

LAW COUNCIL TAX WORKSHOP

Vibe Hotel, Rushcutters Bay

22 October 2005

TRIBUTE TO THE LATE JUSTICE GRAHAM HILL

Justice Richard Edmonds

Federal Court of Australia

[After reading parts of a tribute prepared by the Honourable Justice Michael Kirby, AC, Justice of the High Court of Australia.]

Powerful sentiments, written by a man who, by his own admission, was not a close friend of Graham's, but a friend nevertheless and a man of great intellectual ability who, like the rest of us, admired and respected Graham for what he was – a great lawyer and an equally great human being. Indeed, like Justice Kirby, his humanitarian traits transcended every aspect of his scholarship as a lawyer.

I first met Graham in 1972 at a Tax Institute Conference at Terrigal. At the time I was playing first grade rugby for Sydney University and on arriving at Terrigal on the Saturday evening after a match that afternoon, somewhat battered and bruised, he greeted me: 'Oh you're Jock Harper's offsider, you'll have to give the rugby away, look what it did to him'. I didn't repeat this to Jock, who at the time was President of the Institute, not because I thought he would be offended, but because another person I worked for at Allens in those days, Justice William Gummow (as he now is), was also in Jock's ear about my preoccupation with playing rugby.

In my experience, Graham was not an easy person to get close to. In his latter years that can be put down in part to the office he held, but it manifested itself in earlier times, when he was at the Bar and his days as a solicitor. I have heard some suggest it was intellectual arrogance, but I can assure you it was not. Graham was always quick, some would say, sometimes too

quick, to take issue with you where he disagreed but this was not a manifestation of intellectual arrogance; it merely exemplified his enthusiasm to be involved in debate about issues arising in the context of revenue law.

While I was a good friend of Graham's, I would never have called myself a close friend. Few could. Of two that certainly were in his latter days, particularly following the death of Patrick Mayes – one, David Raphael, is here today, the other being Stephen McMillan. Strange as it may seem, their close affinity to Graham stems from common ground – they both briefed Graham at the Bar to the point where I am sure that had he rejected every other brief, they would have kept him gainfully occupied; although, and this is where the common ground ended – David was in private practice acting for a wide range of tax avoiders – from the purchasers of \$1 million fridges and sewing machines to the purchasers of deferred annuity arrangements – Stephen was acting for the Commissioner endeavouring to ensure that, 'if it sounded too good to be true, it was too good to be true'. To his great credit, Graham treated all retainers, whether they be for taxpayers or the Commissioner, on the same basis, applying all his intellectual and forensic skills in his scholarly fashion without discrimination.

In those days, the mid eighties, I had the great privilege of being Graham's junior on a number of occasions. Two, in particular, spring to mind, and each exemplifies what I said earlier that Graham's great humanitarian traits transcended every aspect of his scholarship as a lawyer.

For a start, he was intimidated by no one. This was no better exemplified than in a case in which he led me before the Administrative Appeals Tribunal. I cannot recall the precise issue although it did involve the taxpayer company's entitlement to an allowable deduction for the write-off of a bad debt. The principal of the taxpayer company was, by birth, of Yugoslav origin and a person who we perceived to be fairly volatile. In preparing the case for hearing, we were instructed that the Commissioner intended to call a witness, also of Yugoslav origin, who had, in times gone by, worked for the taxpayer company. Apparently, at one stage, the principal of the taxpayer company (who I shall call Mr Z) and this prospective witness had been good friends, however, at some point in time there had been a falling out and, at the time of the hearing, they were the worst of enemies. On instructions from Mr Z, Graham and I prepared a cross-examination of the Commissioner's witness and, on the second day of the hearing after this witness had been called and about half an hour before lunch, Graham

