

## The Hon Justice GFK Santow AO

On Friday 14 December 2007, a formal ceremony was held to mark the retirement of Justice Kim Santow AO as a judge of appeal in the Supreme Court of New South Wales. Tragically, less than four months later, he died, after a bout with cancer of which he had no knowledge at the time of his retirement. His life was one which went well beyond the law, as was attested to at a ceremony in the Great Hall of the University of Sydney on 23 April 2008. He had recently retired as the chancellor of the university where he had studied as a student, was a rowing blue, and at whose law school he had also taught for many years. He was instrumental in securing for the University of Sydney the prestigious United States Studies Centre and was a driving force behind the funding and building of the new Law School building on the campus. Of the gathering in the Great Hall to celebrate his life, the journalist Paul Sheehan wrote in *The Sydney Morning Herald*:

There is a view, a cliché, that the Emerald City glitters with a shallow greed behind its brilliant harbour. That is only partly true. There is also a steel spine of intellectual rigour, a discriminating elite that holds the city together. Discrimination is a good thing, so is elitism.

This spine does not usually seek, nor often grace, the mass media. But it is there, it is sizeable, it is crucial, and it was amply evident in the Great Hall of the University of Sydney last Wednesday night.

In short, this gathering represented the leaders of the state, in its various manifestations, to pay worthy tribute to one of its greatest and most tireless contributors.

Justice Santow was appointed as a judge of the Supreme Court on 30 August 1993, having being a partner at Freehills. He was appointed a judge of appeal on 29 January 2002. During that period, as noted above, his Honour was also the chancellor of the University of Sydney. His Honour also served on the Appeal Panel of the Takeover Tribunal, and in the court served on the Rules Committee, the Legal Practitioners Admission Board and the Education Committee of the court. Beyond and before his time on the court, his Honour's engagement with the community of Sydney and the public interest was manifested in a daunting array of extra-mural roles including as chairman of the Malcolm Sargent Cancer Fund for Children, chairman of the Board of Trustees of Sydney Grammar School, membership of the council of the Australia Asia Institute of the University of New South Wales, the Art Gallery of New South Wales, the Sydney Opera House, VisAsia, St Vincent's Hospital and the Commonwealth Attorney General's Advisory Committee on Company Law. He was awarded the OAM in 1990 and the AO in 2007. He was also awarded an honorary LLD by the University of Sydney in 2008.

At the farewell ceremony for Santow JA, Chief Justice Spigelman spoke on behalf of the court, the Hon John Hatzistergos MLC, attorney-general of New South Wales, on behalf of the Bar and Mr Hugh Macken, acting president of the Law Society of New South Wales on behalf of the Law Society of New South Wales.

Spigelman CJ noted that his Honour was only the second solicitor appointed as a judge of the court, but said his Honour 'swiftly overcame the lingering prejudices of your new former barrister colleagues by reason of the depth of your legal learning, your personal charm and



L to R: Beazley JA, Santow JA, Spigelman CJ

your capacity for hard work'. Spigelman CJ noted that his Honour's judgments 'have made significant contributions to the development of the law', and emphasised one contribution made by Santow JA:

of a character which simply could not have been made by any other person. You brought to the realm of commercial disputation a breadth and depth of knowledge of the world of commerce that few judges of this court have ever had. Over decades as one of the most accomplished commercial solicitors in Sydney you acquired an understanding of the interface between law and commerce, especially of its creative potential, which was rarely if ever available to barristers, whose primary source of knowledge in these respects is cleaning up after a disaster.

From the time that your Honour assumed responsibility for the management of corporations law cases, this court established itself as a pre-eminent court in the corporate field. Supported by other judges, your Honour brought a unique combination of talent and experience to ensuring that the court resolves disputes in corporations' law at the highest quality of decision-making and with a full recognition of the commercial realities underlying the disputes, both in terms of the need for speed and the determination of the result. It is, accordingly, appropriate to highlight the special contribution your Honour has made to the development of corporations law as a judge.

