CHRISTOPHER CANAVAN QC

Edited interview with Juliette Brodsky for Foley's List oral history and filmed by Elisabeth Crosbie, 22 March 2016

Part 1 – Telling clients the facts of life

Q Chris Canavan QC, thank you very much for making the time to be interviewed for Foley's List. You've been described to me as the doyen of the planning bar. Being as highly regarded as you are, do you care to share the title with any of the other denizens of this floor, Stuart Morris QC for example?

A I just spent three days fighting Stuey – he had a bad case and I'm going to win, but he did a sensational job. That's the mark of a good barrister – any barrister can look good with a good case, but Stuey did a bad case really well. I'm proud when a barrister fights a bad case well.

Q Does that happen often to you?

A I've got two jobs. My first job is tell clients the facts of life so that they can make an informed decision and then the next job is to give the case a really red-hot go. If the case is really bad, and unless I can see some sort of collateral advantage, I would prefer they didn't spend their money or I try to negotiate something for them. On four or five occasions, I haven't proceeded, because I couldn't justify the expenditure of the cash.

Q How often, Chris, do you find in planning matters though, people who tenaciously want to press ahead, when it's a matter of their rights, against your advice?

A I uually say something to them along the lines, "You're paying me an obscene amount of money – the least you can do is accept what I say". Tenancious isn't the right word. People are entitled to their points of view, and part of my job is to represent their points of view – not mine. I don't mind people having their own point of view, but it's my job to tell them whether they're spending their money effectively and whether it's going to be worthwhile.

Q I suppose you've had the opportunity to see firsthand the "shapeshifting" qualities of objectors over the years. Residents' action groups have been described as having the ability to "sprout fangs and spit fire". Has that been your experience?

A Oh, it is. There's no doubt that over the last twenty years they've become miles more effective. They know exactly where the pressure points are and they know how to take advantage of the system – good luck to them.

Q You've been made a Legend of the Bar in 2012 – the Bar News described you, Chris, as having an "agile mind, a handsome profile and a fickle charm".

A That's a bit harsh - I'll cop the first two, the fickle charm is a bit tough.

Q What does it take to become a Legend of the Bar?

A I think it's longevity and an obvious love for the Bar. And respect for barristers who are what I think barristers should be.

Q Where did you grow up and where did you go to school?

A I grew up mainly in South Yarra. My dad had a pub in Fitzroy for a while. I went to St Patrick's College in East Melbourne. I went to Melbourne University. I did one year's articles with Arthur Phillips & Just. I came to the Bar just before turning 24 and I've loved every minute of it. During the course of my degree, I spoke with Xavier Connor who was probably president of the Bar Council at the time - his son's got a room three doors along (from here) - and he said "There's only one place to learn how to be a barrister and that's at the Bar". Which is not the current view; no-one could do what I did (these days), or you could but I think you'd starve. You need four or five years' maturity, contacts and experience to come to the Bar (now); the learning opportunities aren't there anymore. We used to go to the Magistrates' Court and do "specials" – motor car accidents for $150 –

Q "Crash and bash".

A Yes, you got $21 for the brief and $4 for the conference. It was a lot of money in '69 – a lot of money.

Part 2 - "Foley's is the only list to be on"

Q You must have had a lot of confidence all the same – plenty of people did go to the Bar in those days, not in the numbers they do now, and you did need to know how to make a quid then. Did you get a lot of work to begin with?

A I did, but it was miles easier (then). I had the confidence of ignorance and the brashness of youth. Looking back, I was hopeless. I remember John Coldrey in about week four saying "You probably shouldn't lead your witnesses quite so much". There was no readers' course in those days. You just came to the Bar. Jim and Kevin Foley were my clerks and they looked after you and made sure you didn't do anything way beyond your ability – and away you went. On one occasion, the case was adjourned and the solicitor rang and said "The client doesn't want him – he looks too young". I did look like a kid. Basically, you basically just did your best. One day I was sitting out at Coburg Magistrates' Court waiting to do something and it was the first time since I began at the Bar (that) I wasn't shaking. It was tough, but it was great.

Q I wanted to ask you briefly about Jim Foley. Most people I've interviewed said he took a fatherly interest in young barristers.

