

IN THE SUPREME COURT OF NEW ZEALAND

Date: 7 April 2017

Coram: Elias CJ
William Young J
O'Regan J
Ellen France J

Speakers: Dame Sian Elias – Chief Justice
Ms U R Jagose - Solicitor-General
Ms K M Beck – President New Zealand Law Society
Mr C L Elliott QC – on behalf of the New Zealand
Bar Association
Mr J A Farmer QC

**FINAL SITTING SPEECHES FOR HONOURABLE JUSTICE
TERENCE ARNOLD**

ELIAS CJ:

Te Whare e tu nei, tena koe.

E nga mate, haere atu ra

E nga kanohi ora o ratou ma

Nau mai, haere mai ki tenei hui o Te Kōti Mana Nui

Tena koutou katoa

I have greeted this courthouse and the shades of those who have gone before us. I greet you who follow in their tradition. You are all very welcome to this special sitting of the Supreme Court of New Zealand, Te Kōti Mana Nui.

I want to specially welcome and greet the family of Justice Arnold, Susan and the family are seated at the back somewhere. Sorry Susan I can't see you to acknowledge you; and the grandchildren and Sarah.

Before turning to the business in hand I first will invite senior counsel present to enter their appearances. Madam Solicitor, Mr Farmer, Mr Carruthers, Mr Millard, Ms Scholtens, Mr Goddard, Mr Cook, Mr Mills, Mr Lithgow, Mr Hodder, Mr Heron, Mr Stapleton, Mr Pike, Mr Elliott, Mr Radich, Mr Laurenson.

Well this is a sitting of the Court to acknowledge the service of Justice Arnold on the occasion of his retirement from the Court. I have first to give an apology from the only member of the Court who is not able to be present, that's Justice Susan Glazebrook. She is very sad to be in North America at this time as she would very like to have been here and wishes to be associated with what is said.

This is not the end of the contribution Justice Arnold will make to our country and our law. We may be confident, given his vigour and mental agility that this is not even the beginning of the end. But it is the end of a significant stage of the career of an eminent man and it is appropriate to mark the rite of passage by reflecting on this stage and to express appreciation for the past 11 years and what it has meant for us. So, although this is principally an occasion for acknowledgement by the Government and the profession, there are some acknowledgements that should be made publicly at this time from the perspective of those of us on this side of the bench and on behalf of the judiciary more generally.

When Justice Arnold was sworn in in 2006 it was with universal support and goodwill. He was a practitioner who had earned the confidence of all who had been privileged to work with him or see him in action and we

had high expectations then and our expectations, of course, were exceeded by the contribution made by the Judge.

At the Judge's swearing in, I invoked the view of Aharon Barak that a good Judge must display "intellectual modesty" which avoids the trap of thinking that everything he does is good and praiseworthy. Judges cannot have agendas – and this Judge has not. He has been open-minded, careful, and brave when it is required. Although I suspect he would not see that what he has done is brave himself. He would see it as simply doing what he was bound to do.

It is not surprising that Justice Arnold has been a such an outstanding Judge because he is someone who has demonstrated throughout his working life great intellectual curiosity and has been adventurous in his career. He took all opportunities seemingly that came his way. It is startling in reviewing his CV to see that someone who has been as effective in major commercial litigation at the Bar (really the heaviest to come before the Courts in our time) was also the Robert Marshall Fellow in Civil Liberties and who was so committed to teaching criminal law that he took leave from Chapman Tripp to go back to do it in Canada after having returned to New Zealand. And I don't think everyone would have found it irresistible if armed with shining Masters' degrees from both Victoria and NYU to take up teaching positions at Windsor and Dalhousie, eminent intuitions though they are but one might have thought that he had other fish to fry but he was obviously very committed to that.

So he brought to his work as a Judge unusually wide range of experience in a range of activities. And although he in later years concentrated in private practice in commercial litigation, he always had a public law interest perhaps arising out of that interest in criminal law. But it meant that he was well-placed to take on regulatory commercial work at a time when that work assumed great significance in the legal order with

government restructuring and modern commercial regulatory legislation. So he was briefed by private clients and public bodies and indeed undertook regulatory work himself when appointed to the Takeovers Panel. So it's not surprising that the government should have sought Terence Arnold out to be Solicitor-General in 2000. Perhaps it was a little more surprising in an age when the call to public service is not always accepted, that he did accept that office to universal acclamation and the triumphant headline that the Clark Government had appointed a boy. As Chief Justice at the time I had occasion to follow how well Terence Arnold discharged that high office both in terms of his appearances on behalf of the Crown and outside the courtroom in the active he provided and the intermediary role he undertook between the bench and the government.

So the considerable contribution that Terence Arnold has made as a Judge not only in this Court but in the seven years in which you served on the Court of Appeal is not surprising. I said in welcoming the Judge when he was appointed to the Court of Appeal in 2006 that in the New Zealand Court of Appeal, you can hear the heart of justice pumping and the Judge worked hard at the pump. So it wasn't at all surprising and was I think universally welcomed when he was appointed to this Court in 2013. He was well qualified for it, not only by the range of experiences that I've mentioned and the learning and scholarship he demonstrated in his judgments in the Court of Appeal, but also because as Chair of the Advisory Committee on abolition of appeals to the Privy Council he came here with a belief in the necessity of a final New Zealand appellate court and he's worked during his time here tirelessly to achieve the aspirations for the Court. Anyone who serves in this Court is conscious of the responsibility it entails but none more than Justice Arnold because of those experiences and because of the soundings that committee took, he was uniquely aware of the hopes and fears when the Court was floated.

