



Special Sitting of the Full Court of the
Supreme Court
to Honour the Life and Work of

Sir Francis Burt AC KCMG QC

former Chief Justice and Governor of
Western Australia

Friday, 17 September 2004

By

The Hon David K Malcolm AC
Chief Justice of Western Australia

Supreme Court of Western Australia



We sit this morning to honour the life and work of the Hon Sir Francis Burt AC KCMG QC who died on Wednesday, 8 September and was given a State funeral on Wednesday of this week. Today we wish to honour his work and life in the law and the legal profession and, in particular, his contribution as Chief Justice of Western Australia for 11 years from 1977-1988 as well as service as a Judge of this Court from 1969.

I am pleased to acknowledge the appearance today of the Hon Jim McGinty MLA Attorney General, Mr Ian Weldon, the President of the Law Society and Mr Ian Viner QC, the President of the Western Australian Bar Association. I also acknowledge a number of Queen's Counsel, Senior Counsel, and many other representatives of the legal profession in attendance.

We are privileged to have with us on this occasion a number of members of his Honour's family. Mrs Sally O'Connor and her husband Peter and their daughters Natasha and Kassia, Mrs Janine Milton and husband Steve and their sons Michael and Robert, and Mr Jim Burt and his wife Sue. There are some very particular old friends of his Honour. Many of them are here today and I have been especially asked to welcome, and I do so most warmly, Mr and Mrs Peter Atkins, "Atty", who is one of Red's oldest friends who spoke so eloquently at his State funeral. Mr and Mrs Tom Atkinson, Mr Ken Brady, Mr and Mrs John Brazier, Mr and Mrs Richard Brazier, Mr and Mrs Richard



Burgess, the Honourable Gresley Clarkson QC, Mr and Mrs Tubby Craig, Ms Penny Holmes, the Honourable Ian Metcalfe QC, former Attorney-General, Mrs Betty Weise and Mr Harry Whittaker.

There are also many former Judges of this Court, Justices of the High Court, heads of jurisdiction and others who will have their attendance recorded in the official record of these proceedings. It would be, I think, laborious to refer to them all personally by name and I hope they will forgive me for that.

The Hon Francis Theodore Page Burt AC KCMG QC LL.M Hon LLD was born on 14 June 1918 at Perth. His father, Archibald, was the son of Septimus Burt KC and a grandson of Sir Archibald Paul Burt, Kt who had been appointed the State's first Chief Justice in 1861.

Sir Francis was educated at Guildford Grammar School and the University of Western Australia. He was an outstanding student at the Law School, winning a Hackett Scholarship. He graduated with first-class Honours in 1940 and was admitted to practice in March 1941. He had then completed a thesis, later accredited as the "industrial bible" entitled *Annotated Provisions of the Industrial Arbitration Act*. This earned him a Masters' degree in Law, but he had to survive war service before the degree could be conferred in 1945.

In the meantime, "Red", as he was affectionately and universally known, served in the RAN and then the RAAF from 1940-1945. He served in Europe for a significant part of his war service in Sunderland flying boats, as they were called. It was in this period that he formed a lifelong friendship with Tom Hughes QC, later the Commonwealth Attorney General and a leader of the Australian Bar.

In 1945, after a short period with Northmore Hale Davy & Leake, Sir Francis became a partner in Joseph Muir & Williams, now Freehills.



He quickly established a large practice in the common law and industrial fields. From 1945 to 1965 he was a visiting lecturer at the UWA Law School. Students of my generation were privileged to have been lectured by him on the Law of Contract. He also lectured in Administrative Law.

My Contract lecture notes, which I have preserved, record the methodical, clear, economical and penetrating analysis and explanation of the relevant law, which was the hallmark of his work at the Bar and on the Bench.

The first reported case in which Sir Francis appeared was *Lennox v McKay* in 1948 in March which was an appeal from the Local Court in which the question was whether his client was in occupation of premises contrary to the National Security Regulations. In this case he was successful.

In April he appeared before that formidable Chief Justice Sir John Dwyer in *Cook v Cook* which involved a property dispute between a husband and wife. On this occasion he was partially successful, but the Chief Justice denied him his costs.

The next month he appeared in *Astone v Hatjiannakis* in which he was opposed by Seaton KC. This was another case under the National Security Regulations. On this occasion, unfortunately he was unsuccessful.

The first major case in which Sir Francis was involved was *The Panamanian*, which ran for three weeks in 1949 before Dwyer CJ. In January 1945 the ship caught fire while loading at Fremantle. A piece of hessian on the deck caught fire and was thrown overboard by a lumper employed by stevedores. Oil floating on the water ignited and the ship was badly damaged by fire. Sir Francis was one of the junior counsel led by Seaton KC for the Commonwealth who successfully defended the



action. One speculates whether that was a result of his appearance against Seaton in the earlier case of *Lennox*.