A Jim and Kevin (Foley) were fantastic to me. I decided to be a barrister when I was 14 because my godmother told me I should. When I was halfway through my articles, I asked my principal which list I should be on, and he said "Foley's is the only list to be on". So I traipsed up and knocked on Jim Foley's door. I sat down and said, "My name's Chris Canavan" and he said he

was Jim Foley. I asked if I could be on his list and he said the list was closed. I said, "But I've asked around and I want to be on your list." He repeated that the list was closed. "No, I really want to be on your list." He sighed and asked who I was reading with and I said Haddon Storey. He said (Haddon) was the secretary of his clerking committee, he'd have to do something for me and so I was signed up. It's been a major influence on my career. When he retired, Jim gave me his books he'd had as a law clerk when he retired, which I really treasured. Though you'd be hanging around with nothing to do and you'd hear the phone ring and you'd hear Jim or Kevin say "Maintenance case in Williamstown tomorrow? No, we have no-one who could do that." And you knew that's where you were in the pecking order! When I spoke to Jim Foley, I was calling him "Jim" (not realising) there were older, more qualified people calling him "Mr Foley". I thought "How did I do that?" It all worked out - both Jim and Kevin treated me as almost a son, so I was very lucky.

Part 3 – Reading with Haddon Storey

Q You mentioned Haddon Storey who later became Victorian planning minister. What was it like reading with him?

A Haddon was fantastic to me. Looking back, I never fought him, but he was a pretty good barrister and a fantastic master. He gave me a piece of advice in my first week, which I still quote to juniors. In my first week, my old firm gave me a difficult advice to do about chattels mortgages, which were a way of avoiding stamp duty. It took four days and I asked what I should charge (the client). I was only a kid. Haddon said "There's only one rule – if you don't charge, they won't respect you". I've tried to gain respect ever since. I reckon for about three years after I finished reading, I would be in Haddon's room, two or three times a week, asking his advice. (He) never ever put me off, always had time to give me all the advice I needed. He left me all his books when he went into politics and I've since passed some of them onto younger barristers.

Q Do you know who he got his books from?

A They were second-hand, I can't remember now. The major set were the Commonwealth Law Reports. Some of the text books are out of date now, of course.

Q Where were Haddon's chambers when you started out?

A 8th floor of East (Owen Dixon chambers), room 815. On one side of him was Jim Gobbo, on the other side was Norman O'Bryan. Next to him was Daryl Dawson and George Hampel (had a room there). They were my heroes when I came to the Bar - they were all pretty impressive.

Q Ian Hayden, too, said it was a wonderful floor. Did you have occasion to speak with some of these barristers? Norman O'Bryan or Daryl Dawson, for example?

A Sir Daryl was very helpful – I owe a lot to Sir Daryl. I was junior to Norman O'Bryan and Jim Gobbo who was the doyen of the planning bar. In later years, I appeared in front of him frequently. I was his junior, not often – Mike (Wright) was his junior more than me. Jim's son Jeremy was my junior for about ten years, before I took silk. I can't work out whether Jeremy is my oldest son or my youngest brother!

Part 4 – Getting into Planning / Garth Buckner

Q Were you in those early days intending to have a broad practice or were you already thinking in terms of the planning bar?

A When I came to the Bar and told Kevin (Foley) I wanted to do both commercial and crime, I was told to make up my mind - I couldn't do both. You can't do crime part time. So I did commercial work for about five or six years and got to the stage of appearing mainly in the County Court and the Supreme Court. I got into planning through teaching Don Chisholm's kids to water-ski. One of my best mates was David Miles who was articled at Maddock Lonie and Chisholm. Don had a boat and was a partner at Maddocks which handled most of the councils' planning work in those days. Don hated water-skiing, so David and I taught Don's kids to water-ski every Sunday, and then we'd have dinner with Don and Lynn and the family.

