

**ADDRESS ON THE RETIREMENT OF THE HONOURABLE
MURRAY TOBIAS AM
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
BANCO COURT, SUPREME COURT OF NEW SOUTH WALES
SYDNEY, 25 MARCH 2011**

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

The first two lines are:

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

The penultimate stanza of the poem is:

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

But for the reference to obedience, these are words that can be applied to Justice Murray Tobias: “good upbringing”, “proper habits”, ‘purposeful doubt’, “warm orthodoxy” and, underlying it all a fundamental ‘sanity’.¹

I know I speak on behalf of all of the judges of this Court, when I highlight at the outset, the contribution you have made to the collegial atmosphere of the Court. We have all been the beneficiary on a personal basis of your generosity of spirit, your intelligence, your thoughtfulness and your compassion. These personal characteristics are also reflected in your conduct during hearings and in your judgments.

Your principal professional characteristic, which I wish to emphasise is your rigour. As many of your judicial colleagues

experienced at the bar, often to their cost, and on the bench, always to their benefit, your Honour approached every legal task in a meticulous, conscientious and complete manner. There were no gaps in your preparation, nor in your judgments.

You brought to the Court the wealth of experience acquired by a silk who had been at the top of the profession for over two decades. This Court has had the benefit of that experience across the entirety of its civil and criminal appellate jurisdiction. There are two particular features of your contribution which I will highlight.

First, your Honour has an extraordinary capacity to deal with complex fact situations and to ensure that all of the varied elements of a case were properly assessed and placed in their correct sequence and relationship. These skills explain in large measure your Honour's extraordinary success in planning and environment law at the bar. It is a field which always involves multiple interrelated variables. This was a skill set that you successfully deployed in the full range of civil appeals in this Court. Your colleagues who sat with you in complex fact cases always appreciated the thoroughness of your preparation and of your judgments.

Secondly, although your legal learning was broadly based, your depth of knowledge and understanding of every aspect of planning and environment law and of administrative law, was simply unsurpassed.

Your Honour has delivered influential judgments which will continue to be relied upon in the future on a wide-range of areas of the law. This includes native title,² estoppel,³ rectification,⁴ indefeasibility,⁵ easements,⁶ jurisdictional facts,⁷ procedural fairness,⁸ legal professional privilege,⁹ delay in proceedings under the *Corporations Act*,¹⁰ indemnity costs in untenable appeals,¹¹ directors and officers insurance,¹² workers compensation,¹³ exemplary damages,¹⁴ unconscionability in contracts,¹⁵ the application of development standards,¹⁶ and the validity of local environmental plans,¹⁷ development consents,¹⁸ local government notices,¹⁹ conditions on a development consent,²⁰ and of a purported delegation of council powers.²¹

Your Honour brought to the Court of Criminal Appeal relevant experience acquired in criminal trials in the Navy, where you appeared as prosecutor and defence counsel whilst head of

the New South Wales Reserve Legal Panel and later presided over such trials as Judge Advocate. In the Court of Criminal Appeal you presided over conviction appeals raising complex issues of evidence law,²² conduct by the Crown,²³ inconsistent verdicts,²⁴ and a wide range of sentencing issues.

In addition to this formidable output of judgments, your Honour has made further contributions to the administration of justice and to the legal profession.

You have always manifested a concern with maintenance of professional standards. This was a product of your strong belief in the traditional professionalism of the bar. You brought with you to the bench a firm intention to maintain the symbiotic relationship that has always existed between the bar and the bench, requiring mutual respect. The strength of your commitment to the fundamental ethical principles of the profession was manifest throughout your judicial service.

Your sense of courtesy, particularly to counsel, has ensured that the atmosphere in the courtroom was proper and appropriate. On one occasion, when you were presiding in the Court of

Criminal Appeal, and a judge, now a former judge, of this Court was engaged in a somewhat vigorous exchange with counsel, you adjourned the Court for a few moments and, during the adjournment, informed that judge that you were not prepared to preside in a case in which counsel was treated so rudely. On return, the conduct stopped.

You have served for four years as Deputy and then Presiding Member of the Legal Profession Admission Board. To this role you brought your deep commitment to the profession as an institution and to the importance of maintaining its ethical standards, promoting its competence, preserving its independence and reinforcing its integrity.

There were two developments of particular significance for the future of the legal profession to which you made a fundamental contribution during your tenure of this office.

During this period, a national set of Uniform Principles was adopted with respect to the admission of overseas lawyers to practice in Australia. In many respects these Principles were over-engineered. They reminded me of an earlier time when the

Commonwealth government was seeking to corral all of the States to adopt a system of uniform censorship, so that material then regarded as salacious by some, which was permitted to be imported into Australia, would not be banned in some States. The then Attorney General of the State of Victoria, Sir Arthur Rylah, sought to protect the morals of, as he put it, his teenage daughters. I recollect a cartoon in *The Bulletin* which depicted Sir Arthur sitting in chair encased in a straightjacket. The caption read: "Of course I believe in uniform censorship and I will supply the uniform".

The Uniform Principles for admission of overseas practitioners had a somewhat similar quality. They would have been applied so as, in substance, to exclude overseas practitioners of considerable experience and skill. Under your Honour's leadership, the Board ensured that this straightjacket was removed, leading to a change in the Uniform Principles, to the great advantage of the administration of the law throughout this nation.