For many years, you were the author of more judgments reported in the *Australian Corporations and Securities Reports* than any other judge in Australia. Your judgments covered the full range of corporations law including statutory demands, preferences, the court's remedial powers, selective capital reductions, valuation of minority interests, schemes of arrangement, including such high profile cases as Advance Bank, the NRMA and James Hardie. Your Honour's judgments are, and will remain, the leading judgments in many areas of corporate law.

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Many of these judgments called for the exercise of discretions and an understanding of the need to reconcile different interests in a practical and positive way, perhaps most notably in schemes of

arrangement. In this regard your background as a commercial solicitor made you more likely to look for solutions to problems, rather than to act only as the umpire of a fight.

The chief justice paid tribute to Santow JA's contribution to the Education Committee of the court, to which his Honour brought the breadth of his general knowledge and interest together with his depth of understanding of social, economic and political issues and of the arts:

This contribution was invaluable, not least by introducing to the court a wide range of international contacts, particularly in the law but not limited to the law, many of whom at your invitation came to address the annual conference of the court to the delight and education of all of your colleagues. This included a number of the most senior judges from England but extended to a wide range of others, including Pierre Rykmans, Australia's pre-eminent Sinologist, and Margaret Marshall, chief justice of the Supreme Judicial Court of Massachusetts and her husband, the legally literate *New York Times* columnist, Anthony Lewis. They and others were introduced to us as your friends. The intellectual curiosity, energy and sophistication of yourself and of your wife Lee, will be missed by us all. Together you have expanded all of our horizons'.

The attorney-general noted his Honour's contribution to the body of law in New South Wales, especially in the area of corporations law:

Your decision in the NRMA demutualisation case, *Re NRMA Insurance*, raised many important issues on the principles of mutuality. It was a case posing almost every question of principle applicable to schemes of arrangement and dealt with the treatment of schemes on a comparative law basis. Your drawing together of the principles that apply to civil penalties and disqualifications under corporations' legislation in *ASIC v Adler* is widely cited judicially and academically. It was subsequently cited with approval by Justice McHugh in the High Court as a leading case on civil penalty and disqualification.

As you know, special leave was sought from the High Court to appeal aspects of the decision of the Court of Appeal handed down by your Honour, but the High Court refused that application. In *Allianz Australia Insurance v GSF Australia*, Allianz's argument to the Court of Appeal was that injury was not an injury within the meaning of that term as defined by the Act, and that was dismissed by a majority decision. However, a subsequent appeal to the High Court was allowed, saying that the finding of the Court of Appeal was in error. Your Honour had wisely dissented in that case.

The attorney-general noted that earlier in 2007 Santow JA was made an officer of the Order of Australia, having been awarded the medal of the Order of Australia in 1990, awards that recognised his Honour's 'service to the judiciary and to the law, to education, particularly in the area of university governance, and to the arts'.

The attorney-general concluded:

When you were sworn you alluded to Vikram Seth's *A Suitable Boy* and the case of a recalcitrant candidate for the bench who refuses to accept the offer of chief justiceship until he is moved by the simple yet profound words of his former law clerk, 'Do you not want to do justice?' Your Honour has answered in word and indeed this calling. You understood well the perennial challenge facing the law, that of

continuity and change, a challenge which your Honour embraced. As John Henry Newman observed in his clever oxymoron, 'Great ideas change in order to remain the same,' a remark that equally applies, I would venture, to the law.

You have served the people of this state with distinction and for that the community is grateful. Knowing your fondness for the arts, I thought it would be fitting to conclude with a line from Shakespeare. There is a memorable scene in *The Tempest* where Prospero breaks his staff, buries it certain fathoms in the Earth and, deeper than you ever plummet sound, drowns his book. But in your case I think a line from *King Lear* is better suited. 'Men must ensure their goings hence, even as the coming hither ripeness is all.' The passage of time has certainly not wearied your Honour. I believe yours is a lasting ripeness.