The most controversial cases, not only the most controversial points of law, tend to end up in the Court of Appeal or Supreme Court and because they raise novel points, it's very important to have Judges with the ability to think through some of the points with breadth of experience, intellectual curiosity, knowledge of the principles of the law rather than the knowledge of the rules and of course Justice Arnold had those qualities in spades.

In an appellate court too, where the Judge sits as one of a number of colleagues, the culture of the court is critical to its effectiveness. What is essential as Chief Justice French recently said is not so much the number of cases in which unanimity is reached or even a clear majority opinion, but a culture in which the court tries to reach unanimity and tries to at least come up with a clear majority opinion and in which the judges work collegially and co-operatively, even when the cases provoke strong disagreement.

Well Justice Arnold has been glue in this Court in that way. His style, of course, is self-effacing and inclusive and modest and it is highly effective. When he speaks, he is listened to and his views are always sought.

He also has infectious optimism about law. He believes that the ends it serves are good. As a Judge he has worked to de-mystify law and to make it understandable and valued by all and that is seen not only in his judgments but in his approachability and willingness to give of his time to help colleagues, practitioners, students and others. He is a natural teacher as scores of law clerks in recent years would agree. His questions at hearings are to the point and precise and sensitive to the role of counsel. They seek to clear up doubt, not to obtain submission. He is unfailingly courteous to counsel, to court staff, to colleagues (whatever the provocation). He is however no pushover and his well thought out views are ones to which he holds firm unless he is convinced to change.

His attempts to build consensus in the Court and his willingness to contribute to the work of others even when he takes a different line have made him a linchpin in the Court. It is no accident that he has generally been in the majority and has written so many judgments for the majority or for a unanimous court.

And he's also shouldered a very heavy burden of judicial chores and it's been a great comfort to me as Chief Justice to have to have him to deal with the sort of responses we have to give to policy development bearing on court function and to have someone at hand as versed in constitutional principle and the practice of government.

As a former colleague on this Court recently said about Justice Arnold's time on this Bench, he has been a pivotal member of the Court. His judgments are well-reasoned, clear and thoughtful in exposition of legal principle and in its application.

Justice Arnold has been a close colleague and dear friend of all on this Court and of Judges from other benches. He has been a large part of our lives and we're very sorry indeed to see him go from the permanent Court. But we look forward to our continued association and friendship with him and with Susan, whom I now see right in the front, great hostess and friend to us all, in the years ahead. And we know his family may be at last able to claim a bit more of his time – although they are unlikely to be able to have him entirely to themselves because he has much still to do. Madam Solicitor.

SOLICITOR-GENERAL:

E te kaiwhakawā o te Kōti mana nui, tēna koe

Greetings to the Court

E nga kaiwhakawā, tēna koutou

And to the Judges

Your Honour it gives me great pleasure to appear today on behalf of the Government at your final sitting. The Attorney has asked me to pass on his apologies to you, that he can't be here to deliver this address. He departs today for France to represent New Zealand at events commemorating the Centenary of the Battle of Arras in Northern France. He remembers well the day he phoned you to ask you to take Justice Chambers place on this Court Sir and he wants me to tell you today that he was very grateful to you for accepting the position in that very sad time for the judiciary and for the profession. New Zealand was lucky to have someone of your calibre to fill the vacancy.

Your Honour's background and career will be familiar to many here today. You graduated with a Bachelor of Arts and Bachelor of Laws with Honours in 1970 from Victoria University. In 1972 you completed a Masters of Law with distinction, also at Victoria. In 1973 on completion of your studies in New Zealand you travelled to New York to pursue your interest in criminal justice at New York University. There at NYU you completed an LLM in Criminal Justice and you worked as an Assistant Director of the Criminal Justice Standards Evaluation Project which was run through the University's Institute of Judicial Administration.

After a year in New York you relocated to Canada where you spent four years as a lecturer at the University of Windsor, St Mary's University and Dalhousie University with a focus on criminal law. Then you returned after being away for five years to New Zealand and to Victoria University where you took up a position as Senior Lecturer lecturing criminal law, legal systems and an Honours seminar.

In 1982 you left academia to begin a long and very successful association with Chapman Tripp, becoming a commercial litigation partner in 1985. You became a member of the Bill of Rights Monitoring Group in 1986, advising the Minister of Justice on the establishment of a Bill of Rights for New Zealand. Then in 1994 after nearly 12 years at Chapman Tripp you

commenced practice as a barrister sole and shortly thereafter were appointed a Queen's Counsel. You were a founding member of the Law and Economics Association of New Zealand and were appointed its President in 1996. You have also served as a member of the Market Surveillance Committee of the New Zealand Electricity market from 1996 to 2000.

