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THE SUPREME COURT OF

WESTERN AUSTRALIA

WELCOME TO THE HONOURABLE JUSTICE BANKS-SMITH

FULL BENCH

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON FRIDAY, 22 JULY 2016, AT 9.16 AM

MARTIN CJ: Be seated, please. The court sits this morning to welcome the Honourable Katrina Banks-Smith to the court, her Honour having taken the oath of office at Government House on 8 July, and having received her commission, which took effect on Monday of this week. I would like to particularly welcome this morning members of her Honour's family to this morning's sittings, including her Honour's husband, Kevin Banks-Smith, and her Honour's sons Sam and Dominic, and her Honour's many special invited guests, including Ms Monica Coombes, Ms Kaitlin and Mr Jack Morgan, who are visiting from London.

I would also like to welcome his Honour Justice Tony Siopos, his Honour Justice Neil McKerracher and his Honour Justice Michael Barker of the Federal Court of Australia; his Honour Judge Eaton, representing Chief Judge Sleight of the District Court; his Honour Judge Peter Whitford SC of the District Court of New South Wales, who has travelled across the Nullarbor specifically for this occasion; his Honour Judge Denis Reynolds, President of the Children's Court; Mr Peter Quinlan SC, the Solicitor-General; the Acting Director-General of the Department of the Attorney-General, Ms Pauline Bagdonavicius; and other distinguished guests, including many past members of this and other courts.

I would also like to particularly welcome those who address the court this morning being the Honourable Michael Mischin MLC, Attorney-General of Western Australia, Ms Elizabeth Needham, President of the Law Society and Mr Matthew Howard SC, President of the WA Bar Association. The welcome of a new judge to the Court is always a significant and, indeed, historic occasion. However, this morning's welcome has a particular historic significance as it is likely to be the last occasion upon which ceremonial sittings of this kind will be conducted in this building.

Following the ceremonial sitting to mark the Court's occupation of its new premises in the David Malcolm Justice Centre next Wednesday, ceremonial sittings to make the appointment of members of the Court will be held in the large Court in that building which has been designed to permit all members of the Court to sit comfortably on the bench at one time as compared to the somewhat cramped conditions of this courtroom. We will, however, continue to conduct admission ceremonies in this courtroom, not only in recognition of its heritage value and nostalgic charm, but also because of the photo opportunities provided by the

gardens adjacent to this building, but I fear that I digress.

In appointing Justice Banks-Smith to this Court the government has been good enough to overlook the fact that her Honour was born and received her undergraduate education in Tasmania. Her Honour is a distinguished graduate of the University of Tasmania graduating in law with First Class Honours after receiving various prizes for topping individual subjects in the course of that degree. Her Honour was admitted to the Supreme Court of Tasmania in 1990, but in that same year saw the light and joined the firm then known as Parker & Parker in Perth that same year and was admitted to this Court the following year.

In 1992 her Honour took leave of absence from the firm in order to pursue her academic interests having been awarded a scholarship to attend Cambridge University. Her Honour graduated from that university with the degree of Master of Laws, again first class, having read subjects in restitution, securities regulation and civil liberties and undertaken a thesis in corporate law. The commercial subjects which your Honour studied at post-graduate level will, of course, be of great relevance to your work on this Court, notwithstanding the substantial changes in commercial law since the early 1990s.

This Court is also charged with the responsibility of protecting the civil liberty of all within its jurisdiction and so your study of civil liberties will also be of assistance, although perhaps, paradoxically, your Honour will also be required on occasion to deprive people who have been convicted of offences against the laws of this State of their liberty, sometimes for significant periods. Your Honour joined the partnership of Parker & Parker in 1996 which, having regard to the time spent in postgraduate study overseas, was a remarkably short period after joining the firm as an employed solicitor. Obviously the partnership was quick to recognise your obvious talents and abilities.

Your Honour remained a partner of the merged entity trading under the name of Freehills following the merger which took place between those two major firms in 1997. Your Honour rose to assume a prominent role in the litigation work of that firm, rising to the head of the Perth litigation group between 2007 and 2009; a group which comprised 10 partners and approximately 60 employed lawyers and paralegals. And your Honour was also a member of the firm's National Litigation Executive between 2005

and 2009. You also served as the head of a group known as Women At Freehills Perth between 2002 and 2009.