Then Don gave me a brief. My first brief from Maddocks was to act for an insurance company where the client was claiming that he'd destroyed a veranda and had to replace it. This was in Port Melbourne. In those days, there was a bylaw that prohibited you from replacing Victorian verandas in Port Melbourne. So we went and said he'd suffered no damage because it couldn't be put back, and we won. Then I did council prosecutions for Maddocks. I'd never done a planning appeal. One day Kevin (Foley) rang and asked me to be a temporary chairman of the Town Planning Appeals Tribunal. Being a brash kid, I said yes. I went and saw John Fogarty first and he said "Easy – sit down, shut up, listen and take notes." It went alright on the first day, and then on the second day, I turned up and there was Garth Buckner who was terrifying on one side, Steven Strauss and Ron Merkel on the other. That was a pretty stressful three days. We sat in threes in those days and the gentlemen I sat with were miles more experienced. They looked after me pretty well, so that's how I got into planning.

Q You mentioned Steven Strauss and Garth Buckner. What did you learn from each of them that had some bearing on your own approach?

A Subsequently, for about five or six years, I was Garth's almost fulltime junior. In those days, junior counsel wrote the submissions, but it didn't work that way with Garth. You'd go out there, and he'd sit in his chair in his little office above the garage and say, "I'll do the submission, but you bulldog me". He'd start off, make a mistake, slam his hand down and was intimidating. But he was a very good man.

Q You learned to fence on your feet with him.

A You did, with Garth. My first experience with Garth - I was acting for Werribee Council and he was acting for the Smorgons. We brought the first private prosecution under the Environment Protection Act. We didn't finish the first day. By that stage, I had chambers down on the second floor (of Owen Dixon East) and Garth was along the passage. The next day I had my door open and Garth was walking up and down outside my door saying, "If you want an effing war of attrition, I'll give you a war of attrition". I was terrified. But he subsequently became a dear friend. We played squash together every Friday night and I became close to him and his family.

Q He sounds a very competitive individual.

A Oh, God yeah.

Q Do you think you're like that?

A I'm not as competitive as I used to be, and not as much as him, but I learned some bad habits from Garth. I think he'd be up before the stewards once a week these days for his aggression and implacable desire to win. Advocacy's changed. What was legitimate strenuous advocacy twenty years ago would be now regarded as blatant bullying. You've got to cut your cloth as you go along.

Part 5 – A thorough kicking

A In the first couple of weeks at the Bar, I was asked to go over and ask for an appeals cost fund certificate. It was about a quarter past nine. I looked at the legislation and I thought if my client lost, I'd get it as of right. So I went over to the Full Court and there was a senior barrister on the other side (I won't tell you his name). My solicitor was very experienced and I was acting for the defendant. I walked in and said I thought I didn't need to ask for the certificate, but they said "You've got to apply". The Full Court came out - Sir Henry Winneke was presiding – I can't remember who the other two judges were. My client duly went down and I got up to apply for the appeals cost fund certificate and called them "your worships", which is what you call magistrates. I asked for the certificate and Sir Henry Winneke almost put me on his knee, patted me on the back and said "I think that's as of right, Mr Canavan". Instead of shutting up, I said "Yeah, that's what I thought, too!" But I did say that in retrospect.

Q They must have known, though, you were young and starting out.

A Sir Henry Winneke was lovely.

Q Would you have got a drubbing with anyone else? Sir John Starke for example?

A I don't think so. I remember, I did a matrimonial in front of Justice McInerney. My opponent (eventually) became a Supreme Court judge – I won't tell you who it was – but I bullied him and I won. It was about full disclosure of all the trust accounts of a major city firm, because one of the

partners was getting divorced. I was acting for Mary Cameron who was pretty terrifying –

Q Why?

A Oh, Mary just was super-tough – (though) she mothered me a bit. Anyway, Henderson and Ball – that was the firm – appealed to the Full Court. It was an interlocutory judgment. In those days, the Full Court didn't overturn interlocutory judgments unless they were clearly wrong. I sought out appeal and went and saw John Winneke who was appearing for the appellant. He wanted to know what I was appealing for – "it's an interlocutory matter". He affected to be one of the boys, but was super-smart. He laughed and said "We'll see". Well, I got slaughtered. I can't think who the third judge was, but they started off with (Justice) Gillard holding me down while Justice Dunn gave me a thorough kicking, with phrases like "Are you meaning to tell us that….?" Total massacre. I'd been at the Bar about eight years. Good lesson – great lesson.

Q What did it do to you personally when that happened? Were you able to learn toughness quickly?

A It just made me determined to be better. You don't want it to happen twice. I never called the Full Court "your worships" again. The hard thing for any barrister is knowing when to talk. Smart barristers know when to shut up. You just shut up. That's the skill.

