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THE SUPREME COURT OF

WESTERN AUSTRALIA

WELCOME TO THE HONOURABLE JUSTICE GAIL ARCHER

FULL BENCH

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON MONDAY, 19 JUNE 2017, AT 10.32 AM

**MARTIN CJ:** The court sits this afternoon to welcome the Honourable Justice Gail Archer to the bench. Her Honour took the oath of office and received her commission as a member of this court on Monday, 29 May, and is now, therefore, something of an old hand when it comes to the business of judging. I would like to particularly welcome this afternoon her Honour's family, her husband, his Honour Judge Patrick O'Neal, and her brother, Mr Rob Ashton, and her Honour's many friends.

I would also like to welcome the Honourable Malcolm McCusker AC CVO QC, former Governor of Western Australia, Mr Peter Quinlan SC, Solicitor General, the Honourable Justice Simon Moncrieff, representing Chief Judge Thackray of the Family Court of Western Australia, his Honour Chief Judge Kevin Sleight of the District Court, his Honour Judge Denis Reynolds, President of the Children's Court, Chief Magistrate Steven Heath, Dr Adam Tomison, the Director General of the Department of the Attorney General, and other distinguished guests, including many past members of this and other courts.

I would also like to particularly welcome those who will address the court this afternoon, being the Honourable John Quigley MOA, Attorney General of Western Australia, Mr Alain Musikanth, President of the Law Society of Western Australia, and Mr Matthew Howard SC, President of the Western Australian Bar Association. Her Honour graduated in jurisprudence and law from the University of Western Australia in 1988, receiving a prize in jurisprudence in her final year.

Although I'm sure that jurisprudential theory is of great assistance in resolving the many issues which arise in our courts on a daily basis, it must be conceded that the works of H.L.A. Hart and Professor Wesley Newcomb Hohfeld are not given as much attention in the published decisions of this court as they deserve. I've only been able to find two references to Hohfeld in the published reasons of the court. I'm sure people will not be surprised to hear that one is by Edelman J in *Minerology Limited* against the Chief Executive Officer, Department of Environmental Regulation.

That case was concerned with a transshipment licence and a desalination licence relating to the operation of an iron ore project in the Pilbara. His Honour found that to be fertile ground for an analysis of the fundamental distinction between the creation of a freedom on the one hand and the conferral of a right on the other, praying in

aid the principles enunciated by the good professor. No doubt, that reference reflects the attention which both parties to that case would attach to the Hohfeldian analysis of corresponding rights and duties in the performance of their daily tasks.

The other reference to Hohfeld's work which I've been able to find provides rather less encouragement to those with a penchant for jurisprudential analysis. In *Barmingo Investments Proprietary Limited v O'Brien*, Pullin J cited with approval a passage from the judgment of Windeyer J in *Mathieson v Burton* where his Honour reserved - observed that in considering whether a right exists the court is, and I quote:

...not engaged in an exercise in analytical jurisprudence, or with the classification expressed, in terms of correlatives and opposites, that delights and attracts both disciples and critics to Hohfeld.

Now, your Honour, I'm sure that in your three weeks on the court you've already learned that the expression of divergent views is one of the enduring and endearing characteristics of any court, but I fear that I digress. In common with any - many other members of this court past and present, your Honour commenced your legal career at the Crown Solicitor's Office in 1989. You were exposed to a wide variety of work in widely different jurisdictions until you joined the Office of the Director of Public Prosecutions in 1993.

In the nine years you worked for that office, you conducted well over 150 jury trials and represented the State in numerous matters in the Court of Appeal, as it then was. Your Honour's capacity to walk both sides of the street was evident when in 2002 you took up the position of Principal Legal Counsel at the Legal Aid Commission of Western Australia. In that capacity, you also appeared in many jury trials and appellant matters, albeit on a different side of the bar table to that which you had occupied as a prosecutor.