Sir I will leave it to those who speak after me to elaborate on your private law career and your outstanding contributions during those years to the legal profession as a whole. I wish instead to focus on your role as the Solicitor-General, a position you were appointed to in 2000. And Sir, may I say on a personal note that it's a great pleasure for me to be able to address you today; given that you were the first Solicitor-General that I worked with when I came to Crown Law. As Solicitor-General Sir you served three Attorneys-General. You always maintained the integrity of the law and the independence and impartiality of the law officers. You carried the burden and the privilege of the role with dignity and with grace. You were an excellent advocate on a number of challenging cases in all of the courts. Such cases travel a range of matters from taxation, the Commerce Commission to human rights, to criminal law. You also improved the professional leadership in the office, introducing two new Deputy Solicitor-General roles which remain today a critical part of the office's leadership.

During your distinguished term as Solicitor-General Your Honour was also instrumental in assisting with the establishment of this Court, Te Kōti Mana Nui, the Supreme Court of New Zealand. You chaired the Ministerial Advisory Group which considered and advised the Government on the structure and purpose of the new Court. It is fitting then that you have sat on this Court and continued your valuable contribution to its development in New Zealand's constitutional framework.

Sir you are very warmly remembered at Crown Law. Those of us fortunate to work with you in the office remember your legal skill of course, but you are particularly remembered for your exhortation to strive for simplicity, for clarity and precision, all critical techniques of persuasion. We still refer to your

practice seminar on litigation strategy Sir and your advice on techniques of persuasion contained the valuable and now often repeated hint, “Don’t antagonise the mind that you seek to persuade.” Doubtless that’s a live notion whichever side of the bench one is positioned. And your influential work on articulating principles for how the Crown should conduct itself in Court underpins our understanding and our practice of the Crown’s obligations as litigant. Needless to say the important and significant cases you argued for the Crown were not always the ones where the Crown’s arguments succeeded but they have been nonetheless critical to the development of New Zealand’s law. To mention just one case Sir, in a treaty and Aboriginal title context of course was *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) the foreshore and seabed case. Both in the Court of Appeal, and then when policy was formulated in response to the judgments in the Waitangi Tribunal, that was litigation which continues to inform the engagement between Crown and Māori.

There’s just one further notable matter that warrants mention Sir. In 2002 you and Justice Simon France, Crown counsel as he was then, appeared before the Privy Council in a seminal case on the right to appeal, *R v Taito* [2002] UKPC 15, [2003] 3 NZLR 577. Of course the case was well argued but the outcome was not what you argued for. I’m advised Sir that on that day you and your junior, Justice France were thus responsible for the loss of some 1500 criminal appeals in one fell swoop. This still stands as an office record. If I may so Sir, one that I’m very eager to let you hang onto.

In 2006 you were appointed as a Judge of the High Court and of the Court of Appeal and you served over 10 years on the bench. After seven years in the Court of Appeal in June 2013 you were appointed to this Court where you have served over three years. Your contribution has been significant, as the Chief Justice has just referred to, and exemplifies your wide range of experience and expertise across different areas of law and your dedication to public service.

In December 2015 you were honoured as a Knight Companion of the New Zealand Order of Merit for services to the judiciary. Outside of the law you have been a keen yachtsman and I'm sure others will mention that today. And various members of the Crown Law Office have fond memories of being press-ganged into service on your boat, both around Wellington Harbour and beyond.

Your Honour you have served your community well and your retirement is well earned. The Government thanks you for your service to the law both during your time as a practitioner and as a member of the judiciary and wishes you all the best in your retirement. Sir, ara te kōrero, there is a saying, "He rei ngā niho, he parāoa ngā kauae," if you have the tooth of a whale you must also have the whale's jaw. You, Sir, clearly have both, you have the ambition and intelligence, the courage and the devotion of the law for the great enterprises that you have undertaken. Ka rite ki te pai o te Kōti. As the Court pleases.

ELIAS CJ:

Thank you Madam Solicitor. Mr Elliott, I'm sorry Ms Beck, President of the New Zealand Law Society.

MS BECK:

May it please the Court. Your Honour it's a privilege to convey to you the best wishes and gratitude on behalf of the profession and the New Zealand Law Society today. Other speakers will, I'm sure, cover more your time at the bench and at Crown Law as Madam Solicitor has done already. I want to focus on your incredible generosity and devotion to the legal profession.

Preparing this address was somewhat daunting. The magnitude of what you have achieved and have done for the profession and the wider public made it difficult to commend your achievements in such a short time. Don't worry, I will do so. When I was contacted in relation to your retirement I have to say I was surprised; your four years on this bench has gone very rapidly and I'm sure this courtroom will agree. Your Honour practiced for 10 years as a commercial litigation partner with Chapman Tripp and during that time Sir you

were one of our country's top commercial and civil litigators. Those who worked with you in practice commented on your intellect, efficiency and clear focus. You were balanced and practical in your approach to the legal matters before you. You were a great leader within the firm and you survived a rather fiery period in the firm's partnership, as I understand it. One of your fellow partners did mention that partnership discussions during the period were, to use his words, "Exquisitely rambunctious" and provided the perfect training ground for your time on the bench although certainly not this bench Sir.

