

David Catterns retires

‘Mr Murdoch, when witnesses give evidence before this tribunal, it is customary for the tribunal to be told, what is the witness’s address. I noticed that your counsel, Mr Meagher, did not ask you, what is your address. Would you mind telling the tribunal what it is?’

This was David Catterns’ opening question to Rupert Murdoch, in proceedings in the Australian Broadcasting Tribunal, which were consequential on Murdoch having renounced his Australian citizenship and taken up US citizenship, for the purpose of acquiring media assets in the United States of America. This brought Murdoch into apparent conflict with Australian broadcasting law, in particular concerning his ownership of television licenses TEN-10 in Sydney and ATV-10 in Melbourne.

Murdoch and his advisers sought to outflank the effect of the Australian broadcasting laws, by the transfer of the ownership of his Australian broadcasting interests to companies controlled – at least in a legal sense – by his three sisters, each of whom was an Australian citizen.

With characteristic skill and charm, David Catterns subtly disassembled this legal artifice, in a lengthy hearing in the tribunal, in which his opposing counsel comprised Roddy Meagher and Dyson Heydon (for the Murdoch companies) and Tom Hughes and Jim Spigelman (for the sisters’ company), each instructed by teams of lawyers from Dawson Waldron. David, then still a junior barrister, acted on the instructions of his old friend, Peter Banki, on behalf of the relevant trade unions (the Australian Journalists’ Association and Actors Equity), who wished to see the end of any involvement in Australian broadcasting, on the part of Murdoch or his family.

David was able to cast enough doubt on the legal efficacy of Murdoch’s arrangements, to persuade the tribunal to remit the proceedings to the Federal Court of Australia,



Australian Championship for the Adams 10 class, in which David Catterns did not compete.

to decide the questions of law which arose in the matter. This was notwithstanding that the tribunal had received into evidence the written advice of Mr A M Gleeson QC, opining in favour of the legal validity of the transactions, for the purposes of the Broadcasting Act.

In the proceedings in the Full Court of the Federal Court (*Re Application of News Corp* (1987) 15 FCR 227), David’s arguments were successful; with the effect that Murdoch was effectively left with little choice but to dispose of his Australian broadcasting interests, by a true arm’s-length sale.

This Murdoch did; but as part of a larger overall series of transactions, in which Murdoch obtained the ownership of a large section of the Australian print media, including the Herald & Weekly Times, the publisher of the Melbourne *Herald* and Adelaide *Advertiser*.

The trade unions then again sought to challenge those transactions in the tribunal, on the grounds that they involved an exercise of power over Australian broadcasting licences, on the part of a US citizen (Murdoch), which exercise of power was impermissible under the Broadcasting Act. In those later proceedings, this argument sank without trace, perhaps in part because in those proceedings, the services of David Catterns had been retained by one of the

media interests which was a participant in the overall transaction.

In the highest traditions of the bar, Catterns’ services continued to be available to whatever party sent him a brief but, in a later broadcasting case, when David appeared on behalf of the Australian tycoon, Alan Bond, it proved to be beyond even the skill of Catterns, to win the argument that Bond was a ‘fit and proper person’, for the purposes of the Broadcasting Act (*Australian Broadcasting Tribunal v Bond* (1991) 170 CLR 321).

While the outcome of this litigation was not in favour of Mr Bond,

he at least thereby had the opportunity to do a little bit of yachting with David Catterns, an activity at which, it is fair to say, Bond had the greater fame but Catterns had the greater aptitude.

Catterns’ youthful exploits included his participation as the Australian representative in the Laser dinghy world championship at the famous Kiel regatta venue. In later years, he match-raced in Etchell yachts and even beat another famous Americas Cup yachtsman, Sir James Hardy.

Following his appointment as Queens Counsel, Catterns had the opportunity to make use of his yachting background, in litigation over the design of the Adams 30 keelboat, when he led Richard Cobden, before Justice Daryl Davies in *Shacklady v Atkins* (1994) 126 ALR 107. In that case, the copyright in the yacht’s plans and their industrial application was in controversy and an interesting question arose as to whether the yacht’s design was purely functional or whether it incorporated aesthetic elements. While Mr Adams (the designer) was unwilling to concede in cross-examination that his design involved any aesthetic considerations, Justice Davies was persuaded by Catterns’ argument, that it did.

By this time in Catterns’ career, he had become the doyen of the law of copyright in Australia.