Your Honour joined the Independent Bar in 2004, working in a variety of fields, including civil penalty proceedings, administrative law, consumer protection, occupational health and safety, coronial inquests and disciplinary proceedings. As a barrister, your Honour has regularly appeared in many and varied jurisdictions right up to the High Court of Australia. Your Honour's abilities as counsel were recognised in November 2007 when you were appointed Senior Counsel on the recommendation of the

committee which provides advice in relation to such appointments.

As would be expected, since that appointment you've appeared in a number of the most significant cases in the jurisdictions in which you regularly practised. Your Honour has had a taste of judicial life having served as a Commissioner of the District Court for more than three months in total. You've also had a significant association with the Corruption and Crime Commission, having served as Acting Commissioner of that commission for three years and having conducted the statutory review of the legislation establishing that commission in 2007.

Your Honour has a longstanding interest in and commitment to forensic advocacy and has regularly participated in the teaching of that important skill throughout Australia and occasionally internationally. You've served as a coach in the Bar Readers' Advocacy Module, including periods as, of course, director of that module, and as a coach in the Australian Bar Association Advanced Advocacy Course.

In 2011, your Honour was one of two barristers in Australia selected to teach at the Advanced International Advocacy Course held at Keble College, Oxford over six days. In 2015, your Honour was one of three Australian barristers selected to teach at the Singapore Law Society Intermediate Forensic Advocacy Course in Singapore. And your Honour has also taught forensic advocacy to students at The University of Western Australia and at Murdoch University.

Hopefully all the efforts which your Honour has put into the teaching of forensic advocacy will be rewarded by the skills of those who appear before your Honour in the next phase of your legal career. However, no doubt, there will be those who appear before your Honour who lack the skills of advocacy which you acquired and taught. I would, however, encourage your Honour to develop the patience, which regrettably sometimes I find in short supply, and would discourage your Honour from using the trial process as an opportunity for advocacy instruction.

It has never worked for me, although, of course, I bow to your Honour's greater expertise in the field of advocacy training. This court enjoys very good relations with our friends and colleagues at the District Court, however, your Honour has taken that relationship into a whole new realm, although, happily, this is a realm sanctified by the bonds of matrimony. I'm sure that I speak on behalf of the

entire court when I welcome your Honour and Patrick into the community of the court and in the confident expectation that Patrick will refrain from using our social occasions to ventilate the exasperation which busy trial judges occasionally feel as a result of the decisions of the Court of Appeal.

It only remains for me to again congratulate your Honour upon your appointment to this court and to wish you every success and satisfaction in your endeavours as a member of this court. Mr Attorney.

**QUIGLEY, MR:** May it please the court. Of course, it's one of the greatest pleasures that I have as the Attorney General to nominate someone to the Cabinet of Western Australia to join the bench of the Supreme Court of Western Australia. Premier Mark McGowan likes to run his Cabinet on a consensus basis, but I can say that in presenting Justice Archer's nomination to the Cabinet it was met with unanimous acclaim. Her reputation is well known throughout all of the members of the Parliament, and especially of the Cabinet, for her work in - not only in the courts, but in her very important work in the statutory review of the Corruption and Crime Commission legislation which she undertook in 2008 and presented that report in 2008.

I will lament that not all of Justice Archer's recommendations were taken up by the ensuing administration, but we're getting to work on that now, Justice. I'm indebted to you, Chief Justice, for setting out in such detail the very storied career of Justice Archer, and I shan't take the court's time in repeating all of the work that she has done as a barrister at both the Crown Solicitor's Office, the Director of Public Prosecutions Office, the Legal Aid Commission of Western Australia, and then at Francis Burt Chambers.

Her reputation at Francis Burt Chambers was one of the hardest working barristers at chambers and her reputation for preparation was unparalleled. I will say that there was some anxious moments with Justice Archer's nomination and appointment. I did approach the Solicitor General to in turn approach Ms Archer SC, as she then was, but the answer wasn't immediately forthcoming and left us hanging there for a week whilst she considered her position, and this is reflective of the care and contemplation she gives matters before finally settling on a position and I'm sure that after that week's reflection and giving the commitment that she - that Justice Archer has given, it is reflective of the commitment that she will show to the administration of justice in this state.