Q Whose advocacy style were you most influenced by, particularly in those early years?

A Probably unfortunately, Garth (Buckner). One of the best advocacy performances I ever saw was J.D. Phillips who went to be on the (Victorian) Court of Appeal. Super-smart. I was junior to Norman O'Bryan in the High Court where John (Phillips) was making an interlocutory application. He wasn't yet a friend. He was breath-taking. Not only was he smart, he was genuinely, persuasively eloquent. Who else was great? Daryl Dawson was a fabulous advocate – I saw him fight Garth out at the Broadmeadows Magistrates' Court.

Q What happened?

A Garth was defending some health prosecution and Daryl was acting for the council. I think Daryl won; but it was a classic contrast of styles. Garth was in madman beserker mode while Daryl became more and more proper as the day went on. Jeff Sher – great barrister - fantastic cross-examiner. I was opposed to him and Alan Goldberg in the Housing Commission Inquiry – they were devastating, a dream team. Both excellent barristers.

Q What about your own dream team?

A Now or in the past?

Q Either.

A Jim Gobbo and Garth Buckner were a pretty good team – they had it all. You had Jim's charm and charisma and Garth's hard work and bloody-minded determination, nailing every point. About twice a week, when I was a junior to Garth, he would ring me at 10.30. He wouldn't identify himself, but would say "I've got the answer!" He'd have spent hours on some minute point of law that he thought was important.

Part 6 – Advocacy and Dealing with the Tribunal

Q The fashion in advocacy has certainly changed over the years. The days of grandiloquence and filibustering are long gone. Is the more calm laconic approach the way to go now, or is it changing again?

A I think there are two things. In general advocacy, there's more of a sense of partnership with the bench, to achieve an outcome. The first goal of any barrister in any case is to gain the trust of the judge. Everybody forgets what an insecure position judging is; everyone can see you up there, you don't know half of what the case is going to be about and your mistakes are going to be incredibly public and indeed picked over by the appeal court unless you're very careful. If the barrister can provide to the judge a level of confidence and trust so that they know they're not going to finish up with egg on their face - that's a giant advantage. The other change is the extent to which advocacy is now written. When I was a kid, everything was oral. You go into the Court of Appeal now, two-thirds of your weapons to persuade are written. They require submissions, and then just pick you off or draw you out on the points that interest them. That's a big change. I suppose the third thing is this: removal of aggression. It's very much the case that cross-examination is not allowed to be cross, particularly down at the (Victorian Civil and Administrative) Tribunal. Half the decisionmakers are planners. If you put some planner to the sword, they'll think "There but for the grace of God goes me". Until witnesses show themselves to be deceitful, unhelpful or biased, you've got to be polite and go along for the ride.

Q How agile have you had to be dealing with the vagaries of some of the Tribunal's sitting members, given that many of them are not lawyers by training?

A The identity of the decision maker is a very important element that goes into the mix of the advocacy. You can assume Supreme Court judges know stuff; they've done what you've done and they get the demands of advocacy better than most – they wouldn't be there if they didn't know what they were doing, particularly with the current Bench, which I think is terrific, but at the Tribunal, you can't (assume). You have to know when to elaborate and when you're preaching to the converted. The problem with the Tribunal, unlike courts, is that it's the only area of law I know where you're dealing with the future. Everything else is the past – it's "who shot who", "who signed what?" "who went through the red lights?" The Tribunal is, "what <u>will</u> it look like?" which immediately injects a level of uncertainty, (requiring) even more confidence-building than the Supreme or County Court.

Q That's a nice way to describe it – that VCAT deals with the future. How often does VCAT get it right with regard to planning?

A There have been changing fashions at different times. Back in the 70s and 80s, the tribunal was too pro-applicant. There have been times when they've been too pro-council. At the moment, because of the effectiveness of public groups like Save Our Suburbs, too many of them ask "why?" rather than "why not?" There's so much subjectivity in planning. One person's grandeur is another person's visual bulk, which makes it difficult to generalise.

Q The former planning minister Robert McClelland said "You can't legislate good taste" – do you agree?

A I do. There's this constant tension in planning decision-making and law between certainty and flexibility. Currently we're going through a period where the tension's slightly in favour of certainty. There's now more mandatory height limits, but great architects need flexibility. You can't do great buildings to a formula.