The level of respect with which your colleagues and those who have appeared before you speak of you pales in comparison to the comments I received from those who actually worked directly for you. You trained many juniors during your decade in that firm and your time at Crown Law and there are many on the bench and in our top positions who refer to your leadership and mentoring as paying a very key role in their careers. When you left Chapman Tripp your strengths in the area of competition in regulatory law led to your appointment as a member of the Market Surveillance Committee of the New Zealand electricity market and you were also a former member of the advisory board of the Competition Law and Policy Institute. This was a period of significant change in the competition area and you were a strong leader for this bar and helped to establish the Law and Economics Association of New Zealand. You were one of its founding inaugural members in 1994 and you were its President between 1996 and 1997. That organisation is dedicated to the advancement in New Zealand of the understanding of law and economics. It remains a successful and strong organisation, partly due to your continued involvement as its current patron.

Your Honour published widely, perhaps wildly also Sir, but widely while in practice and spoke at many conferences and seminars. The Law Society is particularly grateful for all the work over many years that you put into the Litigation Skills Programme. You were integral to the establishment of that flagship programme and many young litigators have benefited from your wisdom and generosity.

During the early 1980s the possibility of New Zealand adopting some of the techniques which had been advanced by the National Institute for Trial Advocacy, NITA, in the United States of America was explored. Largely because Your Honour's passion, energy and drive together with the same commitment from the late Douglas Wilson, the New Zealand Law Society's first Litigation Skills Programme took place in Porirua in 1986. Well over 2000 lawyers have greatly benefited from the New Zealand Law Society CLE Limited Litigation Skills Programme which celebrates its 32nd birthday this year. It's something of which we are inordinately proud and so very grateful for the very fundamental role you have played in this. I do say that Sir with some personal reservation. Having undertaken that course myself about 23 years ago I'm not sure that grateful is how I would have described my feelings at the time. Extraordinarily tested was probably a better description. I am however very grateful now and it remains a key moment in both my and, I'm sure, other careers.

It was through this course that our lawyers became familiar with Mauet's *Fundamentals of Trial Techniques* and I still have the book; a highly regarded and influential book. Eventually with your invaluable assistance a New Zealand edition was published with contributions from judges and senior counsel, many of whom were with you on the faculty of that first litigation skills programme. All royalties received by the authors were generously contributed to the New Zealand Law Society and later the Douglas Wilson Advocacy Scholarship Trust. The object of that trust was and remains to assist lawyers who may not otherwise be able to afford to attend litigation skills courses.

You remain a trustee of the Douglas Wilson Advocacy Scholarship Trust and this trust has provided assistance for lawyers to attend advocacy training programmes since 1986. Initially it was for attendance at their annual Litigation Skills Programme but today its assistance is available for 11 different programmes. Annually between \$16,000 and \$29,000 is awarded to applicants. Many lawyers who could not otherwise have attended training programmes have been assisted due to the Trust's resources.

I suppose we should not be too surprised that you have been so generous with giving back to the community, your father was one of Wellington's leading social and church figures and I understand he was the Wellington City Missioner at one point. The commitment to service was obviously in your genes Sir.

Given the extent of your extracurricular activities, frankly we have wondered whether the word "no" was actually in your vocabulary, however I've been assured by colleagues who have appeared before you that this is a word with which you are, unfortunately for them, very familiar. That said, it seems to have been a word that you have used infrequently when it comes to giving back to the profession at large. What has really stood out for me while preparing this speech was the extensive influence and involvement that you have had and continue to have in the legal profession. If you saw room for improvement or betterment in a certain area, you didn't just bemoan the deficits to the world in general. You actively engaged in trying to improve the situation and what's more, you didn't just flit in and out; when committed you dedicated yourself fully and we thank you for that.

Sir, you are a true leader. It was not surprising to those around you when you were appointed Solicitor-General. As the Attorney-General at that time said, "Your Honour has a developed conceptual understanding of the role of law in public administration, public management and civil society." However just as important was the strong leadership skills you were to bring to that role. The mentoring, training and support that you were then able to bring to such a large group of lawyers made a real difference to those who worked for you. Your reputation is one of fearlessness and fairness. You strive to uphold the rule of law and the administration of justice in all that you do on this bench. When we appear before you we know that we will be treated with respect and that we will receive a well reasoned and impartial judgment. Your conduct and work on this bench has been all one could ever hope from one of our most senior judges in our country. Your Honour has set very high standards for those who follow in your footsteps.

When the announcement came that you were to be made a Knight Companion of the New Zealand Order for Merit for services to judiciary, no one was surprised. That was an extraordinarily well-deserved honour. However we did question at the time why this honour was simply for services to the judiciary. You deserve this honour for more than just that. For most of your practising life you have served the profession and you have continued to do so, even after you were elevated to the bench. You have done so much more than serve the judiciary. The profession will remain forever grateful for the service and valuable time that you have given to us.

The next phase awaits and I know that there are many that will be clambering to try and get some of your precious time. Head into this next phase knowing that you have made an enormous and lasting contribution to the law and the legal profession, and for that we thank you deeply. May it please the Court.

ELIAS CJ:

Thank you Ms Beck. Mr Elliott, on behalf of the New Zealand Bar Association.

MR ELLIOTT:

May it please the Court and Justice Arnold. Today I have the privilege of appearing and addressing the Court on behalf of the New Zealand Bar Association at this special sitting to mark Your Honour's retirement.

Now Your Honour graduated with a BA from Victoria University majoring in Classics. Your Honour then went on to obtain an LLM as we've heard from previous speakers but right from the outset Your Honour saw yourself as a teacher; mainly in the law, teaching criminal law and then moving on and teaching in Canada as we've heard. And in a sense Your Honour's love of teaching others has remained with you as a core guiding principle throughout your career.

