

THE CONTRIBUTION OF SIR FRANCIS BURT TO THE LAW

By The Hon Justice David Malcolm AC Chief Justice of Western Australia

When inviting me to contribute to the brochure to mark the change of name of “Bar Chambers” to “Francis Burt Chambers”, the Chairman of W.A. Bar Chambers Limited, Mr CL Zelestis QC, recognised that an article dealing with Sir Francis’ contribution to the law would be “a rather daunting task”. That is something of an understatement. What follows is not intended to be a scholarly exposition, but more an assessment of his contribution in terms of his personal qualities, both as a lawyer and as a Judge.

My first professional contact with Sir Francis was in 1955 when I worked as a Summer Clerk with Joseph Muir & Williams (a predecessor of Freehill Hollingdale & Page) in the summer of 1955 – 1956 before commencing my studies at The University of Western Australia Law School. During that time I was set the task of preparing a number of documents under his supervision and also accompanied him when he argued a number of cases, both civil and criminal, in the Supreme Court. As an advocate “Red Burt”, as he was almost universally known, always appeared extremely assured and quietly confident. He spoke clearly, firmly and with great precision, whether he was addressing the court or questioning witnesses. His capacity for analysis of both facts and law was extremely impressive. He seemed to have an unlimited fund of common sense which gave him an ability to communicate with persons of every age and background.

Sir Francis made a contribution to the law in a number of ways. Firstly, he contributed greatly to legal education, particularly in the law of contract as a visiting lecturer at The University of Western Australia from 1945 – 1965. Secondly, he was the Editor of the Western Australian Law Reports from 1949 – 1962 and Western Australian Editor of the Commonwealth Law Reports from 1949 until 1959 which was the year in which he was appointed Queen’s Counsel. Thirdly, there was his contribution as counsel, both in relation to his advice and advocacy. Finally, there was his contribution as a Judge following his appointment to the Supreme Court in 1969 and his period as Chief Justice between 1977 – 1988.

Returning to practice after the Second World War, the first two reported cases in which Mr Burt appeared were both property cases, namely *Cook v Cook* (1948) 50 WALR 1 and *Lennox v McKay* (1948) 50 WALR 91. In 1949 he appeared for the Commonwealth as junior counsel to Mr LD Seaton QC in *Eastern Asia Navigation Company Limited v Fremantle Harbour Trust Commissioners and the Commonwealth (The Panamanian)* (1949) 51 WALR 94 which involved many difficult issues of contract, negligence, nuisance, the validity of a by-law excluding liability in tort and the immunity from suit of a Crown instrumentality. In that case, a piece of hessian on the deck of *The Panamanian* caught alight and was thrown overboard into the water by a wharf labourer employed by stevedores. Oil floating on the water ignited causing a fire which damaged the ship. Although many authorities were cited in argument during a lengthy trial, the judgment of Dwyer CJ is notable for the fact that the only case referred to in the judgment was *Rylands v Fletcher* [1866] LR 1 Ex 265; [1868] LR 3 HL 330. The action for damages against the Fremantle Harbour Trust and the Commonwealth failed.

Red Burt was not always on the winning side. In *True v Coalminers Industrial Union of Workers of WA* (1958) 60 WALR 113 it was found that the resolution of Mr True’s union lodge expelling him from

membership and seeking his suspension by his employer evidenced a conspiracy which rendered the union and its officers liable in damages. In the same year he had a major victory in *Rio Tinto Finance and Exploration Ltd v Australiasian Oil Exploration Ltd* (1958) 60 WALR 138 in which shareholders of Australasian Oil Exploration Ltd (“AOE”) obtained a declaration that the sale by that company of its shareholding in Mary Kathleen Uranium Ltd was unlawful as involving an unauthorised reduction of capital and as an attempt to impose upon shareholders a liability greater than they had undertaken on their shares. Wolff SPJ found that this was a case of oppression by the majority shareholders by entering into a transaction without legal authority which was *ultra vires*.