In July of 2009 your Honour left the relative comfort and security of the firm which had been your professional home for approximately 19 years and joined the independent bar. Again, your obvious talents and abilities were quickly recognised by the broader profession and your services were sought in a wide variety of primarily commercial cases, very often the more - indeed, the most - complex commercial cases. I was delighted to accept the recommendation of the committee, which advised me in relation to such matters, that you be appointed senior counsel in 2013. Despite having touched the Tar-Baby known as the Bell Group litigation, your Honour has gathered experience in a broad area of litigation including general commercial work, property, insolvency, corporations law, construction cases, revenue cases, class action tort claims and professional regulation cases.

Despite the breadth of your professional commitments, your Honour has also found the time to undertake a range of pro bono work during the course of your career. Your Honour has also found the time and the energy to contribute to both the profession and the community. You've served as a coach at various advocacy courses, as a member of the Bar Council at the WA Bar Association, as a member of the advisory board of the Law School at Notre Dame University and as the legal member of the Princess Margaret Hospital Human Research Ethics Committee. In 2009 your Honour's significant professional achievements were recognised by Woman Lawyers of Western Australia when you were awarded Senior Woman Lawyer of that year.

I have had the pleasure of being assisted by your Honour as counsel in a number of significant cases. I'm sure that I speak on behalf of all members of the Court when I say how much we are looking forward to your assistance as an energetic and enthusiastic contributor to the work of this Court. After allowing your Honour a little time to adapt to the view from the bench, you will be provided the opportunity to expand your broad professional horizons even further by sitting in the criminal jurisdiction of the Court; a jurisdiction which, regrettably, continues to occupy an ever-increasing proportion of this Court's time and judicial resources.

I'm confident that you will find the range and breadth of work which you will be asked to undertake as a member of this Court as stimulating and energising as the broad variety of work you have undertaken prior to this

significant step in your Honour's career. It only remains for me to, again, congratulate your Honour upon your appointment to this Court and, on behalf of all members of the Court, to welcome you and your family into the community of the Court and to wish you every success in your future endeavours as a member of this Court. Mr Attorney.

MISCHIN, MR: Thank you, your Honour, and if it please the court. Your Honour has covered in quite some detail her Honour Justice Banks-Smith's career and I will, of necessity, touch on those matters as well, but her Honour grew up in Tasmania, as has been mentioned, and where she was educated at St Michael's Collegiate in Hobart. She attended, as has been mentioned, the University of Tasmania and graduated with a Bachelor of Laws with First Class Honours in 1988 together with the Butterworths' prize for jurisprudence and the Shri Dutt Sharma Memorial Prize for administrative law. Before attending law school, Justice Banks-Smith originally enrolled in and commenced to study medicine.

I understand that her move into law roughly coincided with her first lesson in the cadaver laboratory. Having won a Commonwealth scholarship, her Honour furthered her legal education at Cambridge University in 1992-1993 and graduated with a first class degree in Master of Laws. She was admitted to practice in Tasmania in 1990 and in that same year travelled to Perth with her husband Kevin and joined Messrs Parker & Parker. In 1991 she was admitted to practice in the Supreme Court of Western Australia and also to the Federal Court and High Court of Australia. Her Honour developed a wide practice in commercial litigation with a particular emphasis on insolvency.

In those early years at Parker & Parker her Honour worked closely with the late Stephen Paterniti who was a great mentor and who, I venture to suggest, would take immense pleasure and pride in her Honour's appointment to this court. Justice Banks-Smith was made a partner at Parker & Parker in 1996 and a partner in Freehills upon its merger with that firm in the following year. From 2007 through to 2009 she was head of the Perth litigation group which comprised 10 partners and some 60 staff. Her Honour was also a member of the Freehills national litigation group between 2005 and 2009.

Her Honour's experience at Freehills included extensive work acting for banks, insolvency practitioners, listed companies, property owners and developers and mining companies, mainly in Supreme and Federal Court proceedings.

She joined the bar at Francis Burt Chambers in July 2009 and was appointed Senior Counsel in 2013. Her practice at the bar comprised appearances as both junior and senior counsel in contested Supreme and Federal Court matters, including trials and appeals in banking, insolvency, securities and construction industry cases. She also contributed to the profession and community groups.

And, as has been mentioned, as the member of the Notre Dame University Law School Advisory Board, the Princess Margaret Hospital Human Research Ethics Committee and the bar counsel. While at Francis Burt Chambers she was a valued and active member of the board of management and a great mentor and role model for younger members of the bar. She has coached at the Young Lawyers advocacy course and the WA Bar Association essential trials advocacy course and was named Senior Woman Lawyer of the year in 2009. Justice Banks-Smith and her husband of 30 years, Kevin, have two sons, Sam and Dominic. The family has a great love for and a talent for music. Justice Banks-Smith herself is an accomplished classically trained pianist, I am informed.

