waterman v Gerling Australia Insurance Co Pty Ltd* (2005) 65 NSWLR 300; [2005] NSWSC 1066, concerning the operation of automatic cessation clauses in insurance contracts and estoppel arising from a mutual assumption of the parties which is inconsistent with the terms of the contract in question;
- (3) *Department of Community Services v D* (2006) 66 NSWLR 582; [2006] NSWSC 827, concerning the operation of s 126B of the *Evidence Act 1995*, and when medical documents should be excluded under that section as the subject of a protected confidence;
- (4) *Michael Wilson and Partners Ltd v Nicholls* (2008) 74 NSWLR 218; [2008] NSWSC 1230, concerning the possibility of objecting to an order for discovery where compliance with that order would involve contravention of a foreign law;
- (5) *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550; [2008] NSWSC 1344, holding that a former trustee is not entitled to retain, as against a new trustee, trust assets as security for an accrued right of indemnity out of those assets.
- (6) *Hitchcock v Pratt* (2010) 79 NSWLR 687; [2010] NSWSC 1508, concerning the extraterritorial operation of the *Succession Act* insofar as it purports to affect estates of those domiciled outside of New South Wales;

- (7) *Re OneSteel Manufacturing Pty Ltd* (2017) 93 NSWLR 611; [2017] NSWSC 21, concerning defects in registration under the PPSA, and whether certain defects were “seriously misleading”.
- 23 On the Court of Appeal and in the Court of Criminal Appeal, his Honour has participated in some 270 decisions, including many of note such as:
- (1) *Kardos v Sarbutt* [2006] NSWCA 11, concerning the approach to property adjustment and the evaluation of contributions in the context of the *Property (Relationships) Act 1984* (NSW);
- (2) *Trajkovski v Simpson* [2019] NSWCA 52, concerning solicitors’ duties when acting for a separated couple on the sale of relationship property, and whether disbursement of the wife’s share of the proceeds to the husband without her permission constituted a breach of the solicitors’ duty of care to the wife;
- (3) *Li v Attorney-General for New South Wales* (2018) 99 NSWLR 630; [2019] NSWCA 95, a dissenting judgment of his Honour regarding the extent to which ‘justice must be seen to be done’;
- (4) *Steinmetz v Shannon* (2019) 9 NSWLR 687; [2019] NSWCA 114, concerning a widow’s claim for family provision and the use of annuities as a form of testamentary disposition;
- (5) *State of New South Wales v Ouhammi* (2019) 101 NSWLR 160; [2019] NSWCA 225, concerning the application of the *Civil Liability Act 2002* (NSW) to cases of negligent battery;
- (6) *Council of the Law Society of New South Wales v Michael Arthur Hislop* [2019] NSWCA 302, concerning an application to remove a practitioner from the roll of lawyers and whether facilitating rehabilitation was a sound basis for departing from the usual order for costs;

- (7) *Kay v Playup Australia Pty Ltd* [2020] NSWCA 33, a difficult case concerning the construction of a Share Sale and Purchase Agreement, interdependent obligations and whether the deprivation of accrued contractual rights can amount to a penalty;
- (8) *Hochbaum v RSM Building Services Pty Ltd; Whitton v Technical and Further Education Commission t/as TAFE NSW* (2020) 102 NSWLR 941; [2020] NSWCA 113, concerning the construction of s 39 of the *Workers Compensation Act 1987* (NSW), in particular whether the threshold of 20% impairment is crossed when the injury is assessed as being so;
- (9) *Ford v R* [2020] NSWCCA 99, concerning reductions in objective seriousness where the accused is convicted on the basis of joint criminal enterprise rather than as the principal offender, and the circumstance of 'special aggravation';
- (10) *Ghosh v Medical Council of New South Wales* (2020) 102 NSWLR 303; [2020] NSWCA 122, concerning NCAT's role as the appellate body for decisions of the Medical Council, and the manner in which such de novo hearings should be conducted;
- (11) *Folbigg v Attorney General of New South Wales* [2021] NSWCA 44, a judicial review in which Justice Brereton wrote as part of a Court, concerning the first inquiry into Kathleen Folbigg's convictions, dealing with complex questions of jurisdiction, the nature of the judicial officer's function at the inquiry, and novel medical evidence;
- (12) *Sidoti v Hardy* (2021) 105 NSWLR 1; [2021] NSWCA 105, concerning title to land via adverse possession in circumstances where the adverse possession began prior to the conversion of the subject land from Old System to Torrens Title;