Sir Francis developed an extensive practice in the common law and industrial fields. At the same time, he was a visiting lecturer in law at the University of Western Australia Law School between 1945 and 1965. He was appointed Queen's Counsel in April 1959 and in March 1961 he established the Independent Bar of which he became the undisputed leader.

The first reported case in which he was involved after taking silk was *R v Dodd* in 1960 which was heard over three days in August and September 1959. In that case it was held that on a charge of wilful murder, it was a misdirection to withdraw the alternative verdicts of murder and manslaughter from the jury. It was also held that the partial intoxication of the accused was relevant to intention and should have been left to the jury. This was a case in which Sir Francis demonstrated his firm grasp and knowledge of the criminal law. It was a Legal Aid case in the sense that it was unlikely that it yielded any fees. The fact that Red's great friend Peter Atkins was Red's junior in that case, not a jurisdiction in which he regularly practised, confirms that impression - that it was a freebie.

A major civil case heard in 1959 was *Kohler v Amalgamated Collieries of Western Australia*, the first reported case in which his partner the Honourable John Wickham, himself later a Supreme Court Judge, following his appointment as Queen's Counsel, appeared as Red's junior. It is fair to say that in the late 1950s and the 1960s Red Burt emerged as the dominant figure and acknowledged leader of the Western Australian Bar.



In the 1950s and 1960s, he was also much involved in professional affairs. He was President of the Law Society of Western Australia from 1960 to 1962. He was Chairman of the Institute of Radiotherapy from 1960 to 1962 and Chairman of the Board of Management of Sir Charles Gairdner Hospital from 1962 to 1972. He was a member of the Senate of the University of Western Australia from 1968 to 1976 and also made a contribution to local Government.

In 1967, Sir Francis was appointed Counsel Assisting the second Royal Commission which inquired into the events surrounding the loss of the *HMAS Voyager* following a collision with the aircraft carrier *HMAS Melbourne*. His outstanding efforts in this assignment saw him achieve national recognition. This was followed by his work as a Commissioner inquiring into the affairs of Wool Exporters Ltd, the report of which was completed after his appointment as a Judge of the Supreme Court on 19 February 1969.

The first reported decision following Sir Francis's appointment to the bench was *Leete v Piccadilly Nu-Fabrics Pty Ltd* in 1969, in which it was held that a husband and children were dependants of a working wife who was working full-time at the date of her death and were consequently entitled to workers compensation under the *Workers Compensation Act*. That was a landmark decision in workers compensation law in Western Australia.

From that relatively inauspicious beginning, his judicial career flourished and he became recognised as one of Australia's leading jurists. It surprised no-one that in 1977 Sir Francis was appointed Chief Justice to succeed Sir Lawrence Jackson. Sir Francis was an absolutely outstanding Chief Justice. He was the leader of the Court in every sense and



commanded the respect and affection of all who worked with him until his retirement on 25 May 1988.

In the meantime, on 20 April 1977, Sir Francis was appointed Lieutenant Governor of the State. He carried out his vice-regal duties without in any way permitting the performance of those duties to interfere with his work as Chief Justice.

In farewelling Sir Francis, the then Senior Puisne Judge, the Hon Justice Wallace, who I am happy to say is still with us, noted that the evaluation of Sir Francis' contribution of the law remained to be written. It will very soon be found in the *History of the Supreme Court* being written by Professor Geoffrey Bolton and Ms Geraldine Byrne.

Cases in which his Honour appeared as counsel dominate the *Western Australian Reports* during his time at the Bar and also comprise a significant contribution to the *Commonwealth Law Reports*. Sir Francis became the Western Australian reporter for the *Commonwealth Law Reports* and the editor of the *Western Australian Law Reports* in 1949. He appeared in major cases including *Beamish v R* in which he represented Beamish for the modest fee contained in the *Poor Persons' Legal Assistance Act*. Cases such as *Haque v Haque* and *Hargreave v Goldman* come to mind.

Hargreave v Goldman comes to mind in the context where, having lost in the Privy Council, Mr Goldman complained to the media that he paid Mr Burt a very substantial fee and the money had been wasted. That was a lie and Red and Margaret were holidaying in Greece at the time. I managed to get hold of him and I suggested a course of action. He said, "Get hold of Tom Hughes and get him to settle a notice." I did that and the newspapers were forced to publish apologies on the legal notices pages of every major newspaper in Australia.



Cases such as *Haque v Haque* and *Hargreave v Goldman* were important. Another was *The Esplanade Hotel* case relating to the preservation of its famous verandahs.