The second matter I wish to acknowledge in this respect is the critical contribution your Honour has made in the deliberations

to establish a uniform regulatory system in Australia and, thereby, to create a national legal profession. With your Honour's usual thoroughness and attention to detail you served as a member of the National Legal Profession Consultative Group. Your efforts were always directed to ensuring that the reality of an independent profession would be maintained by this new regime. In some respects this was a reprise of your Honour's significant contribution, when you were President of the New South Wales Bar Association, in an earlier period of legislative change.

I relied on your advice in these respects for my own involvement in this matter, including in the deliberations of the Council of Chief Justices. I am particularly grateful for your assistance in this respect. The legal profession owes a great deal to your diligence during this period.

The strength of your commitment to the profession is a product of your personal history both as a barrister, as a silk, as an elected member of the Bar Council, with some interruptions, from 1976 until your election as President in 1993, of your family background as the son of one of the most esteemed solicitors in this city, who worked as a solicitor for 58 years, and of your

education at the University of Sydney and at Oxford. You are a great example of the tradition of the common law and of the bar, which traces its roots to England, as you have always understood, maintaining to this day your connection to Oxford and with your fellow students in the BCL course.

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

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

"Sailing away from ourselves, we feel
The gentle tug of water at the quay –
Language of the liberal dead speaks
From the soil of Highgate, tears
Show a great water table is intact.
You cannot leave England, it turns
A planet majestically in the mind."²⁵

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

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- ¹ Peter Porter *The Rest on the Flight: Selected Poems* Allen & Unwin, Sydney 2010.
- ² See *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council* [2009] NSWCA 138; (2009) 166 LGERA.
- ³ See *Galaxidis v Galaxidis* [2004] NSWCA 111; *Hypeck Electronics Pty Ltd (In Liq) v Mead* [2004] NSWCA 221.
- ⁴ See *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65; (2007) 69 NSWLR 603.
- ⁵ See *Kogarah Municipal Council v Golden Paradise Corporation* [2005] NSWCA 230; (2005) 12 VPR 23,651; *Canada Bay Council v FND Bonaccorso Pty Ltd* [2007] NSWCA 351; (2007) 71 NSWLR 424.
- ⁶ *McGrath v Campbell* [2006] NSWCA 180; (2006) 68 NSWLR 229.
- ⁷ See *Lesnewski v Mosman Municipal Council* [2005] NSWCA 99; (2005) 138 LGERA 207.
- ⁸ See *Castle Constructions Pty Ltd v North Sydney Council* [2007] NSWCA 164; (2007) 155 LGERA 52.
- ⁹ See *Westpac Banking Corporation v 7 8 9 TEN Pty Ltd* [2005] NSWCA 321; (2005) 55 ACSR 519; *Bayley v Director General, Department of Land & Water Conservation* [2009] NSWCA 100; (2009) 74 NSWLR 333.
- ¹⁰ *Colcher v Gordon* [2005] NSWCA 135; (2005) 53 ACSR 442.
- ¹¹ *Bon Appetit Family Restaurant Pty Ltd v Mongey* [2009] NSWCA 14.
- ¹² See *Vero Insurance Limited v Bankcorp Advantage Limited* [2004] NSWCA 390; (2004) 13 ANZ Insurance Cases 61-630.
- ¹³ *Raniere Nominees Pty Ltd v Daley* [2005] NSWCA 121; (2005) 66 NSWLR 594; *Wollongong Fabricating Pty Ltd v Ramsbottom* [2006] NSWCA 279; (2006) 68 NSWLR 387.
- ¹⁴ *Varmedja v Varmedja* [2006] NSWCA 117.
- ¹⁵ *Crowe v Commonwealth Bank of Australia* [2005] NSWCA 41.
- ¹⁶ *Residents Against Improper Development v Chase Property Investments Pty Ltd* [2006] NSWCA 323; (2006) 149 LGERA 360.
- ¹⁷ See, eg, *Gails Holdings Pty Ltd v Minister for Infrastructure and Planning* [2006] NSWCA 388; (2006) 69 NSWLR 156.
- ¹⁸ *Notaras v Waverly Council* [2007] NSWCA 33; (2007) 161 LGERA 230.
- ¹⁹ *Kyogle Shire Council v Muli Muli Local Aboriginal Land Council* [2005] NSWCA 4; (2005) 62 NSWLR 361.
- ²⁰ *Maitland City Council v Anambah Homes Pty Ltd* [2005] NSWCA 455; (2005) 64 NSWLR 695.
- ²¹ *Bell Morgan Property Development Pty Ltd v GPT Re Limited* [2007] NSWCA 171; (2007) 153 LGERA 450.

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- ²² *R v Collison* [2003] NSWCCA 212; *R v Rima* [2003] NSWCCA 405; *R v El-Kheir* [2004] NSWCCA 401; *Chow v R* [2007] NSWCCA 225; *Tran v R* [2008] NSWCCA 332.
- ²³ *R v Teasdale* [2004] NSWCCA 91.
- ²⁴ *R v Tolmie* [2004] NSWCCA 396; *Thornton v R* [2007] NSWCCA 104.
- ²⁵ Peter Porter op cit p 77.