- (13) *Johnson v Mackinnon* [2021] NSWCA 152, a difficult case concerning misleading and deceptive conduct in the context of a fraudulent betting scheme and the extent to which the gullibility of investors may affect findings of materiality and reliance in causation;
- (14) *Johnson v Firth* [2021] NSWCA 237, concerning the application of s 50 of the *Civil Liability Act 2002* (NSW), and the bases upon which expert evidence of 'professional practice' can be rejected;
- (15) *Hopper v D J Sincock Pty Ltd* (2021) 107 NSWLR 153; [2021] NSWCA 305, concerning a guarantor's implied contractual right of indemnity;
- (16) *Michael Wilson & Partners Ltd v Emmott* [2021] NSWCA 315, concerning personal jurisdiction, service outside of jurisdiction and the test of a 'real and substantial connection to Australia' in the context of a partnership which primarily carried on business overseas, and where some claims lack a reasonable prospect of success;
- (17) *Dhupar v Lee* (2022) 107 NSWLR 492; [2022] NSWCA 15, a medical negligence case concerned a failed tubal ligation leading to unwanted pregnancy, and the calculation of damages in such a scenario;
- (18) *R v DB* (2022) 108 NSWLR 51; [2022] NSWCCA 87, concerning a defendant who had been acquitted at trial of sexual touching as he was asleep and therefore lacked volition, where the Crown sought, on appeal, a special verdict under s 30 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW);
- (19) *Twigg v Twigg* [2022] NSWCA 68, a complex case concerning fiduciary duties, constructive trusts and trustees de son tort, laches, tracing and limitation periods in respect of the misappropriation of funds from a large family group;

- (20) *Clancy v Plaintiffs A, B, C and D; Bird v Plaintiffs A, B, C and D* [2022] NSWCA 119, in which Justice Brereton wrote as a member of the Court dealing with difficult issues of tendency evidence and admissibility of ‘admissions’, the application of the Briginshaw standard and negligence;
 - (21) *Davidson v R* [2022] NSWCCA 153, concerning the determination of manifest excess in sentencing where there are no truly comparable cases;
 - (22) *Rader v Haines* [2022] NSWCA 198, concerning the application the UK Defamation Act’s threshold of “serious harm”, as well as issues of qualified privilege;
 - (23) *Dean v Pope* [2022] NSWCA 260, in which Justice Brereton wrote a concurring judgment concerning the application of the ‘professional practice’ provision in s 5O of the *Civil Liability Act 2002* (NSW); and
 - (24) *123 259 932 Pty Ltd v Cessnock City Council* [2023] NSWCA 21, concerning the application of the ‘presumption’ in *Amann Aviation* regarding the recovery of reliance losses, and whether a plaintiff must first establish that it is “impossible” to prove expectation damages.
- 24 Justice Brereton’s prodigious output as a judge of this Court over so many years has been matched by few, if any, and this record of achievement is all the more remarkable when one overlays it with his multiple extracurricular activities.
- 25 Within the Court, his Honour has served on a number of Supreme Court Committees, including as a member of the Building Committee from his appointment in 2005, as a member of the Heritage Committee from 2007 to 2009, and as a very dedicated Chair of the Costs Assessment Rules Committee from 2016 to the present. His Honour has also chaired the Costs Assessment User Group, from 2006 to the present, in which capacity his Honour, in 2012, led a review into the Costs Assessment Scheme.

