

JUSTICE KIT TOOGOOD

FINAL SITTING

**COURTROOM No. 1,
AUCKLAND HIGH COURT
2 AUGUST 2019, 3.30 PM**

Tihei mauri ora
Nau mai, haere mai, noho mai
E nga mana, e nga reo, e nga tangata, e nga whare kooti e tu nei
Tēna koutou katoa

Ki nga mate o te motu Haere, haere, haere atu ra

Ki te mana whenua me te hapu ō Tāmaki Makaurau
E mihi ana ki a koutou katoa

Kia ora ano tatau e huihui mai nei.
No reira, Tēna koutou, Tēna koutou, Tēna tatou katoa

First, I wish to acknowledge the members of the Inner Bar who honour me with their presence:

SILKS TO MOVE

Before I invite counsel to address me, I want to introduce you to the talented people who have joined me on the Bench. On my right is my long-suffering Associate, Penny Murray, who has supported me throughout my time here. Penny has worked in the courts and particularly for judges in this court for over 20 years. She taught me how to keep the wheels moving and stopped them from falling off more than once. I could not have hoped for a more efficient, willing, selfless and caring assistant. Nothing has ever seemed a burden to her – she has worked late into the evening or come in to work at ungodly hours to get the job down when urgency required it, without ever once complaining. She has been a wonderful friend, especially when we have had to deal with distressing cases.

I will miss greatly the morning coffees and the sound of Penny's cheerful humming and singing as she plows her way through yet another draft judgment or transcript. I did realise early on, however, that when she hums How Great Thou Art, she's not thinking about me.

Behind me are six of the eight extremely clever young lawyers who have been my research clerks since my appointment in early 2011: Julia Adams, Tom McKenzie, Jordan Grimmer, Luke Elborough, Cheyenne Conroy-Mosdell and Tom Riley. My first two clerks, Matt Gale and Tom Westaway, are currently in London doing great work in major law firms.

These are the people who followed my instruction that their principal task was to make me look as though I knew what I was doing and, of course, to make sure in the interests of our customers that I got it right most of the time. To the extent that they succeeded, they deserve the credit. To the extent that they failed, the responsibility is entirely mine. I like to think of our relationships as partnerships: they tell me what I need to know about the law and I tell them what they need to know about rugby and cricket.

The relationship between judge and clerk is a special one. To be successful, the judge must have complete confidence in the clerk's ability but, above all, must have absolute trust in their integrity. I am proud to say that not once has any of these terrific young people ever let me down on either count. I am delighted they accepted my invitation to sit with me as a Full Court.

ADDRESSES FROM:

Kate Davenport QC, President of NZ Bar Association

Marie Dyhrberg QC, Vice-President of the Auckland District Law Society

Kathryn Beck, Immediate Past President of the New Zealand Law Society

Ms Davenport: thank you for your generous remarks on behalf of the New Zealand Bar Association. You spoke kindly of me at my swearing-in, and because of our association as fellow chambers inmates over 20 years or so prior to my appointment, I am delighted that you are making further submissions but, this time, in your capacity as President rather than a substitute. It is a particular pleasure for me to have in prospect the Bar Association's Annual Conference, this time in Queenstown in just three weeks, where I will look forward to re-establishing my close friendships with so many colleagues from the independent Bar from whose social company, I regret, I have been a little removed for a few years. I hope to play an active role assisting the work of the Association, although I deeply regret that I will now be required to pay a full membership fee.

Ms Dyhrberg: I am delighted also that you have been asked by the President of the Auckland District Law Society to speak today. You have been far too kind in your remarks, however. As

you know, criminal practice is dear to my heart and you are rightly recognised as a leader in that field. I have enjoyed your appearances before me, both in trials and at appellate levels. Thank you for taking the time to be here. It was in the criminal courts, more than anywhere else, that I first learned and honed my skills as an advocate, such as they were. And it has been the criminal cases by-and-large which have given me the greatest pleasure and caused me the greatest pain as a judge. I regret to say that there are many people, both outside our profession and within it, who simply do not understand the vitally important contribution to the maintenance of the rule of law made by members of the criminal Bar, both as prosecutors and defence counsel. And I know that the burdens counsel carry, particularly defence counsel, weigh very heavily on their personal lives.