As Wallace J said at Sir Francis' farewell:

"The clarity and precision of his judgments are an inspiration to all privileged to read them and have had a profound influence of lasting measure. His Honour's humble approach to the solving of problems, his hesitation against ready acceptance of an early answer, his continual posing of the right question involved, has on countless occasions disarmed advocates and made light the work of his fellow members on the appeal court bench."

Sir Francis was capable of great compassion and had a quick and rich sense of humour. Those of us who were present on the occasion of his retirement will recall how he indicated that he often passed the time by counting the number of panels on the gallery above. His life was one of enduring service to the community above and beyond the call of duty. His service to the law was appropriately recognised by the University of Western Australia when it conferred on him an honorary degree of Doctor of Laws early in 1988.

There was one case in which I was involved, *Court v Hewitt*, which went to the High Court. It had been decided by John Wickham at first instance and it related to the Question whether or not a young couple had an equitable interest in a partly constructed mobile home which was to be transported to a farm in York and put on stumps. Wickham J held that there was an equitable interest to the extent of the payments which had



been made in the partially completed house and it was the subject of an equitable lien.

When I was putting this argument when the decision had been appealed against us I was asked the question, "Mr Malcolm, what is an equitable lien?" and I endeavoured to give an answer. He then asked, "Is there any authority for that proposition?" I said, "It is to be found in the old case of *Swainston v Clay*." "Where?" he asked, and I endeavoured to point it out, without going into any great detail.

Subsequently the case went to the High Court and our appeal to the High Court against the Full Court's decision was upheld. Deane J very held that the purchasers had an equitable lien, saying:

"I am fortified in that conclusion by the judgment of Turner LJ (with whom Knight Bruce LJ agreed) in *Swainston v Clay*."

I had two notes. One came from Wickham J which said, "Well done, Porky. We won." The other was from Red, "On this occasion I am forced to concede that the High Court may be right."

As a Judge, Sir Francis held the firm view that it was the essential task of a Judge to decide cases. In his last year as Chief Justice, Sir Francis was involved in a total of 168 cases, and wrote 70 substantive judgments. He participated in no less than 98 decisions as a member of the Full Court or the Court of Criminal Appeal. This reflected his view that the essential task of a Judge was to decide cases, not to write essays.

There are two things which Sir Francis said in his own farewell address that are of very considerable importance.

The first was that:



"The efficiency of the legal system in bringing justice to people is entirely dependent upon the way in which the profession – that is to say, all parts of it: solicitors, barristers and judges – do their work together. Each is dependent on the other, and efficiency is entirely dependent upon the manner in which they work together as a team."

In my opinion, the recognition of this is of the utmost importance. The second thing which Sir Francis said was that:

"The profession, and the judiciary in particular, must recognise that they have an obligation to communicate. We live in a democratic society. The courts are accountable, and this means that they must communicate to people so that they will know what the courts are doing: what they are failing to do, and how they do what they do. But communication is not possible if people have no interest to listen, and they won't have any interest to listen unless they appreciate and understand the importance of the judiciary and of the profession in the maintenance of a just society. This is a communication problem. I can't see how it can immediately be resolved, but surely education is basic to its solution, because we cannot make a step towards solving it until we have a society which really understands and appreciates the importance of the rule of law as it has been developed in our system of government."



This was something which Sir Francis impressed upon me very strongly when handing over the reins of office. This was something which Sir Francis impressed upon me very strongly when handing over the reins of office. He also made a remark which is indelibly engraved on my memory. I suggested to him that I was being offered this appointment too soon, that I was unworthy of it and somebody else should be found who might be a more worthy successor. His response was, "Porky, if you don't take this job, I will never bloody well speak to you again." There was no answer that could be able to overcome that level of encouragement.

Sir Francis was an inspiration to successive generations of lawyers who had been taught by him or worked with him. He was without pretension. His humanity was deep and sensitive. His knowledge of the law and understanding of the human condition was likewise deep and extensive. He had a great amount of commonsense and wisdom. While an intellectual giant, he could relate to persons of almost any background. He was the acknowledged leader of the bar when in practice and he remained the leading lawyer in the state in his capacity as a judge. His appointment as Chief Justice was universally acclaimed. He lived up to all of the expectations of him. His judicial work and leadership on the Court was recognised throughout Australia. Above all, he earned the great respect and affection of all of those who worked with him or came into contact with him.

I think that he would be pleased that we have celebrated his life and work in this courtroom in which he both argued at the Bar and later presided with such great effect. It is very pleasing that he consented to have his portrait painted in a form which showed him in retirement, watching over the present generation with a degree of kindly patience,



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reminding us to strive to do right to all manner of people, as he had done through his magnificent career.