commenced his cross-examination. Within that half hour and by the time of the luncheon adjournment, Graham had raised the anxiety level of the Commissioner's witness to the point where one could visibly see that he was, as they say, ready to lose it. Deputy President McMahon adjourned the hearing for lunch and Graham informed me that he had to immediately return to Chambers to attend to something. He asked me to look after any issues arising and come and see him in Chambers before we returned that afternoon. He hurriedly left the hearing room and I noticed that as the witness left the witness box and proceeded to the door of the hearing room he engaged Mr Z in animated conversation. A short while later Mr Z approached me and said that he had been threatened by the witness. I asked Mr Z what was the nature of the threat and he said: "He told me I was fucking dead". Mr Z went on to say, I want you to tell Mr Hill that he must immediately cease his cross-examination of this witness. I informed him that I would do so but that so far as the case was concerned it was not in his interests that the cross-examination cease. On my return to Chambers I went up to Graham's room and told him of these events. After a little consideration Graham said to me I want you to go back to the Tribunal before we resume and speak to Mr Z. Will you please tell him that I only wish to ask the witness one more question in cross-examination and would he please permit me to do so. As a diligent junior, I did this and Mr Z agreed that Graham could ask the witness one more question and then cease his cross-examination. On the resumption of the hearing after lunch Graham asked: "Mr X when you left this room at the luncheon adjournment, did you say to Mr Z 'you're fucking dead?'" After picking Brian McMahon off the floor and giving the witness a cylinder of oxygen to enable him to resume his composure, the witness answered: "Yes". I think it was Tony Slater who was appearing for the Commissioner but within two minutes of that answer Tony had received instructions from his client to settle the matter on very favourable terms to our client company.

Second, Graham had a dry sense of humour and this is no better exemplified than in a case in which Graham led me in the last days of the Taxation Board of Review No. 1 – I think it must have been around 1986. Our instructing solicitor was David Raphael and it was one of those cases involving the purchase of a \$1 million fridge or sewing machine. The case was listed for three days but on the first day Graham was otherwise engaged in a case before Enderby J in the Supreme Court. He said to me, I want you to go down to the Board and open this case for the whole day. I said, you're joking. He said no. I said there is no way I could open this case beyond lunch time and even then I would be repeating myself. He said, you've got to do this because, in the knowledge that the Board was proposing to sit only two

members rather than three because of the imminent retirement of Tim McCarthy, Brian Pape will be up before Burchett J in the Federal Court endeavouring to obtain an injunction restraining the Board from sitting two members (as events turned out this failed) and I will not be available until tomorrow. Again, being a diligent junior, I went down to the Board and opened the case until lunch time. My recollection was that I was able to do this without detracting too much from the value of the fridge or the sewing machine the subject of the hearing, but just before the luncheon break the Chairman of the Board, Harry Stephens, made it quite clear that he expected me to get on with my case immediately after lunch. I returned to Chambers and spoke to Graham. I said to him there was no way I could continue to open our case and he said yes you can, start reading the *Income Tax Assessment Act*. Again I said you're joking. He said no, start at s 6 and go forward. I returned to the Board and informed the Chairman and Peter Roach that my opening would continue for the rest of the day. They gave me a puzzled look until such time as I went to the relevant definitions in s 6 of the *Income Tax Assessment Act* and began to read. By 3.30 pm I had got up to s 23(q); at that point, the Chairman spat the dummy and offered to adjourn for the day. It was an offer I accepted without hesitation or condition. The punch line to the story is that on the following day when Graham freed up and came down to the Board he said to the Chairman (tongue in cheek), I'm sure you would like us to open our case. Harry Stephens, who did not display a sense of humour, if he had one, was not amused.

I have no doubt everyone can recall an anecdotal incident involving Graham, but one of my favourites, I personally witnessed. It occurred on the occasion of the taxpayer's application for special leave to appeal to the High Court in *Gregrhon* – for those of you who can't remember, *Gregrhon* was the Commissioner's belated but successful attempt to apply s 260 to 'bottom of the harbour schemes'. In the Full Federal Court, where the Commissioner was represented by Gleeson QC, Hill QC and Bathurst as junior (not a bad team) and the taxpayer by Staff QC, Bloom QC and myself as junior, the Commissioner succeeded in overturning the decision at first instance in favour of the taxpayer. Between that time and the special leave application Gleeson QC was appointed Chief Justice of the NSW Supreme Court so that Graham was lead counsel for the Commissioner defending, so it was thought, the taxpayer's special leave application. Doug Staff got to his feet and provided a persuasive argument as to why special leave should be granted. Upon being called, Graham got to his feet and said: "The Commissioner neither supports nor opposes this application." Mason CJ said: "What did you say?" And Graham said: "The Commissioner neither supports nor

opposes this application.” Mason CJ said: “Thanks for nothing Mr Hill.” As I have already said, Graham was a person who was always quick to respond but, on that occasion, the look on his face said everything; nothing was forthcoming.

Graham’s contribution to the tax jurisprudence of this country between 1989 and 2005 was enormous, not only in the number of cases he sat on both as a single judge and in Full Courts, but in the development of basic concepts over the period. I had his Personal Assistant, Jennifer Farrell, take out for me a list of every tax case – both at first instance and on appeal – during this period. It runs for over seven pages, with over 30 cases on each page – a total of over 210 cases. I would be happy to make it available to anyone who is interested.