Ms Beck: thank you for appearing on behalf of the New Zealand Law Society and for your kind words. I am pleased to have an opportunity to acknowledge publicly my admiration for your outstanding service to the legal profession and to the community through your term as President of the Society. Others, closer to the difficult issues you handled so skilfully and with such sensitivity, have acknowledged your efforts, but I wanted to add my own note of appreciation. As you know better than anyone, there is still much for the legal profession to do in addressing issues of fairness and equity in the profession, and ensuring the safety of all of those who choose to work in the dynamic environment of legal practice. But I am confident that, in the continuing role you have accepted in this area, you and your colleagues will provide a leading example for the many other professions, occupational groups and organisations among whom there are many less-publicised problems of the kind you addressed so sensitively. You and I have a professional relationship going back more than 30 years, and although I regret, of course, that Ms Epati was unable to be here, I am delighted that she asked you to stand in for her.

It has felt awkward indicating my willingness to hold a special sitting as I leave this Court knowing that members of the profession would feel obliged to attend and that some would be expected to say kind things about me. Mercifully, none of you has needed to spend any time discussing my academic record, but I have been greatly warmed by your generous addresses and by the many messages of goodwill I have received from people who have been unable to be present.

I want to thank all of you for coming. It is humbling and heart-warming. I thank particularly those practitioners who have been able to do so for donning ceremonial dress for this occasion. It had not been my intention to require you to do that because I know it can be tedious, and just being here is enough of a burden for you. But as one of the last of the Senior Court judges who was admitted to the Bar during the Jurassic period, and who regrets the demise of the red robes and full-bottom wigs in favour of this new, sleek version, I appreciate it. I am getting used to this gown, even though I know from conversations I have had with the many young practitioners, and their families, whose admissions to the Bar I have been privileged to order, that they like the Senior Court judges to dress up. For me, the scarlet colour of the old robes symbolises the ancient authority which the judges of the High Court – both in England and here – derive from the Crown, not from Parliament. The colour reflects the vitally important constitutional principle that the Judiciary is a separate branch of Government, independent of both the Legislature and the Executive.

The old robes are out-dated and colonial in origin and, for many, understandably culturally inappropriate. But they – and your wigs and gowns – provide what I regard as an important link to the past, symbolising centuries of the maintenance of the rule of law by our honourable profession and by the courts, whose traditions are entrenched firmly in our history. I hope the profession will continue to wear wigs and bands on ceremonial occasions, even if the judges do not.

I do acknowledge that there is much in the design of this new gown that better reflects contemporary New Zealand society and, importantly, our bicultural foundations. Our nation's distinctive heritage under Te Tiriti O Waitangi is reflected in the poutama pattern trim in red, black and gold. So today, although just a little reluctantly, I embrace the new look.

The particular reason I am pleased that you have joined me here is that I have the opportunity to thank those people who have supported me over the past eight-and-a-half years. At my swearing-in, I hoped that the support I had received from my new judicial colleagues, from my former colleagues at the Bar, and particularly from my family and friends, would mean that as my ship altered course I would not founder on the rocks and that the voyage would be immensely fulfilling. I do not think I have foundered although, if you will forgive the metaphor, I have had my bottom scraped a few times. The voyage has unquestionably been the most fulfilling period of my professional life.

The work of a judge can be very lonely. Except on those occasions when I have been privileged to sit as part of an appellate panel in the Divisional Court, I have had to take sole responsibility for making what have sometimes been difficult decisions in both the civil and criminal jurisdictions, aware of the profound impact they will have on people's lives.

I could not have coped with those burdens without the extraordinary support of my beloved Pip, my children, the other members of my family and our friends. Pip, Will and Ben, particularly, have had to put up my absences on circuit; my inattention while distracted by the workload which has required, on occasions, working long hours in the evening and at weekends, and I know there have been times when my mood has been less than ebullient. They have throughout remained steadfastly understanding, supportive and loving and I cannot thank them enough. My eldest son, Matt, and my daughter, Fleur, have other commitments that have prevented their being here – Matt running his thriving business in Dubai, and Fleur witnessing the conferment of her husband Greg's PhD as I speak. They, also, have been encouraging and insightful when we talk, as we do inevitably, about aspects of my work.