As evidence of her dedication and commitment to hard work, I note that, as your Honour noted, Chief Justice, she was sworn in on Monday, 29 May, but I am aware that right through until Friday, 26 May, she was appearing as counsel in an important matter in this state and that matter had not quite concluded, and over the weekend of 27 and 28 May, was preparing written submissions in that matter before attending at the - Her Excellency's residence for swearing in the next day, and I think that that is reflective of her commitment to hard work and to her profession.

My friend, the learned Solicitor General, Mr Quinlan SC, was, of course, the President of the Bar and informs me that at Francis Burt Chambers he would describe her preparation and attention to detail as almost eye watering. There was no stone left unturned. Her preparation style, the Solicitor General informs me, was stuff of legend at the chambers. And so it just leaves me to on behalf of the Government of Western Australia to extend our most sincere congratulations on your appointment, to do that on behalf of the community of Western Australia and on behalf of the Government to say that we have every confidence in the excellent work that you will produce in this court and your contribution to the administration of justice in this state. Thank you very much for accepting the appointment, Justice Archer.

**MARTIN CJ:** Thank you, Mr Attorney. Mr Musikanth.

**MUSIKANTH, MR:** May it please the court, it is both my privilege and pleasure to appear on behalf of the Law Society of Western Australia to welcome your Honour to the bench of this honourable court. On behalf of all members, I congratulate your Honour on achieving this significant milestone and I commend the State Government on your appointment. As has already been outlined by the Chief Justice, your Honour has enjoyed a varied and accomplished legal career to date, and I do not intend traversing every aspect of that again, however, it would be remiss of me not to highlight at least some features of your Honour's past which illustrates your unwavering commitment, both to the administration of justice and to the advancement of the legal profession.

As has already been noted, after graduating from UWA your Honour commenced articles at what was then the Crown Solicitor's Office. Your Honour's legal work in the public sector continued some 10 - some three years later when you joined the Office of the WA DPP. In January 2002, your Honour joined Legal Aid WA, WAS Principal Counsel,

conducting a high level of counsel work before all courts for the benefit of indigent clients.

As mentioned, after leaving Legal Aid, your Honour commenced practice at the WA Bar in July 2004, and predictably it was not long before your Honour became highly sought after as counsel, and after less than three years at the Bar, a Senior Counsel, practising, as his Honour the Chief Justice mentioned, in a variety of areas and conducting appeals in both civil and criminal matters from both sides of the bar table.

It should be immediately said that your Honour's work for the benefit of the wider community by no means diminished after joining the Bar. To the contrary, your matter has been mentioned already, less than a year after doing so, your Honour commenced as a Commissioner of the District Court for a period of just over two months in 2006, and for some four weeks in 2007. As also been noted, your Honour conducted a comprehensive statutory review of the Corruption and Crime Commission Act, culminating the tabling of a report containing some 58 recommendations for reform of that Act in early 2008.

And not long after that, your Honour was pressed into service, as the Chief Justice mentioned, as Acting Commissioner of the CCC where you occupied that important role for a period of close on three years. Your Honour's energies were not over confined to your regular day-to-day work, whether in the private practice or while acting in a public capacity. Your Honour was also and remains renowned across the legal community for the selfless devotion of much of your personal time for the benefit of the profession generally and to the advancement of practical legal education in particular.

Soon after being admitted in 1990, your Honour took the significant, and may I dare say, the essential step of joining the Law Society of Western Australia. Over a sustained period of many years, your Honour has remained an active and longstanding contributor to the work of the society. Among other things, you have served as Deputy Convenor of the society's Ethics Committee, as a member of its General and Commercial Litigation Committee, as a member of the society's Senior Advisors Panel, providing essential confidential guidance to practitioners grappling with real or perceived ethical dilemmas.