On receiving your knighthood in 2015, His Honour commented that he had always been interested in education. That that observation is borne out by his huge contribution to legal education in New Zealand over a period of 30 plus

years, which has been outlined today by our two previous speakers. It's best expressed in Your Honour's longstanding passion for teaching young litigators, many of whom are in this Court today. On behalf of each and every one of them I express their immense appreciation for what you did.

During the 1980s and early 1990s Your Honour appeared as a junior on a number of occasions with Ted Thomas QC, as he then was and Jim Farmer QC, amongst others. Dr Farmer will address the Court later on some of his personal reflections on some of those groundbreaking cases, so I won't deal with that.

After your academic career and stellar rise through the ranks of Chapman Tripp, Justice Arnold became a barrister sole in 1994 and was appointed Queen's Counsel soon after that in 1997. While Solicitor-General Your Honour had an extremely busy practice, providing advice to the Government but at the same time appearing for the Crown in a number of important cases. A few notable cases include *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91, the case on the right to protest involving a man charged with disorderly conduct for protest outside the home of a police officer who had executed a search warrant against him. And in *Attorney-General v Zaoui* [2005] NZSC 38, [2006] 1 NZLR 289, a very well known case involving the process for the removal of a refugee from New Zealand and the rights of that individual, a really important case.

Now Your Honour is well known for your understated, almost self-effacing approach to things and for being practical, but at all times highly principled. A colleague described Your Honour as quiet by nature but as having a fantastic dry sense of humour. On being knighted Your Honour reflected on feeling very privileged but you put your success down to good luck and that's the luck you had enjoyed in the many roles you had played, including being a Judge of the Supreme Court. Now those who know Your Honour and have had the privilege of either working with you or appearing before you, know that your success had very little to do with luck and everything to do with your undoubted intellect, your application and your abiding sense of duty.

Now Your Honour recognised that your knighthood was mostly for the position you held as a Supreme Court Judge and you were quoted as saying, “It underscores the significance of the role in our democracy.” That comment has even greater resonance today when we look back on the first decade of the founding of the Supreme Court and the developments in certain western democracies where the separation of powers which just a few years were taken for granted are now being seriously tested. The Supreme Court plays a critical role in that balancing exercise and the Bar Association expresses its gratitude to Your Honour for the contribution you have made to the Court in its formative years.

New Zealand is indebted to Your Honour at many levels. Your involvement with this Court started well before becoming a judge. You chaired the Ministerial Advisory Group which provided recommendations to the then Attorney-General on the purpose, structure and composition and role of the proposed new Supreme Court. The Supreme Court as we know was established to recognise New Zealand as an independent nation with its own history and traditions and to enable important legal matters to be resolved according to our own unique conditions, history and traditions. That is no doubt why a Judge firmly grounded in Classical Greek studies with a passion for education and the unique New Zealand way of doing things was so well suited to the role which Your Honour fulfilled in both the law and in this very important Court. In terms of that work Your Honour has stressed that you always found the law absorbing and in particular in terms of sitting in a final appellate Court said that the cases are often hard, difficult to decide, uncertain and highly arguable. You observed however that that provided the Court with different choices and that you personally enjoyed immensely the process of argument and investigation in terms of options and alternatives. That was the perfect environment for what Kathryn Beck has called your “intellect, efficiency and clear focus”.

Your Honour has been recognised, is recognised for your sense of balance and fairness, summed up in the observation that it was always important to

Your Honour to explain to a losing party why or the Court had decided the case against them, and to do so properly it was necessary to address every point the losing party had raised.

Your Honour's many achievements, for example, in founding and then continuing to support the Law and Economics Association has been referred to. Those achievements are too numerous and varied to do justice to them in a short address like this. What does stand out however, is the comment you made on becoming Solicitor-General that this was a way that you were able to give something back to the community and New Zealand as a whole and that New Zealand had been very good to you. There can be no doubt that in that unequal exchange, New Zealand has been the real benefactor.

Your Honour has appeared as counsel in and presided over a number of very high profile and important cases in our history. These cover a wide and diverse field. This special sitting is not the place to list or discuss them. Dr Farmer will however touch on a few after me.

To conclude, Your Honour's hallmark has been to do everything to the highest possible standard, that is apparent in all that you do. Your approach exemplifies the very high professional and ethical standards expected of Judges and lawyers generally. The New Zealand Bar Association honours your outstanding and valuable contribution to the law and to the legal profession. On behalf of the Association may I thank you and wish you a long and enjoyable retirement. May it please Your Honours.

ELIAS CJ:

Thank you Mr Elliott. Mr Farmer, I wasn't sure whether this was a bifurcated New Zealand Bar Association address.

MR FARMER:

Well this address is a personal one, with Your Honour the Chief Justice's special leave as I understand it, for which I'm very grateful.

ELIAS CJ:

Well I didn't know about it. Very happy to hear you but don't pass it on.

MR FARMER:

Well that's okay. Well the request and this is not a precedent, the request was made because of my long association with Justice Arnold.

ELIAS CJ:

Yes, I know.

MR FARMER:

Both before and after you were appointed to the bench, which you've served with such distinction, and I did, just, so it is personal reminiscing and I hope I may be forgiven if I go too far.