Mr Macken referred to his Honour's contribution to corporate and commercial law and his Honour's mentoring ability, promoting collegiality within the profession and excellence in professional practice, emphasising the importance of building and contributing to a profession rather than a business.

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His Honour reflected on the question 'Do you not want to do justice?' to which he had referred at his swearing-in:

That insistent question... was first posed for me by my Hungarian father, who had so happily emigrated to Australia, escaping the horrors that beset his judicial brother who would not leave. My father was a deeply reflective, humanitarian surgeon and obstetrician. His hope was that I would aspire to judicial work. Sadly he died long before this could have even been contemplated. When finally I had the privilege of joining this court, no longer a commercial solicitor though not leaving that craft behind, my concerns were more akin to those of a caring doctor. In equity particularly, I drew upon the metaphor of a public hospital, engaged in a healing operation under

a constrained budget, our patients often poor. That operation had to be conducted with as much humanity and individual concern as the traumatic encounter allows, necessarily with an eye to efficiency and cost but not sacrificing fairness. I learnt early on from Brian Page, senior partner in my old law firm, that a legal answer which offended common sense or basic fairness was usually wrong, however cleverly contrived. That conviction sustained me throughout my time on the court.

When later I joined the Court of Appeal from Equity, I became ever more conscious of how important it was to explain in the clearest and simplest of language, especially to the losing party, why the court has decided as it has. This is no less important than explaining what is important about the decision itself in legal principle. Our President Keith Mason's dedicated and unselfish leadership has marked my time at the Court of Appeal, for which I will always be grateful. I have been especially fortunate to have served in such a collegiate court, so well led, its members bringing an intellectual breadth rarely to be found in any institution. I think for example of Justice Hodgson, testing ideas of guilty intent in the criminal law against his profound interest in philosophical concepts of free-will and of consciousness itself. Or of Chief Justice Spigelman – writing of Thomas à Beckett, relating those issues of conflict between church and state, to the constitutional problems of our time.

To return to family influence, I was strongly beckoned towards judicial office by the letters written by my father's brother, Uncle Imre, whose ruptured career was a tragic loss both to legal scholarship and to the Hungarian judiciary. His 'retirement' from the judiciary was no thing of honourable stepping down. He was brutally dismissed – under the Hungarian anti-Jewish laws passed during that Nazi era. Stripped of office, he was sent into the countryside to work as a labourer, before finally meeting his death in Buchenwald; a stark reminder of the vulnerability of our own judicial status to the

cataclysms that engulf an apparently ordered society, and exploit its fault lines. Recent events in Pakistan demonstrate yet again how the rule of law depends upon the community's support for an independent judiciary, itself dependent on the judiciary staying within its own proper sphere.

Uncle Imre's daughter (Ildiko), here to-day, will recall the words her father wrote as a young student in his twenties, studying comparative law at the Sorbonne. He rejected the lucrative prospects of commercial legal practice, instead choosing that slow progression towards a professional judicial career, starting at the lowest rung as one did in Europe. This is what Imre wrote:

If I wait until the time when I will be able to undertake the most inferior tasks of a judge, then in this way I would perhaps have in my reach the most wonderful and purest of legal work a lawyer is ever able to undertake ... I will not have to view affairs and cases, from a single vantage point.'

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These, then, were the contradictory influences on my life. On the one hand Imre's absolutist sense of civic duty, and on the other my father's own idealism, tempered by clear-sighted realism and his Irish wife's practicality. Both made their mark. Unlike Imre I gained much from my experience as a commercial solicitor at the then firm of Freehill, Hollingdale & Page. I was fortunate to be appointed at the behest of an attorney-general who, like his successors, sought to widen the ranks of the judiciary with those bringing a diversity of background and experience. This was so long as, to quote Sir Anthony Mason, they had 'an intellectual capacity to acquire in a relatively short time the requisite professional legal skills appropriate to judicial work.' I sought to bring to bear, as have my successors, a commercial sense of what lay beneath the water-line, in what remains the busiest corporations list in the country.