Your Honour has also over many years made a significant and deeply appreciated contribution to the society's CPD Program, including our Summer School Program.

Of special note has been your Honour's work as a highly valued coach at the Society's courses for aspirate advocates, particularly in the area of cross-examination. Indeed, your Honour's contribution as a coach at the society's Annual Practical Advocacy weekend became well - began well over a decade ago.

As the Honourable Chief Justice has mentioned, your commitment to legal education has extended way beyond that and I will not traverse once again the various other features of that, save to say, that it has extended not only locally and nationally, but also internationally. The casual observer might be forgiven for thinking that with so many commitments there would be precious little time left for much else. However, those who have come to know your Honour best in practice would say otherwise.

Just some of the descriptions of your Honour as a colleague and mentor have included the following: "Very approachable", "Can talk to her about anything", "Extremely generous with her time", "Will even take a call on a Sunday while about to board a plane", from a junior practitioner grappling with an ethical conundrum, "Very caring to her fault", "Has a rare gift of being able to make yourself feel good about yourself", "A great sense of humour", "Going to be sorely missed".

With sentiments such as these, coupled with your Honour's wealth of experience, it should come as little surprise that the announcement of your Honour's appointment was welcomed with great enthusiasm across the legal community. The role which your Honour now occupies is, with respect, one to which you're not only eminently well suited, but also one which the profession has every confidence your Honour will be able to discharge with dignity, grace and distinction.

On behalf of the Law Society I once again extend our heartiest congratulations to your Honour and wish you well for a happy, rewarding and successful career. May it please the court.

**MARTIN CJ:** Thank you, Mr Musikanth. Mr Howard.

**HOWARD, MR:** May it please the court. It is my privilege to appear on behalf of the Western Australian Bar Association at this afternoon's welcome. The medical professional recognises the speciality of the intensivist. According to their college, an intensivist specialises in the comprehensive management of critically ill patients as the leader of a multidisciplinary team. Further, they have



advanced communication skills that enable effective interaction with patients, family, team members and others which enable collaborative practice.

The intensivist continues to learn throughout their professional life and acknowledges that involvement in teaching, quality improvement and administration are integral to the role. If we in the legal profession recognised an analogist, grouping or speciality, your Honour would surely be the prototype of that grouping. With the substitution of cases for patients and solicitors for families, the description and label resonates strongly with your Honour's approach, attitude and passion within the practice of the law.

Your Honour was known for the meticulous, to the point of obsessive, some might say, preparation in everything you did. Your Honour sought to pass that off as being a speciality in facts rather than in any practice area, but that is too self-deprecating a description. If your Honour was on the case, then no fact, however buried or quietly hoping to be overlooked, was safe. Any rabbit, whether self-respecting or not, down any burrow was liable to be pursued, subdued and bent to your Honour's unyielding preparation.

Indeed, one might wonder whether if your Honour had been around in 1907 there would have been any need for this state to have constructed the rabbit proof fence. Your Honour organised facts, cases, instructors, juniors and even judges, with fearsome precision, whether that was by the colour coding of your brief, the provision of timetables and schedules down to minutes, or encyclopaedic lists of issues to be worked through.

But your Honour was not a white-knuckled intensivist. You were the embodiment of what another advocacy coach, Judge O'Neal, would often describe as "the duck serenely gliding across the pond while paddling vigorously out of sight under the water to keep things moving in the correct way". You were warm and caring, especially to your instructors and juniors, and they loved you in return. You are a mentor and guiding light to many.

You are regularly described by those who have worked with you as inspirational and you were widely admired for being both a leader of and role model to women in the profession. That is a natural segue in to your Honour as the advocacy coach. Your Honour has been involved in advocacy training for so long that it would not be polite to mention the length of time. That involvement, as we

have heard, was in courses both in Australia and overseas and both as a coach and course director.