Q Will you feel the same way when buildings go up and spoil your wonderful view here?

A I made a mistake - I should have stopped that one! I've had two or three occasions where neighbours have wanted to do things, and I'm a lot more easygoing than most of my clients and objectors. Lawyers' starting point, coming from the 18th century English gentry, is the sanctity of property rights, whereas planners come from a perspective of "Your property rights are what's left when we've decided what the community needs". My neighbour to the north at home has built a balcony that's a bit hot, but I accepted that. Another neighbour built an extension in South Yarra to my west, which I didn't object to, even though it's pretty bulky. No, I'm a bit of an easy touch, actually.

Part 7 - Third Party Rights

Q Would you say that your practice over the years has dealt much with what economists describe as the actions and consequences of the invisible elbow? The invisible hand is about the transaction between buyers and sellers, but other people (neighbours) are also affected by the actions of the invisible hand – they're knocked by the invisible elbow! We're talking about third party rights, which are a hot button issue.

A I've put three kids through private schools because of third party rights. In NSW, there's no third party rights and also no appeal, strictly speaking, on issues of fact. Victorian planning law and its administration involves two things: on one hand, adjudicating disputes between the citizen and local government, and on the other hand, enfranchising the community so at the end of the day, they feel they've been heard and that everyone had a fair go.

Q Would you say Victoria's got planning (law) right more than other states?

A I've done a few cases in other states. The Environment Court in NSW is a bit more legally oriented than we are but it's pretty good. Our system works pretty well – we have fantastic people, like Justice (Greg) Garde, also Stuey Morris who was before him – I haven't forgiven him for resigning yet, because he gave the Tribunal great morale. I think the state government interferes too often and for political reasons, rather than proper planning merits and net community benefit. Both political parties do it and it's disappointing.

Q So that raises Port Phillip Bay's proposed dredging – you withdrew from that inquiry. Would you like to talk about that?

A I don't want to talk about it too much because there's client privilege involved. The government gets to choose the way it runs its cases. I'm not privy to all considerations that dictate the procedure they adopt. There might well be overwhelming community benefit in providing a streamlined process. Let's say I wasn't very comfortable with that process, and when you're not comfortable, you're not going to do it well, so it's best I didn't do it at all.

Q Without singling out any one government, do you think they consult but (then) go ahead and do what they were going to do anyway?

A If you mean, do they ignore the planning merits? More often than they should. If you mean, do they listen to the community in order to get elected? All too often!

Part 8 - Monopoly with shopping centres

Q In the late 1970s when you were working towards becoming a senior junior, were you beginning to hit your stride? Any milestone cases?

A I did my first shopping centre case, as junior to Kenny Gifford. It was for George Herscu, out in Footscray. It was a very high profile case - I can't remember whether we won or lost - but that pretty well established me. From 1981 onwards, there were three juniors that effectively ran the junior planning process: there was myself, Richard Evans and Michael Wright. We were all different and each had our followers. Richard drowned in Sydney Harbour in 1988.

Q After you took silk.

A Yes, that's how I remember. Richard and I were very close. And I'm still very close to Michael.

Q Stuart Morris wasn't around then?

A Stuey's five or six years younger than me. He came to the Bar seven or eight years after me, made his mark very quickly and did very well. He's been on the Bench. He's been away from the Bar too; at one stage, he wanted to go into politics. He's a very clever man, Stuey.

Q Have you every considered (a career in) politics?

A No. I did once. Don Chisholm was very high up in the Liberal Party and wanted me to stand for a seat. I thought about it for about five minutes, but decided not to. I've only had one career. Not a bad gift from your parents when you still like your job after 47 years.

Q Absolutely. Was that shopping centre case a landmark case? I ask because shopping centres as we now know them really took off in a big way in those days.

A Chadstone started in 1967-8 by John Gandel, and by the 80s, following the American model, they were sprouting everywhere. There was a giant one out at Berwick. There were fights between centres – about who'd get what (patch). In those days, you'd hear all the Tribunal decisions about which shopping centre would go ahead and which one wouldn't. That was fodder for the 1980s.

Q It sounds like a game of Monopoly.