- 26 Whilst Adoptions List Judge, Justice Brereton chaired the Adoptions List Users Group, and whilst the Corporations List Judge was a member of the Corporations List Users Group.
- 27 From 2007 to 2016, his Honour was the Chief Justice's nominee on the Law Extension Committee at the University of Sydney and, from 2015, his Honour has sat on the Harmonisation Committee, responsible for the harmonisation of rules in courts across Australia (including the Federal Court of Australia).
- 28 Still within the law's domain, Justice Brereton has also served as a part-time member and Deputy Chairperson of the New South Wales Law Reform Commission since 2016, and has also, somehow, found time to join Professor Martin Davies and me (and latterly Michael Douglas) in producing three editions of *Nygh's Conflict of Laws*, writing 10 chapters in each edition including those on Family Law, Trusts and Succession.
- 29 Outside the Court, as is well known, is his Honour's long, deep and distinguished contribution to the armed services, most notably but not only with the Australian Army. That particular line of duty began in the Army Reserve in the Sydney University Regiment in 1975, and since then his Honour has held a succession of ever more senior posts, including most recently as Assistant Inspector-General of the Australian Defence Force, and prior to that as Head, Cadet Reserve and Employer Support Division. These positions culminated in the award, in 2010, of membership of the Order of Australia (AM) in the Military Division and an appointment as Major General.
- 30 In that context, I shall refrain from any reference to the "Pirates of Penzance" and Gilbert & Sullivan more generally other than to note that, on the Court of Appeal, we have generally looked to Justice Leeming rather than Justice Brereton for "many useful facts about the square of the hypotenuse"!
- 31 Justice Brereton has frequently spoken extrajudicially on military topics, including:

- (1) *The Director of Military Prosecutions, the Afghanistan Charges and the Rule of Law*, given at the 2010 Rule of Law in Australia Conference, in which his Honour presciently discussed the role of the Director of Military Prosecutions and the importance of that office to a “mature [and] civilised society”;
 - (2) *Military Justice and Chapter III: The Constitutional Basis of Courts Martial*, given at the Australian Association of Constitutional Lawyers Seminar in May 2013, addressing a unique issue at the confluence of executive and judicial power;
 - (3) *Lieutenant General James Gordon Legge*, given at the Supreme Court of New South Wales Remembrance Eve Ceremony on 10 November 2016, a historical account of a controversial soldier who made a great contribution to the legal history of this Court as the collator of the Legge Reports;
 - (4) *Psychological Injury in Veterans and the Law*, a keynote address for the Australian College of Legal Medicine in October 2019 dealing with an issue of great significance to many returned servicemen and women.
- 32 Justice Brereton also remains Deputy President of the Defence Force Discipline Appeal Tribunal which is constituted solely by serving judges and hears appeals against convictions by service tribunals in respect of service offences. It is the equivalent of the military’s Court of Criminal Appeal, and ensures the independence of ADF discipline and justice. The President of the Tribunal, Justice Logan of the Federal Court, has asked me to convey his “sincere appreciation” to Justice Brereton for his service as has General Campbell.
- 33 The work undertaken by Justice Brereton between 2016 and 2020 reflected in his eponymous report into alleged war crimes committed by Australian soldiers in Afghanistan between 2005 and 2016 is a testament to his Honour’s characteristic thoroughness and meticulous attention to detail, and speaks to

his Honour's willingness to do difficult – in some quarters, deeply unpopular – work without fear or favour, and with great courage and perseverance.

- 34 The State of New South Wales has been immensely fortunate to have had a judge of Justice Brereton's calibre, unstinting dedication and remarkable energy to have served it for so long in such a distinguished manner.
- 35 The nation is equally fortunate that, apart from his almost 50 years of service to the armed forces, his Honour will be the first occupant of a most important public office as the inaugural National Anti-Corruption Commissioner. Justice Brereton will bring to that office all of the qualities of which I have spoken together with his fierce independence, courage and conviction.
- 36 Justice Brereton, on behalf of the Court which you have served for so long, and on my own behalf as a friend, I thank you for your magnificent contribution and wish you well in your latest challenge.
- 37 You start on Thursday!