From his very first case – *Davis* – to his very last – *HP Mercantile* – Graham’s reasons for judgment exemplified the great intellectual and scholarly power which he brought to all his writings and upon which his great reputation was so firmly and deservedly built. Only the other day I presented a paper on Graham’s approach to statutory interpretation in the context of the GST to a Tax Institute Seminar in Queensland using as the vehicle his leading judgment in *HP Mercantile*. As I said on that occasion, I think it likely that Graham’s approach in that case, with its emphasis on policy and contextual considerations rather than delving into a syntactical analysis of textual matter will be a template for the future, not only in the area of GST, but in other revenue law areas as well. I know that special leave has been sought in that case but irrespective of the outcome, I predict that Graham’s approach will make that case a ‘watershed’ in the development of tax jurisprudence in Australia in the first half of this century. I know that my colleague Justice Allsop will be speaking to you tomorrow on matters of statutory interpretation and I do not wish to trespass on his ground. He sat on the Full Court with Graham in *HP Mercantile* and has made the subject of statutory construction a specialty of his domain. Certainly, he is far better equipped to speak to you on the subject than I am.

Graham’s contribution to tax jurisprudence in Australia lies not only in the number of cases he heard but in the contribution he made in those cases to the proper understanding and development of basic concepts and difficult areas of statutory construction.

In terms of basic concepts, one only has to look at the cases he decided in the area of the basic concept of income. One might call it: ‘From *Cooling* to *Montgomery*’; while he was

not involved at any stage in *Montgomery's* case, there can be no doubt that the ultimate slim majority in *Montgomery*, whether one agrees with it or not, had its source in Graham's decision in *Cooling*. In the same area is Graham's contribution to a proper understanding of what he called the two strands of reasoning in *Myer Emporium* in their application to various sets of facts which subsequently came before the Court. One only has to look at cases such as *Westfield*, *Henry Jones (IXL)*, *Hyteco Hiring*, *Reuter*, *SP Investments* and other cases which raised the implications of the High Court's decision in *Myer Emporium* to the facts of those cases. Graham contributed greatly to the evolution of the reasoning process that came out of *Myer Emporium*.

On the other hand, one could, perhaps, make the observation, similar to Justice Kirby's observations that neither he nor Graham had any affinity for sport, that Graham did not like sport or sportspeople. That is exemplified in his decisions from the early days in *Cronulla Sutherland Leagues Club*, to his disallowance of Bob Cooper's claims of allowable deductions for the cost of the extra food and beer he ate and drank on the instructions of Roy Masters to maintain his first grade position, and more recently his approach to Ms Stone's javelin throwing and incidental activities.

Graham had an extraordinary ability to take on board the most complex cases and turn them around in quick time. Nowhere is this better exemplified than in the Consolidated Press cases which he heard at first instance and which subsequently went on to the Full Federal Court and the High Court of Australia. There were four cases at first instance and on appeal, although at the end of the day only two of them got to the High Court. They all involved highly complex issues ranging from the application of s 177E (for the first time), the application of Part IVA to a scheme allegedly designed to overcome a specific anti-avoidance provision (s 79D), the application of Part X to a defeasance profit of the kind considered in *Orica* and *Unilever Securities* made by a controlled foreign company, as well as the interaction of the 'thin cap' rules in the context of Part X. Graham turned all four judgments around within fourteen days. I hesitate to suggest it, but no other person in this country could have done that. Overall, while one can sit back and pick holes in certain aspects of his reasons for judgment in those cases, as is exemplified in the decisions of the Full Federal Court and the High Court, he did a pretty good job of it.

Finally, one cannot let Graham's contribution to tax jurisprudence in this country go by without mentioning what I think he would regard as a somewhat disappointing aspect namely, his contribution to the construction and application of Part IVA. Graham thought that he fully comprehended what the legislature had in mind in enacting Part IVA and how it should operate to a particular set of facts. This was exemplified by his early comments towards the end of his judgment in *Peabody* when it was in the Full Court. Like most of us, he had no difficulty with what the High Court said in *Spotless* but the disappointment he felt in the criticism that was made of his reasoning in *Hart* was palpable. So much is evident from what he said at first instance in *Macquarie Finance* and in writings off the Bench.

I doubt that we will see the likes of Graham Hill in the revenue law area again, however, if I am wrong, then it will be a long time before we do. He was, as Professor Richard Vann said, and the press reported, a Titan in the field. We shall all miss him greatly. Thank you.

22 October 2005