The most important contribution my family has made to my wellbeing is one made also by our close friends, some of whom are here: that is, to keep me grounded and stop me from getting up myself. I am looking forward to spending more time with family and friends and to have more fun. My dear mate Ivan Connell, I know, has already put my golf clubs in the back of his car, waiting to whisk me away to Middlemore as soon as possible. Not tonight, but next week almost certainly.

I want to acknowledge also my judicial colleagues across all benches, but particularly the Senior Court judges and, more especially, the judges who have been members of the Auckland High Court common room. I could not imagine a more collegial group of work colleagues. I have derived great pleasure from the gatherings of judges at seminars and conferences and at retirement dinners, such as the one Pip and I are about to attend in a few hours. We have formed warm friendships with many of the judges and their partners. To end my daily contact with the High Court judges in Auckland will be particularly difficult. They are universally helpful, supportive and caring and I simply could not have fulfilled my duties as a judge adequately without them.

It is also true that I have made many close friends among the Registry staff and the management of the Auckland High Court. Again, universally, I have had not one moment when I have not benefited from their expertise, their diligence and their commitment to providing the best

possible service, not only to the judiciary and members of the legal profession, but also – and most importantly – to the litigants and others who bring their lives, their problems, hopes and fears with them into this building. They are exceptionally committed people who work long hours for inadequate remuneration, but they do so with a sense of purpose and dedication that is truly admirable. Most of all, from my perspective, they are great company and I will miss them terribly. The upside is that, from Monday, I will be able to insist that they call me Kit.

I hope I don't offend any of my Registry colleagues if I mention just three in particular. First, Ching Zhou, who is the Support Services Manager. Ching does everything that the rest of us take for granted: from the big jobs such as project managing the building of new courtrooms and the transfer of the Registry offices to a new combined office on the ground floor to managing the shuffle of Judges from one chamber to another when a Judge retires, to coming in at weekends when the garage door has failed and a grumpy judge needs to get her or his car out. Ching does everything with the broadest of smiles and with cheerful good humour. That includes an occasion when he was asked to arrange the permanent installation of a ladder for a vertically-challenged judge who had been allocated a room with only one small window that was two metres above her head, even when she was at full Manolo Blahnik height.

The man in front of me, John Richardson, is the astute, calm, persuasive and highly-principled Registrar and Court Manager who recently succeeded the inestimable Nana Matenga after having been the Criminal Caseflow Manager for many years. One every-day example of John's value to maintaining and enhancing the reputation of the Court occurred when I had to indicate to a prospective juror who was severely physically disabled that his need to have a carer at his side, including in the jury room, meant that I would have to stand him aside if his name was drawn from the ballot box. He was desperately keen to serve as a juror. John didn't simply convey the difficult message; he went out of his way to give the young man an escorted tour of the Court building, including around areas not available for public access. It was a small but typically thoughtful gesture. With the Ashes Series just under way, I will miss John's regular cricketing insights.

The court manager most counsel who appear here would deal with most often is the Judicial Resources Manager, Corrina MacDonald. It is fair to say that the Court simply could not function efficiently without Corrina's finely tuned scheduling of cases and allocation of Judges in the conjunction with the List Judge. Corrina's astute reading of people and her sympathetic understanding of the personal foibles of her judges – and we are **her** judges – is unparalleled.

I am very grateful to her for her friendship and her many kindnesses, not the least of which was scheduling my last proper hearing in Auckland at a time when my family could be present. Importantly, Corrina allowed me to finish my time as a sitting judge on a satisfying note. It had its entertaining elements: the appellant had been unable to resist hopping into an Audi R8 parked in Queen Street with the keys inside and the engine running and taking it for a spin. It also enabled me, as my last order in a criminal case, and with the compassionate consent of the Crown Solicitor, to release on bail a man who needs a bit of help and for whom further time in jail would have achieved no purpose whatsoever.

The last group of people I wish to thank are the members of the legal profession with whom I've worked while in this job. I see many familiar faces here and I am touched that you have joined me on what is a significant day; the last on which I will be an active participant in a court proceeding after more than 46 years. Closest to the Bench I see lawyers I respect greatly and whom I count as friends. Particularly those who grace the Inner Bar. I sometimes think it's wrong that only retiring judges have special sittings and I wondered why it was that we don't honour retiring Silks in the same way. But as I look down I realise it's because the old warriors just won't retire!

Some of you have come from a considerable distance to be here, including my old friend, Matt McClelland QC. It means an awful lot to me that you have given up precious time to do so.