These were just some of the cases which preceded Burt’s appointment as Queen’s Counsel in 1959. No long after his appointment he successfully argued an appeal before the Court of Criminal Appeal which held that on a charge of wilful murder it was misdirection contrary to s595 of the *Criminal Code* expressly to withdraw the alternative verdicts of murder and manslaughter from the jury: *R v Dodd* [1960] WAR 42.

The Western Australian Reports in the years following his appointments as silk contain the reports of many significant cases in which he appeared and which raised questions from almost every area of the law. In April 1961 Burt QC, with JLC Wickham as his junior, argued the extremely important constitutional case *Tonkin v Brand* [1962] WAR 2. This was an action by members of the Legislative Assembly against each member of the Executive Council (other than the Governor) and the Attorney General claiming a declaration that they were under a duty to advise the Governor to issue a proclamation under s12 of the *Electoral Districts Act 1947 – 1955* relating to an electoral redistribution and to consent to His Excellency doing so. The Full Court held that the defendants were under a duty to so advise and that the Court had jurisdiction to make the declaration sought under s25(6) of the *Supreme Court Act 1935* and O25 r5 of the *Rules of the Supreme Court*. The judgment of the Full Court was delivered on 25 May 1961. On 16 June 1961 the Governor in Council issued the proclamation. An application for special leave to the High Court was subsequently refused.

Following my own admission to practice in April 1964 I had the privilege of appearing with Sir Francis on a number of occasions as his junior. This included several cases in the High Court. His patience, organisation and preparation for trial or hearing were an object lesson for the young advocate. He was also generous and had a keen sense of humour. I appeared with him in *Sunny West Co-Operative Dairies Ltd v WO Johnson & Sons* [1965] WAR 232 in which a partnership had been converted into a company without notice to a supplier. When the supplier claimed the price of goods sold and delivered, the partners claimed that the goods had been sold and delivered to the company. The plaintiff replied that it had no notice of the change and that the partners were estopped from denying that they had continued to trade with the plaintiff. The plea of estoppel was upheld. I recall that the present Solicitor General, Mr Robert Meadows QC, then an articled clerk, gave evidence that he had inspected the offices of the business and that there was no sign or other reference to the company. The business note paper, invoices and other documents used in connection with the business including the company’s cheque books, remained the same and contained no reference to the company. Sir Francis was clearly of the opinion that we were well in front. Remarking that it was “time to put the spinnaker up” he invited me to reply to the closing address by counsel for the defendants, Mr HV Reilly.

A few months later I had the opportunity to appear against him, led by Robert Ainslie QC, when Sir Francis appeared with John Lavan as his junior. Lavan and I were opposing counsel in an ongoing arbitration in the course of which Lavan had sought and obtained an order for security for costs from D’Arcy J. The Full Court held that there was no inherent jurisdiction to order security except as part of an original order

appointing an arbitrator or giving some other specific statutory relief: *RJ Davies Pty Ltd v CR Keath Earthmoving CO Pty Ltd* [1965] WAR 189.

Beamish v R [1962] WAR 85 was another important case argued by Sir Francis regarding the adequacy of directions given concerning the circumstances of and the obtaining of an alleged confession by a person who was a deaf mute. Although Sir Francis took the case to the Privy Council for the nominal fee in the provisions of the then *Poor Persons Legal Assistant Act*, he was unsuccessful. On the basis of the law as now stated by the High Court in *McKinney v The Queen* (1991) CLR 468, it is very unlikely that the confession would have been held inadmissible. The controversy concerning the case continued long after it was decided.

In the latter part of 1962 Sir Francis appeared for Alan Goldman in the leading case of *Hargrave v Goldman* [1963] WAR 102 regarding liability for the escape of a fire initially caused by lightning, which involved questions of absolute liability, nuisance, negligence, breach of statutory duty and the application in the Australian bush of the *Fires Prevention (Metropolis) Act 1774* (Eng) s86! Consolidated actions by various landowners against Mr Goldman were dismissed by Jackson SPJ on 9 January 1963. That decision was reversed by the High Court in *Hargrave v Goldman* (1963) 110 CLR 40 which found Mr Goldman liable in nuisance and in negligence. After the decision of the High Court had been reversed but before judgment, an application was made on behalf of Mr Goldman to re-open the case on the ground of fresh evidence. The High Court referred this application to the trial Judge. In *Hargrave v Goldman* [1964] WAR 93 at 95 Jackson SPJ refused the application as the trial Judge while making it plain that he did not "... wish to suggest by anything I have said that the defendant may not have grounds for an application to the Full Court for a general new trial..."