The glee club that will be set up down at the new Supreme Court building will no doubt thrill to that. Kevin has performed in front of a number of bands in Perth, I am informed, and both Sam and Dominic play and sing regularly with their own bands. As a consequence, her Honour spends much of her weekend doubling as a roadie for her children. Fortunately, her Honour has been able to regularly retreat from her busy practice and extra-curricular commitments to the family's farm in Toodyay which will, no doubt, continue to be a haven of quiet and peace and reflection.

Justice Banks-Smith has a proven track record, if I may refer to her legal skill and experience in that way, and her knowledge of the law and the legal system and her commitment to the due administration of justice makes her an eminently worth appointment to this Honourable Court. Your Honour, on behalf of the State Government and the people of Western Australia, I thank you for accepting this appointment and for the responsibilities and duties which go with it and I wish you well in this new chapter of your career.

MARTIN CJ: Thank you, Mr Attorney. Ms Needham.

NEEDHAM, MS: Thank you, your Honour. May it please the Court. It is my privilege to appear today on behalf of the legal profession of Western Australia through the Law Society to welcome her Honour Justice Banks-Smith to the Bench of this Honourable Court. As we've already heard

from the Honourable Chief Justice and the Attorney-General, your Honour has enjoyed a very distinguished career, the experiences from which will, no doubt, stand your Honour in good stead for the next phase of your Honour's life. In 1991, very shortly after arriving in Western Australia, your Honour joined the Law Society and you have been an active and contributing member of the society and, thus, the wider profession and the Western Australia community ever since.

Your Honour has served with distinction on the Law Society's Ethics Committee whilst also graciously passing on your Honour's significant knowledge to fellow legal practitioners through the Law Society's Continuing Professional Development program. Your substantive law presentations for the society have centred around commercial law and have most recently included your Honour's presentation on property law at the Law Summer School this year and a presentation entitled Distressed Directors: Dealing With Directors' Mistakes.

Although I can't help thinking, looking at your Honour's list of cases - the Bell litigation, Sunsqualia, Raine Square Development and, most recently, the misleading conduct case against the maker of a popular pain relief medication - perhaps it should have been more appropriately entitled Dealing With Directors' Mistakes: How To Make Distressed Directors which seems a likely consequence of them learning of your Honour being part of the legal team opposing them. In 2009, the same year your Honour joined the independent bar, you were awarded Senior Woman Lawyer of the year by Women Lawyers Western Australia. Your Honour was nominated by both men and women with whom you worked directly and who admired you for your Honour's support of them, your tenacity and ability to (indistinct) what you expected of others around you.

Your Honour recognised the need for and benefited from the push by you and many other women in the profession to be able to work flexibly. Something that the success of which has benefited individuals, both men and women, in the legal profession as well as legal practices ever since. For by having and properly utilising flexible work practices, legal practices ensure that valuable employees and team members are not lost and are able to function to the best of their abilities. For your Honour, this meant that with the strategic use of technology, whilst taming it so it was your servant and you were not its slave, your Honour was able to prioritise and ensure you attained the all-important and yet so difficult to achieve work/life balance.

For those of us here who have had the pleasure of working with you or sharing Chambers with you, we know that this in particular meant managing the demands of legal practice while ensuring time for family and the importance to your Honour of still being able to immerse yourself in the lives of your two beloved sons, Sam and Dominic.

In 2013 your Honour was appointed senior counsel, one of three to be appointed that year, lifting the total number of female silks in Western Australia from three to six out of 51. With your Honour's appointment, we now return to three female silks. This serves to highlight the difficulty the profession faces with so many women not remaining past approximately seven years in practice. We, the men and women of the legal profession, need to find ways to retain women in the profession, otherwise I fear that achieving parity in our profession will take longer than the presently anticipated 117 further years, as reported at the 2015 World Economic Forum.

For your Honour's part, you have done much to support and inspire the next generation of legal practitioners and women in the business world by mentoring junior practitioners, being part of women's leadership symposiums and forums, tutoring and lecturing at the University of Western Australia, for a time being part of the Professional Development Committee of the Legal Practice Board, being part of the Advisory Board of Notre Dame University, and being part of coaching teams at advocacy courses, including the Law Society's Practical Advocacy Course for junior practitioners.

So your Honour's appointment is both celebrated and mourned, mourned by women at the depletion of senior counsel in their ranks and their leaders, mourned by the loss of a friend and colleague; by the juniors, men and women, who you have mentored, something that you would have seen very clearly at Chambers - your farewell from Chambers - where you were surrounded by many junior practitioners from the Bar who you have supported and inspired, and of course, by your instructors, but also celebrated by all those very same people, and many more besides, for both an appointment richly deserved and for the added diversity that your appointment brings.