The WA Bar Association and the Advocacy Training Council of the ABA owe your Honour a huge debt of gratitude for that work over so many years. In this respect, I should also acknowledge the presence in court of my fellow Advocacy Training Council members. I'm sure that your Honour would say that the satisfaction you took from your interactions with so many participants over the years was some reward. Your Honour was invariably the most popular and sought after coach on any course. Participants were drawn to your learning, warmth and skills.

Notwithstanding all of that, your Honour has given up weeks upon weeks over many years in such service and I'm delighted to be able to say thank you on behalf of the Advocacy Training Council, your fellow coaches and the many participants who have benefited. It is invidious to put any individual into the firing line of a welcome such as this, so let me quote from an informed source who, I suspect, was speaking with their tongue firmly embedded in their cheek:

I am unable to share any stories which would embarrass and humiliate her Honour, not because they don't exist, just because I fear reprisal and it would come one day, some time when I was least expecting it. Her Honour has often spoken about retiring and writing crime novels. That may never happen, but the fear that she would devise a plot where I was the victim is sufficiently concerning to keep me quiet.

Before your Honour starts writing such novels, the association wishes to extend its warmest congratulations and express its unreserved confidence in how your Honour will go about fulfilling this most important office. May it please the court.

**MARTIN CJ:** Thank you, Mr Howard. Justice Archer.

**ARCHER J:** Thank you. Firstly, can I thank the Chief Justice for his kind words today and for the support and encouragement that he gave me leading up to my commencement. I would like to thank the three speakers, the hyperbole has been extreme, but I appreciate the sentiments. Mr Attorney, I am honoured by the appointment and keenly aware of the significant responsibility that you have placed on my shoulders and I can promise you that I will do my very best.

Mr Musikanth, I have known you for a long time and you have always been very kind to me and today was no exception. Thank you very much. Mr Howard, I've known you since I was an article clerk. You're the reason why I spent several years covered in bruises when I was a member of your indoor cricket team, aptly called the Wood Ducks. You've always been kind to me and you have never failed to amuse and today was no exception.

I would like to thank everyone who has come today for taking time out of their busy lives to be here. It is frankly amazing to see so many people here and it is very touching. Thank you. The welcome and support I have received from the court has been extraordinary. My new colleagues and all of the support staff and Aaron have been extremely generous with their time and remarkably patient. The advice is ranged from the intellectual to the practical, including that when the usher says, "All rise", he doesn't mean me.

So you can watch to see if I remember that at the end. Fingers crossed. I've also been overwhelmed by the support that I have received from the profession. The letters, the cards, the emails, I greatly appreciate all of it. I would like to take this opportunity to thank some of the people to whom I owe a great debt and time, of course, doesn't let me name everyone, but there are some people that I would like to single out.

I have to start with Commissioner McKechnie, as he now is. He was a mentor to my entire peer group when we were at the Crown Solicitor's Office and he has suffered in that role throughout our careers. Even after he became a judge of this court, the mentoring continued, sometimes against our will. After one appearance before his Honour, as his Honour then was, he had disposed of the matter on the spot and I walked back to chambers, and as I was walking through the door of my office, my phone was ringing, and I picked up the phone and it was McKechnie J offering me some constructive criticism on my advocacy. I was 40 years old.

And, yes, Mr Attorney, it did take me a week to make the decision, but again it was Commissioner McKechnie who was available to me to offer me his advice in reaching that decision. He has always been there for me and my peers throughout our careers. I next want to mention Paul O'Brien, although he wouldn't have come if he knew that I was going to do that and you mustn't leave now. For those of you who live under a rock, by which I mean commercial lawyers - it's true, when you become a judge you really do get funny.

Anyway, Paul O'Brien was a leading defence lawyer when I first started out in the - well, let's pretend it was the early 90s, and he remained so until he retired very recently. Now, not only was he a remarkably gifted advocate, but he treated everybody with courtesy, and in dealing with opponents he started from the assumption that they were ethical and it would take incontrovertible proof to shift him from that assumption, and that included one young prosecutor who made a mistake when leading her very first witness in a jury trial.