So I think our association began with the judicial review case in *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 1 (CA) in 1990 when I was briefed for the appeal to the Court of Appeal after Ted Thomas, who you had done the High Court case with was appointed to the High Court. And together we won that appeal but then the Crown took the case, you will recall, to the Privy Council where we lost. You will recall though that what a great experience that was and we were led by Sir Patrick Neill of the English Bar, later Lord Neill and that was for both of us a great experience working with him and you will remember, as I do, spending long evenings in his chambers in the middle of the London winter while he poured over the detail of the record and while you and I became increasingly hungry because it was hunger exacerbated too by his promise that we would; he made from time to time, "We must get a curry in," which he never did and you recall that we stumbled out into the London winter, into the snow around midnight looking desperately for somewhere to eat and found nothing open. So that's my first experience with you and we shared that together and we then after that though embarked on a long series of cases for Telecom in Commerce Act litigation against Clear Communications, represented by John Fogarty and

Tom Weston and against the Commerce Commission represented by Douglas White who I see is here today.

There were, of course, several different cases during that period of several years involving those parties but the stand out one was of course the s 36 case with Clear where it was alleged that Telecom had abused its dominant position in the market by refusing to allow access on regional terms to its competitor, a new entrant into the market. And that case, you will recall well, was heard by the late Justice Tony Ellis and Professor Maureen Brunt, distinguished economist from Australia sitting as a lay member. And it was that case that led to the establishment of the famous, or perhaps infamous, Baumol-Willig rule, which for those of you who are not, those of us who are not perhaps familiar with it and I've forgotten some of it, was to the effect that a telecommunications firm in a dominant position in a market in which was charging a competitor to carry calls from the competitor's network to customers on the Telecom network could not be said to be acting anti-competitively if the charges were equivalent to the costs that Telecom itself incurred in provided connecting calls between its own customers.

You will recall that before that hearing you and I went on a wonderful trip around the United States of America looking for an American economist to help us win this case, that at one level seemed to be impossible, impossibly difficult to win and Your Honour Justice O'Regan was involved too I think at Chapman Tripp in helping us with that. But our trip around America where we went to Princeton, we met with Professor Baumol, we met with Professor Willig separately, we went to NYU, your old stamping ground where Professor Baumol was also a professor. We went to Cornell, we saw the late Professor Alfred Kahn and we saw all sorts of other people, it was a truly fantastic trip and the great thing was we were paid for doing it while we sat at the feet of these amazing American economists, teaching us the basic principles of economics and it's terrific that that initial exposure that you and I both had led to your playing such an active part in the Law Economics Association in New Zealand. And you will recall, I'm sure, our initial, yours and my initial doubts about the Baumol, what became the Baumol-Willig rule,

because we at least had the insight that this was likely to entrench Telecom's monopoly profits and we actually raised that with Baumol at some point and what he said was, well if you're worried about monopoly profits just regulate prices and of course that's what happened many, many years with the Telecommunications Act 2001 which actually says in these words, "The Baumol-Willig rule does not apply in respect of applicable pricing principles". So although we won for Telecom in those early days, many years later the legislature did intervene and did regulate the principle out of our law.

Now the other feature of that case also involving Professor Baumol, I'm sure you will remember, is the situation that arose before the trial or I think during the trial when a medical certificate was produced by him that said that long distance air travel was likely to be detrimental to his health. And long distance air travel had a special definition, that it didn't include travel from New York to Paris which Professor Baumol regularly did, but it did include distance, the air travel to New Zealand and so what he was apparently allowed to do by his doctor was to travel to Los Angeles and in those days it wasn't, we didn't have a formal video link system provided for in the High Court Rules but John Fogarty nevertheless did tell Justice Ellis that television, TV1's video system at Avalon Studio in Lower Hutt or wherever it is, could be made available for the purpose of a video link. Telecom were desperate to have, and you'll recall this too, to have Professor Baumol's evidence taken in person because he was so critical to the success in the case and so they made the offer, which we conveyed to the Court, that they would pay for the Judge and the Registrar of the High Court to go to, to travel to Los Angeles where a private courtroom could be made available and would also pay for our opponents to go there as well.

You and I found a private court in Beverley Hills, we did some research and we also decided that the Beverley Wiltshire Hotel at the foot of Rodeo Drive was deemed to be appropriate accommodation for the Judge and for us and that's what happened and Baumol did, of course, perform magnificently. His evidence was accepted, that it led to a success in the case. However I like to think that that it was against the opposition from John Fogarty, it was

our superb advocacy as to the appropriate forum convenience that achieved the result that we got.