Your Honour's appointment now enables you to make a very significant contribution to the administration of justice in Western Australia, one which I have no doubt you will execute with all the skill and ability that has marked

your life on this side of the bar table. May it please the Court.

MARTIN CJ: Thank you, Ms Needham. Mr Howard.

HOWARD, MR: May it please the Court, it is my privilege and also a personal pleasure to appear this morning to welcome your Honour to the Bench of this Court on behalf of the WA Bar Association. In typical fashion, given that your Honour has become something of a connoisseur and critic of welcomes and farewells, I was given an injunction as to what your Honour was expecting from me this morning. Perhaps equally typically, some time after delivering the injunction, your Honour inquired as to whether I needed any help with my address. It seemed unfair that your Honour should be required to prepare two addresses and so, regretfully for the Court and those in the gallery, what follows is all my own work.

Many will recall your Honour's toast to the judiciary at a recent Bar and Bench dinner. Your Honour's address was characteristically warm, funny, engaging, self-effacing and pitch-perfect. In it, apart from poking fun at certain aspects of our profession, your Honour suggested that there needed to be new words developed to describe particular and peculiar aspects of life as a barrister. The features your Honour described were instantly recognisable, if not always comfortably so, by your audience. No doubt, your Honour will be developing a new vocabulary to describe the more particular and peculiar aspects of life as a judge.

That address highlighted your Honour's communication skills, something which will be as much, if not more so in demand in your Honour's new role. Of course, anyone who can communicate with their personal trainer solely by emoticons is a stand-out communicator. The second thing that was immediately apparent from that address was your Honour's insight into and understanding of the human condition. That is a rare commodity at the Bar, and in the profession generally, and one for which your Honour is greatly admired. It is not for me, of course, to speculate as to whether it is a commodity equally rare amongst your new colleagues.

Typically, your Honour has been somewhat embarrassed by the fuss which has accompanied your appointment. I have no doubt that your Honour will be, to a significant degree, discomfited by this morning's proceedings. Again, your Honour's self-deprecation and humility are traits which are greatly admired. Perhaps testament to this

aspect of your Honour's personality comes not from within the profession, but from without. For those who know you, it was utterly unsurprising that the owner of your Honour's local post office posted his congratulations on Facebook while describing how humble your Honour was and how he had no idea as to how important your Honour was.

This court's gain is definitely the profession's loss. Indeed, a partner of a firm which regularly briefed your Honour has described their litigation team as being in mourning as a result of your Honour's appointment. Your Honour has been an admired colleague and a supportive and wonderful mentor to many. Notwithstanding your Honour's very significant workload and other commitments, you were always available to provide wise advice, an understanding ear, and a haven from the occasional crush of hailing testosterone and bad behaviour that can occur in our profession.

Your Honour was a talented teacher within the profession, including at advocacy courses run by the Bar and others. Indeed, I have been specifically contacted to pass on the best wishes of your ETAC friends from Adelaide. Your Honour's leadership was also sought after by the firm of which you are a partner, and then by Chambers and the Bar Associations Council. I will personally miss your good judgment and insight on the trickier Association matters.

Your Honour has a long and deep concentration span. Counsel underestimate that at their peril. Having survived, and indeed, prospered in the Bell trial and having had a significant part to play in other long matters since, those who appear in front of your Honour will find that you do not scare easily and that your agreeable demeanour should not be mistaken for you being a pushover. Nothing could be further from the truth.

To emphasise such personal qualities must not obscure just how good a lawyer your Honour actually is. By way of one example only, while some in Chambers may indulge in the pretence of owning a copy of Thomas on Powers, your Honour is one of the few with the intellectual grunt not just to take the book off the shelf, but to grapple and then master its more arcane and potent learnings. Whether, of course, your Honour's depth and understanding of the law equals or exceeds your Honour's knowledge of indie music is perhaps for others to judge.

It is not for any man to gainsay the challenges which women face in the profession and the Bar. They, to some

degree, may be encapsulated by the observation of the seamstress fitting your Honour's judicial gown who remarked, "We don't make many of these for women." Your Honour characteristically has faced those challenges with grace, good humour and steely determination. Your Honour is an outstanding person whose qualities, temperament, experience and learning equip you well for this high office. The Bar looks forward to appearing before your Honour for many years to come and wishes you all the very best in your new role. May it please the Court.

MARTIN CJ: Thank you, Mr Howard. Justice Banks-Smith.