I don't know whether old dentists or auditors think nostalgically about the early days of their careers in the way barristers do, but I've been thinking a lot about mine with great affection. In those days everybody did everything and you would see in the No. 1 Magistrates Court, Wellington's best advocates entering a mitigation plea in a drunk-driving or shoplifting case, then heading around to the then-Supreme Court to robe quickly and appear in the undefended divorce list, hoping that Sir Alec Haslam wasn't going to be on the Bench. The next day they'd be arguing a personal injury claim in front of a jury or appearing in the linoleum-floored, five-metre-by-ten-metre fridge in which the Court of Appeal sat. We all learned from our mistakes, sharing war stories in Parson's coffee shop. We were just kids, but it was challenging and exciting and we had a great deal of fun.

I know life at the Bar, particularly the criminal bar, is very different now. What has changed most significantly, I think, is the number of women appearing routinely in civil and criminal cases in the High Court and Court of Appeal. The profession and the criminal and civil justice systems are much the richer and better for it.

I had the fondest of memories from my first Triennial Law Conference in Wellington in 1973, which was a spectacular event, so significant that the Law Society contributed to the repainting of the Wellington Town Hall just for the Conference. But I was dismayed and, frankly, ashamed recently when by chance I came across, in no less a publication than the New Zealand Law Journal, an account of the Conference dinner attended by 700 practitioners, Magistrates and Judges, many of whom were from overseas. Fewer than 10 of the practitioners were women. I cannot bring myself to repeat the appallingly misogynistic language of the report.

In Court today, one-third of the Silks are women and we routinely admit more women than men at Admission ceremonies. So, we have come a long way, but there is much more to do. We make it hard for women advocates and others with family care responsibilities to appear as frequently in major criminal and civil cases as they need to do, to develop their expertise and establish their reputations. I encourage the profession as a whole to press for change on matters such as sitting hours and equitable briefing. It is certainly my intention to do what I can to support such efforts.

I didn't mean for this address to be either so long or to become so earnest. It is important that we allow a little levity into even the most serious of cases, just to preserve our sanity. Nothing quite beats the theatre of a busy List in the District Court for original humour. I remember being in the Magistrates Court at Wellington when a defendant pleaded guilty to shoplifting half-a-pound of bacon. He'd smuggled it into his underpants before being arrested as he stepped outside the butcher shop. I doubt that I'll forget the priceless look on the face of Mr Des Sullivan SM when the prosecuting sergeant asked for an order directing the return of the recovered property.

That likeable old rogue, the late Eb Leary, lifted my spirits in one of his last criminal trials over which I presided. Eb was one of I think eight or nine counsel acting for the many defendants, although his client had absconded prior to the trial. I decided the client should be tried in absentia and Eb was there to represent his interests as best he could. It was a major drug trial. A Police officer gave evidence about four of the defendants sitting down over an enormous lunch in a Mt Eden Thai restaurant. The photographs showed the tables laden with food and on the floor, not far from the table, were two bags containing a total of \$242,250 in cash. You may be able to draw an inference, as the jury apparently did, about what they were celebrating. The police officer described the scene when members of the Armed Offenders Squad burst into the restaurant making a huge amount of noise and waving serious firearms. The defendants

leapt from their seats, scattering chairs and tables in their attempts to distance themselves as much as possible from the money. Every defence counsel had an opportunity to cross-examine the witness. I worked my way along the rows of counsel asking whether they had any questions. I came at the end to Edward Poulter Leary. My invitation to Eb to question the detective was procedurally correct but his client was not one of the diners, so it had little purpose – or so I thought. Eb rose slowly:

Just one question, your Honour. Tell me, Sergeant, with all that food on the table and all that money lying around, did anyone pay for the meal?

I have detained you far too long.

I have tried my best to be a good judge and if I have succeeded in that to any degree most of the credit goes to the young people behind me and to the skill of counsel. I am grateful for the patient help that you have given me.

The good company of the profession for nearly 50 years has encouraged me to plan to go back into practice although, of course, not as an active participant in the courtroom. I hope, by making myself available as a mediator, I can provide for lawyers and their clients better outcomes than they may have experienced in my court.

Pip and I would be grateful if you could join us for refreshments in the foyer at the back of the Court. I thank you all so much for coming.