Sir Francis then took the case to the Privy Council. By that time I was instructing him. I hope he will not mind me mentioning that he charged no fee on the basis that Goldman paid for the airfares for his wife and himself and made a contribution to accommodation costs in London. The appeal was argued over three days in April 1966, but the decision of the High Court that, although the fire commenced accidentally, the circumstances gave rise to a duty of care to extinguish or control it, was affirmed, as was the application of the 1774 English Act" *Goldman v Hargrave* (1966) 115 CLR 458.

In the meantime, in 1961 Sir Francis, then Mr FTP Burt QC, retired from the firm of Joseph Muir & Williams of which he was a partner and commenced practice solely as a barrister. He is the acknowledged founder of the Independent Bar. It was he and his fellow founding members who adopted the simple name "Bar Chambers". His appointment to the Bench in 1969, 10 years after he had taken silk, came as no surprise. In the year before his appointment, he was as busy as ever, arguing such as *Capponi v Commonwealth of Australia* [1969] WAR 33 (occupier's liability); *Re Green; Lloyd v Green* [1969] WAR 67 (wills); *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* [1969] WAR 104 (money had and received). The latter was a sequel to *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572. While the argument put in *Bell Bros* failed at first instance and in the Full Court, it was ultimately successful in the High Court after Sir Francis had been appointed to the Bench: *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137. The original advice that the excavation licence fees had been unlawfully demanded *colore officii* was upheld.

Sir Francis delivered his first reported judgment on 26 August 1969 as a member of the Court of Criminal Appeal in *Holman v R* [1970] WAR 2 which considered the meaning of the words "without her consent" in

the context of a charge of rape under s325 of the *Criminal Code*. The leading judgment which he delivered was as follows:

“I agree that the conviction should be quashed and a new trial ordered.”

Thereafter, very many judgments were delivered, a significant number of which were reported, again demonstrating a great capacity to state facts succinctly and with a high degree of precision, followed by an identification of the issues, a statement of the relevant law and its application to the facts as found. Space does not permit of any analysis of his judgments, some of which were of very great importance. This is a task for detailed research and scholarship which should now be undertaken. It is clear that he was the dominant figure on the Court in his time as Chief Justice from 1977 to 1988. Suffice it to say that reference is frequently made to his judgments as sources of very considerable authority and guidance by practitioners and Judges alike. The most recent example is the unanimous decision of the Full Court in *Craig v Troy* (1997) 16 WAR 96 that the defence of contributory negligence was available where a breach of contract also constitutes an act of negligence, so that there is concurrent liability in contract and in tort. In doing so the Court declined to follow the decision of the majority in *Arthur Young & Co v WA Chip & Pulp Co Pty Ltd* [1989] WAR 100, with the result that the dissenting judgment of Burt CJ in that case was regarded as correctly stating law.

At the farewell sitting for Sir Francis on 25 May 1988 Wallace J said:

“His Honour’s keen and cultivated mind quickly masters the issues involved in any case in such a way that the legal answer always appears to the casual bystander to flow a result which is inevitable. In today’s technological world, his Honour has resisted the temptation to resort to the use of tape-recorded judgment. All his original work, as a judge, has been marked by habits of scholarship, evidencing ‘the instinct to verify’, as Sir Owen Dixon called it, fact and law by handwritten judgments in the manner so recommended by Sir Frank Kitto. The clarity and precision of his judgments are an inspiration to all privileged to read them, and have had a profound influence of lasting measure. His Honour’s humble approach to the solving of problems, his hesitation against ready acceptance of an early answer, his continual posing of the right question involved, has on countless occasions disarmed advocates and made light of the work of his fellow members of the appeal court bench.

Throughout His Honour has at all times been conscious of human frailty, and extended compassion in its predicament. He has a quick and rich sense of humour so necessary to complete the picture of the perfect judge.”

I agree, and have nothing left to add.