BANKS-SMITH J: Thank you, Chief Justice, Mr Attorney, Ms Needham and Mr Howard SC for your very kind words. Mr Attorney General, I'm embarrassed to say that I did not even complete my application form for medical school having had the tour of the cadaver laboratory. Both Ms Needham and Mr Howard were my colleagues on level 19, Francis Burt Chambers, and so I'm particularly pleased that they were able to speak today.

I'm delighted, but somewhat intimidated to see so many familiar faces in court: judges I have appeared before, some I even juniored back in the day, clients, my Freehills partners and lawyers, and so many from the Bar. Thank you for taking the time to come today. I would particularly like to acknowledge my family and friends - my husband Kevin for his continued support over almost 30 years; our boys, Sam and Dominic, who despite the state of their bedrooms, are our pride and joy, and in fact, everything that matters.

My parents, Jack and Jenny, live in Tasmania and do not enjoy good health, but they have been greatly cheered up and excited by this news. Growing up with three brothers in Hobart, I learnt quickly to stand up for myself and do my own thing and that has stood me in good stead in this profession. I am also grateful to my close friends joining me as guests today. You are the additional spine I look to when I need it. You are funny, generous and forgiving. This is a rare moment for me, when all our sons' godparents and all my godchildren have been brought together, from England, Sydney and Perth. It is like a Christmas reunion except that everybody is behaving.

In 1990, having been apprenticed to Leigh Sealy, later the Solicitor-General for Tasmania, I joined many of my peers in leaving for the mainland. I arrived with little more than a good education and an inherited work ethic. On

my first day at Parker & Parker, I started working with Dudley Stow in the Property Division. I'm so glad Dudley could join us today. It soon became apparent that the economic circumstances of the State at the time meant a move to insolvency might be beneficial. I worked with the brilliant, and sorely missed, Stephen Paterniti as well as now Justices Kenneth Martin and Tony Siopis. Others in that cohort included now Justice Beech, Mr Howard, and Michelle Cole.

Those were busy and exciting days, and as young practitioners, we were taught well and to high standards. Parkers became Freehills and throughout those years I rolled up my sleeves, had babies, worked flexible hours, ignored whatever part-time partner policies existed and wrote new ones, and was fortunate to maintain a busy practice and be involved in management. None of that would have been possible if Kevin had not also worked flexible hours. We were and remain a team in that regard. I also had loyal colleagues and lawyers.

When I reflect on my time in the profession, however, it is my years at the Bar that have given me the most satisfaction and where I have felt most able to contribute. My legal knowledge developed exponentially. The range of work was challenging and I had the chance to work with some of the best legal minds in the country. I was fortunate at the Bar to be briefed regularly by certain firms and practitioners and with high-quality work. It would be wrong to single out instructors, but I would like to say this as I know many of you are here. It has been a pleasure working with you. I have enjoyed your company and camaraderie and I will miss that aspect of life at the Bar.

There is a very vibrant group of women partners and senior lawyers working in commercial litigation at the moment. Recently I was briefed as lead counsel on one side of significant construction dispute. I was briefed by a woman partner in a large firm. Lead counsel on the other side was Patricia Cahill SC, also briefed by a woman partner in a large firm. All four of us commented on the rarity of this. It is unfortunate that even now such representation and in speaking roles is so unusual. It is my hope that the business community and the profession will increase its support for women in commercial litigation, recognising that the pool of experienced women is deep.

Finally, I would like to thank my colleagues at Francis Burt Chambers. There is an active group of talented juniors. There is significant support and encouragement among silks. To those who I've worked

closely with, and you know who you are, I thank you. The profession is in very good hands. I am also grateful to my personal assistant, Diana Barrett, for taking such good care of me and with such empathy. I will miss you.

At a personal level, I must acknowledge the elder Statesman of Chambers, Mr Zelestis QC and all that he has contributed. His intellectual rigour and exacting and ethical standards have shaped the Bar, my career and the careers of many. He will be most annoyed with me for having said that, but it is done and there is no right of appeal.

And so I come to this new role as a judge of this court. It is an enormous honour. I am honoured and humbled by it. I have received so many lovely letters, flowers, reminiscences and expressions of support. One thoughtful writer reflected on the values that he considered make a good judge: humane, slow to cast judgment, quick to afford a fair hearing, aware of the pressures and limits we all work under, and alive to the nature of human experience. Those values are clearly aspirational, but I do give you all my assurance that I will remind myself regularly to aspire to them. And now, as I say, there is work to be done and I thank you all for coming.

MARTIN CJ: Thank you, Justice Banks-Smith. The court will now adjourn.

AT 9.45 AM THE MATTER WAS ADJOURNED ACCORDINGLY

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