Now having then just said something about your career as a practising lawyer as I knew it and had the pleasure and privilege of enjoying it with you, I should say something very briefly about your judgments given as a Judge and given the time constraints I only want to mention one. But it was a judgment of yours given for the majority of the Court, this Court, in the case of *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 concerning the principles of interpretation of commercial contracts and when I read your judgment I actually cheered out loud on one specific point. And that was the point where in the judgment you picked up on the dangers of judges resorting to notions of “commercial common sense and commercial absurdity” to determine the meaning of contracts. And you made the point that there was reason to be cautious in this area, and these are your words: “because commercial absurdity tends to lie in the eye of the beholder,” and when I read that I recalled my having said something similar in a few cases in the High Court, although I went a step further and said, the comparison I drew was that “beauty is in the eye of the beholder,” and so too commercial common sense is in the eye of the beholder and you didn’t go quite that far. But what you did do was you drew attention to similar warnings given by Lord Hoffman and Lord Neuberger and you quoted from those judgments, but then you went on yourself to add what I thought was a very important insight and that was that the bargain that is struck in a commercial contract may represent various compromises of position and varying interests that each party assesses during the course of negotiations in coming, finally, to an agreement, and that, as you pointed out, is not easily perceived or understood by a court, and I, with great respect, think you and the other Judges who associated themselves with you, have provide a real service in picking up on that point.

Now finally I think I do have a need to say something about your great passion for yachting. I wasn’t going to but the Solicitor-General has said somebody would say something about it so I feel I have a need to say something about it. You sailed your own boat with success for many years in local races in

Wellington. Though I have to say I was a little dismayed when you once said to me that the rule that you must give way to a boat on starboard tack only applies to boats larger than yours. What is perhaps not widely known is that you joined the crew of my yacht when I brought it down to Wellington on two occasions, for the Port Nic regatta, which happened also to constitute on each occasion New Zealand championships, and the boat won and you, and I, became New Zealand champions in yachting on those two occasions.

However there is, finally, one story I do want to tell about your boating experiences that I had with you. It's a story that, as I understand it, went down in the history of Chapman Tripp involving your skills and judgement and involving my perhaps lesser skills and judgement, when you brought your Telecom Chapman Tripp team to Auckland. They consisted of Forrie Miller, Francis Cook, who is here today, Michael Crosby and John Beaglehole and we sailed down and spent a weekend together down at Waiheke, sailed down in my, what was then a Beneteau cruising yacht which I had just bought. You will recall that my experience of keel boats at that time was very limited, I had just started out on my yachting experiences, and my experience of driving a tender with an outboard motor was even less. The events that occurred down at Waiheke, as I understand it, obtained subsequently repeated tellings at gatherings at Chapman Tripp, and I suspect with increasing degrees of exaggeration as to what had actually occurred. So I would like to take this occasion to set the record straight by telling exactly what did happen at Oneroa, Waiheke on that weekend and what occurred was this. We safely anchored the yacht in the middle of the bay, in Oneroa, and then you and I popped into the dinghy, with the outboard motor. You made the mistake, near fatal as it turned out, of allowing me to take the helm of the outboard motor, and the helm for those of you that don't know is a sort of a tiller which you turn for direction and which you rotated also as a throttle for greater or lesser speed. After cruising around the bay you recall that I had some difficulty in lining up the landing platform at the stern of what from our position looked like a tiny 45 foot yacht and we made several passing movements without getting close enough to be able to berth at the rear of the boat. Francis Cook, who had been sitting down below in the yacht, commented afterwards that he'd

been puzzled by the noise of the repeated approaches and departures of a motor boat. But in due course I did get my bearings right and as we drifted close to and alongside the landing platform, you leaned out over the front of the dinghy, I know you remember all this very well, you leaned out over the front of the dinghy and you got a hand on the platform of the yacht. Unfortunately at that very moment, in an attempt to put the outboard into idling speed, I rotated the throttle the wrong way which caused the boat to accelerate with increasing speed away from the yacht. You, however, were still holding onto the yacht with your legs still in the dinghy, and at that point you gave a very good impression of an Indian rubber man, and I thought, in a state of panic, that I was about to be responsible for the drowning of a distinguished Judge before he actually became one. However, you showed your quickness of mind by managing to let go of the yacht and falling back into the dinghy in time and so here we are today. May it please the Court.

ELIAS CJ:

Thank you Mr Farmer. Yes Your Honour.

ARNOLD J:

Well thank you everybody for coming to this final sitting this afternoon. It's wonderful to see so many family and friends and colleagues here. I especially thank those of you that have come from outside Wellington. Chief Justice, thank you for what you have said. I've previously acknowledged the unstinting work you do in promoting fundamental legal values both here and abroad and supporting the judiciary as an institution, and in providing pastoral care to judges. The work you do is extraordinarily demanding but you undertake it with intelligence, thoughtfulness and grace. I would like to acknowledge that again, but this time publicly.

Solicitor-General, I was going to say thank you for your generous remarks on behalf of the Government, but since you reminded me of what is probably the greatest forensic failure in New Zealand history I am not sure. But on that I am delighted to see Mr Ellis here, because it was his case, and in which he ultimately succeeded. Thank you for your generous remarks. In a world

where there are increasing challenges to the unwritten rules of governing, which we tend to call constitutional conventions, the law officers have a particular responsibility to articulate and protect fundamental constitutional values. It's hard work, it's often invisible to the public, sometimes it's unpopular, but it's work that is vital to the ongoing health of our democracy. I understand from my own experience the challenges you face but I know that you have the skills and mental fortitude to make a real impact. I must say, though, that I am glad it's you hearing on Morning Report about some other story, or not, that will become your next crisis, rather than me, and just let it all flow by.