He was among the co-founders, with John Ireland QC, of Nigel Bowen Chambers in 1991. Sir Nigel, who had recently retired from the Federal Court of Australia (having been Chief Judge since the Court was established in 1976), had graciously given his agreement to the use of his name, when asked by David and John. Sir William Deane spoke, at the opening of the chambers, in the presence of Sir Nigel, who had been a mentor of his. Sir William spoke of the distinction of Sir Nigel's career, not as a judge and a politician, for which he may now be better remembered – but as an advocate. He was able to prove his case in this respect, by reference to only a single volume of the *Commonwealth Law Reports*, and the many important cases within those pages in which Sir Nigel had appeared.

The Federal Court, in which Catterns by then mostly practised, was in the process of becoming Australia's most important forum for the litigation of intellectual property disputes. Ireland and Catterns, as heads of chambers at Nigel Bowen Chambers, gathered around them many of the barristers who were, or went on to be, leading authorities in this field.

As is well-known, at the commencement of his career, Catterns had participated in *University of New South Wales v Moorhouse* (1975) 133 CLR 1, a seminal case in the area. David was then a legal officer with the Australian Copyright Council and had become involved with Peter Banki and others, in the creation of CAL (Copyright Agency Limited), the collecting society which facilitates remuneration for authors, from the copying of their work.

Since those early days, CAL and the many other collecting societies have come to occupy a central position in the functioning of copyright law in Australia and the Copyright Act now recognises them and regulates their activities.

By the time of the foundation of Nigel Bowen Chambers and with David's increasing eminence, he began to do more appellate work, leaving the more mundane trial work

to his junior colleagues.

In accordance with the motto '*Servants of all, yet of none*', Catterns has not always acted on the side of the owner of the intellectual property rights. Indeed, in recent years, he has had a strong involvement on behalf of the makers of generic medicines, in legal controversy over the extent of the patent rights of multinational pharmaceutical companies.

Most famously, in *D'Arcy v Myriad Genetics* (2015) 258 CLR 334, Catterns succeeded in getting the High Court to reverse the result in the Courts below, which had applied existing doctrine to uphold the validity of a medical patent. The point in issue was whether genetic information concerning DNA could be the subject of a valid patent and, because of Catterns' success in *D'Arcy*, it is now established that it cannot be.

For the purposes of this article, Catterns was asked to provide a photograph of himself. He has said that none is available. It is known however, that a photograph of him once appeared in the *Sun-Herald* social pages, taken at the annual ARIA music awards. Unwilling to disclose his true identity, David ensured that the caption below this photograph described him as 'David Catterns, international yachtsperson'.

Catterns has been heard to describe himself, as 'the least-famous person in my family'. His sister, Angela, is the well-known broadcaster. His late father, Basil, was a journalist and advertising executive. He was not himself very famous, until the 1980s, when a book about the Kokoda campaign was published and General Paul Cullen was interviewed for the book. Cullen (Major Cullen at the relevant time) described his second-in-command, Captain (later Major) Catterns as 'the best and bravest soldier I ever served with'. Basil had volunteered, with the words, 'I think it's my turn, Sir', to lead the 90 men under his command, in storming a position held by over 1000 Japanese soldiers. They were successful in driving the Japanese away, with the loss of 31 Australians dead and 26 wounded. Cullen's recommendation

of the award to Basil of the Military Cross was rejected for the 'ridiculous' reason (according to Cullen) that Basil had already been given a Military Cross for previous acts of valour in the same campaign. Basil himself rarely mentioned his wartime exploits, until his story was published in that and later books, in newspaper articles and television documentaries.

It is understood that David Catterns saw service, as a reservist, in the Sydney University Regiment (under Lieutenant Colonel K R Murray QC) and then in the Small Ships Squadron. Catterns explains his comparative lack of distinction in the Australian military by a failure on his part to conform to its dominant paradigm. He says that he was rejected by Murray, as 'not officer material'.

David Catterns announced his retirement from the profession and appeared in his last case, on 4 May 2018. The judge, Justice Jagot, permitted David's opponent that day, Tony Bannon SC, to make some informal observations in honour of David's career, after which her Honour also placed on the record, her acknowledgment, from the judiciary's viewpoint, of David's service to the law.

This exchange, together with further observations from Peter Banki and from Justice Stephen Burley, was published in the September 2018 issue of the *Intellectual Property Forum*. It records the very high respect in which David Catterns is held, by all sides of the legal profession.

By Stephen Epstein