It didn't prejudice the accused, but it was terribly embarrassing. I don't have time to tell you the full story, although some of you have heard it before, but in short, Paul managed to persuade his co-counsel and the judge that I - she hadn't made a mistake at all, so if anyone does think that I have been kind to younger members of the profession, I had those two wonderful role models to guide me in that path. I'm also grateful for the support that I received from the judiciary over the years.

In particular, I would like to mention Peter Blaxell, Kevin Hammond and Len Roberts-Smith. When I was at the Bar I was very fortunate to work with extraordinarily gifted solicitors. I can't name them all, but I would like to mention Nick Cooper of Clayton Utz, Nick Ellery of Corrs, Dylan McKimmie of Norton Rose and Mark Williams, now at Minter Ellison. I appreciated their high level skills and dedication to the case, but it was their unwavering loyalty that I will always be grateful for.

They always got in the trench with me. I also enjoyed working with the incredibly talented young solicitors who would be assigned to the case, and in particular, Hayley Cormann, Katrina Welch, Lauren Fysh, Melissa Hanna, Kerry Pallas, Lauren Poett, Kate Pedersen, David Leigh and, frankly, everyone that works at the State Solicitor's Office, let's be honest. I enjoyed working with all of my juniors, but I will name Bill Keane, Penelope Giles and Tim Hammond.

Each of them is an exceptional advocate in their own right, although, of course, we've lost Tim to Canberra. Each of them got into some pretty gory trenches with me, but they stood there next to me, shoulder to shoulder, never flinching, and I will always be grateful for that. I had the benefit of two remarkable PAs who made my life work. Sally Peaty retired over a year ago, even though I forbade it, and I thought I would never find anyone else who could do the job to my satisfaction, but I did and a local law firm now has the benefit of Bridget Thorpe.

I've enjoyed the collegiality and support I receive from many barristers in chambers and, in particular, I would like to mention Andrew Beech SC, as his Honour then was, Craig Colvin SC, Rebecca Lee and Patricia Cahill SC. And I'm very touched to see so many colleagues from the profession here today. Finally, I get to my friends and family. The one person who isn't here is, of course, my father. He died when I was 17, but he had already given me more gifts in 17 years than many fathers manage in 60.

He thought I could do anything that I wanted to do and instilled in me a strong sense of the importance of integrity, compassion, a strong work ethic and public service, and he would have been so pleased to have seen me take up this role. I thank my friends Paul Yovich SC and her Honour Judge Troy Sweeney SC for their lifelong support and love and through some pretty grim times. You couldn't ask for more loyal friends.

And I'm grateful to have the support and love of Troy's husband, Glen Potter. I thank my friends, Alex and Bernie Zilkens, who have taken Patrick and me into their family. Of all my friends, I think Bernie has possibly been the most excited about my appointment which is so typical of Bernie. And I also thank the Yatzis for their support. My friends, Caroline and Harry Moody. Caroline has been my family since I was 13 years old and Harry since I was about 19.

Although neither of them are related to me by blood, for some reason they are proud of me and I'm so grateful for their love and support. My wonderful brother Rob travelled from Sydney to be here today. As my big brother, he was a perfect role model of compassion and integrity and our father would have been so very proud of him, as I am. And, finally, I come to my husband, Patrick O'Neal. Now, he's probably now going to start singing a Leonard Cohen song in his head so that he doesn't have to suffer the mortification that a Canadian suffers when someone says something nice about them, so I'm going to keep it short.

Patrick is my safe harbour, my lighthouse, and my shipmate. He is my greatest treasure and I will always be grateful for his love, support and unwavering loyalty. Can I thank you all again really for coming here today and in such numbers, and now you can all see if I remember not to stand up.

**MARTIN CJ:** Thank you, Justice Archer. That completes this afternoon's sitting. The court will now adjourn.

**THE ASSOCIATE:** All rise. This honourable court is adjourned.

AT 5.04 PM THE MATTER WAS ADJOURNED ACCORDINGLY

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