Ms Beck, thank you for the good wishes of the Law Society. Much of my main involvement with the Society, as you noted, is in the context of continuing legal education, particularly practical training for litigators. It's very satisfying to know that two of the practical programmes I had a hand in developing are still being offered by CLE and are as popular as ever. The strong demand for litigation skills-based training shows that there's a continuing need. I would also like to thank the Society for the support it's given me, and other Judges, over the years. Given the challenges posed by the unrestrained nature of the internet, by fake news, by alternative facts, some of which I think we've heard today but however, it is important that professional bodies are prepared to speak up for in support of legal values and in defence of the legal process. The Law Society has done that and I hope it continues to do so.

Mr Elliott, thank you for the good wishes of the Bar Association. When I was a litigator in a large firm doing commercial litigation I took a slightly jaundiced view of the Bar and its grip on the best advocacy work. In the end I went to the Bar on the basis that if I couldn't beat them I may as well join them, and that decision was the right one for me. The six and a half years I had at the Bar were the most enjoyable years I have in practice, and will always be a highlight of my career, even though if you ever hear me reminiscing at too much length about them, please stop me. As a Judge I've come to appreciate the value of a strong Bar, and I do include litigators and firms in this. One thing that has been brought home to me repeatedly in Court is that oral

advocacy matters. I like to prepare for a hearing reasonably thoroughly. Often I can't help but form a preliminary view about the merits of the case. But in my time as a Judge I've been reassured to realise how often oral advocacy has changed that preliminary view. In light of that I am glad to see that the association is providing programmes and other support to assist with the development of advocacy skills amongst younger advocates.

The way in which the Bar Association has evolved is a credit to all those that have worked so hard on promoting and developing it over the years, including the former presidents who are here today. Three former Presidents had a very significant influence on my development as a litigator and I am in debt to each of them for that, and I am talking of Sir Edmund Thomas, Mr Farmer and Mr Carruthers.

Well that brings me to Mr Farmer. As he said we first met in 1990 when he took over leading the *Petrocorp* appeal and as he said we learnt an enormous amount from that. I learnt a lot from the other litigation that I did with him, and the work that we did together, and against each other, that work was challenging, it was exciting, in both an intellectual and a tactical, or strategic sense, but most importantly about it, we enjoyed doing it. It was fun. Well I do need to qualify that a little bit actually. Working with Mr Farmer was fun. Working against him on the other side was not so much fun, given his combative nature as a litigator. But thank you for what you have said Mr Farmer. Your friendship over these many years has meant a great deal to me.

I am indebted to far too many people to thank all of them on an occasion such as this, and I won't attempt to do so. I must, though, acknowledge Susan and our children, Sarah, Matthew and Timothy, and their partners and children. My family, initially my immediate family, and now my extended family, have kept me grounded throughout my career, and brought my life joy and richness beyond measure, although I have to say, with a certain amount of anxiety and strife, from time to time. But my heartfelt thanks to you all, but especially to Susan who has been the gravitational force that has kept our family as close

knit and well sustained as it is. I also acknowledge my mother Joyce and my sisters Ros, Alison and Hilary, who have given me their unqualified love and support along, I have to say, also with a fair bit of stick, and indeed are sitting there wondering who on earth everybody is talking about.

I was reluctant to take up judicial office, as I doubted my suitability for judicial life, and I was attracted to returning to the Bar once I'd completed my time as Solicitor-General. I am very grateful that I did become a judge, however. It's been an extraordinary privilege and I'm very fortunate to have been given the opportunities I have had.

Ending my career as a member of this Court has been particularly rewarding. Mention has been made of the advisory committee that led to the establishment of this Court. One of the things that we were concerned about was how the court would deal with the unavailability of Judges through conflicts and absences for illness or leave and such like. The committee noted that there was a case for appointing six permanent members to deal with absences rather than relying on acting judges, and the legislation does allow for the appointment of six permanent judges. Ultimately, however, the committee recommended that there be five permanent appointments initially, with the possibility of adding a sixth permanent member to be reviewed once the Court had been in operation for a few years. I think that it is now time to consider whether the Court should move to six permanent members on a full-time basis. This would significantly reduce the use of acting judges, I have to say I may be doing myself out of a job by saying that, but it would better, I think, accommodate absences for leave, illness and such like throughout the year, and most importantly I think it would significantly improve the efficiency of the Court. For example, it would allow a Judge writing a major judgment to have uninterrupted time to complete work on the judgment, and I think ultimately would help speed up delivery times and would allow greater flexibility at the same time in terms of hearing schedules. One objection to this is that the Court's workload does not justify six permanent members. I'm not convinced about that, but in any event this is something to which further

thought should be given, as I believe it would make a significant difference to the way in which the Court operates.

Finally, a word to my Supreme Court colleagues, the Chief Justice, Justice William Young, Justice Susan Glazebrook, Justice Mark O'Regan and Justice Ellen France, I have thoroughly enjoyed working with you, even when you were obviously wrong as occasionally you were. We judges all strive towards a common goal, achieving justice under law. Human processes being what they are, we will never achieve it perfectly, but it is the rigorous pursuit of the goal that matters, and I know each of you is fully committed to that great enterprise. I feel privileged to have had the opportunity to share it with you.

To conclude, being a judge for the last almost 11 years has been an extraordinary experience. There have been days when I simply couldn't believe my luck. But now it's time for me to go and I do so knowing that the judiciary is strong, independent and committed. Thank you, all of you, for joining me here at this final sitting.