A It was, a bit. They ran on legal points, technicalities. No-one would take a technicality at the Tribunal these days – it's almost an admission you haven't got the merits.

Q Why?

A Rightly or wrongly, they see legalism as an impediment to good decision-making about good net community outcomes. They're probably right. There were all these cases in the 70s and 80s where the wrong person signed the application or didn't have authority and it would go to the Supreme Court. It rarely happens these days. If there's a fight now, it will be about the construction of a provision or an unreasonable challenge on the basis that no tribunal, properly instructed, could possibly have reached that decision. Other than that, not many challenges.

Q Was anyone responsible for the move away from legalism?

A Insofar as it was an advocate-led thing, it'd be Michael and I and Richard.

Q You didn't personally care for that point-scoring approach?

A It didn't get up that often in the 80s – I used to say if you get the moral high ground, the judge would work out the law. Whether you were legalistic or not, you couldn't afford to look like you were being legalistic - you had to think about what was best for the community. The courts just lost patience with excessive legalism – it became unhelpful to run cases that way. The three of us never discussed it but I don't think we ever seriously took that line.

Part 9 - Lindsay Fox and Getting to Know Developers

Q Chris, during the 1970s, you were also a member of the Bar's Town Planning and Local Government Practice committee. What were the major initiatives you oversaw?

A Juliette, I have to be honest – I can't think of one. I'm surprised I was a member. It was called the "Heavy Breathers" committee.

Q Why - because you were so busy poring over huge tracts?

A I have no recollection of that. I'm sure we did great stuff - I just can't remember what it was!

Q Fair enough. I'd like to ask you about Lindsay Fox – you've acted for him many times over the years.

A I have.

Q There was a matter to do with the heritage listing of his own house.

A Yes, it's a Norris house. I think it's the biggest single holding in Toorak, with a famous garden. Stonnington wanted to give his house a heritage protection overlay. It was an Arts and Crafts house (a 1930s style) which came from England. I had a good consultant look at it and rang Lindsay and told him he was going to lose. (Lindsay never came into my chambers in those days.) He said, "Listen, son, you do the law - I'll do the politics." It did get protection. Lindsay's a very confident man. I'll tell you a nice story about Lindsay Fox. There was a stage when he tried to acquire part of a beach down at Portsea. Everybody was against him. Paula (Fox) wasn't being invited to parties and none of (Lindsay's) mates would talk to him. Another friend of theirs – Max Beck - rang me and asked me to talk some sense into him. So I went out and I had a chat with Lindsay. What transpired was, he'd put in an application and one of his best mates who lived next door and was going overseas. He didn't have a chance to talk to Lindsay but put in an objection, which hurt (Lindsay's) feelings. I said so, and he looked at me and said "Yes, mate". He is capable of great good and great bad, but he's basically very family-oriented and has a good heart.

Q Do you often meet people like Lindsay or is he one of a kind?

A Not really. What's great about planning is that a number of my clients have become really good mates. George Adams is a great mate of mine – he's developed a lot of stuff out in the west. I act for most of the Jewish organisations in Melbourne and have some great friends in the Jewish community. I've been lucky. That's the difference between what I do and

(barristers who practise) crime – let's face it, you're not going to want to invite the local neighbourhood rapist over to dinner.

Q It's interesting what you say about becoming friendly with developers - we've seen television programs like "In the Mind of the Architect" but never television shows about the minds of developers. What have you found about getting to know developers?

A I don't know that you can generalise. These days, a lot of the big developers are public companies – Stockland, Mirvac. Some people in those (companies) are good fun. Private people - Joe Russo's a character – he and I fight like cat and dog.

Q What do you fight over?

A He thinks he knows what he's talking about and I know I do!

Q Who wins?

A Ultimately it's his decision. More often than not, he listens to what I say.

Part 10 – Slippery notions of heritage

A I knew Erskine House from the 1960s when I was a kid, trying to sneak in and see girls there, a long long time ago. I then presided over its demolition and redevelopment. That's a classic case where new for old works because it made that beach more accessible to more people. I'm not sure the quality of the development is what is what I would have liked, but in terms of a principle, it was terrific.

Q Quite a few years ago, I interviewed Geoff Underwood. You've sat on panels with him.

A He's a mate of mine.

Q Geoff and I discussed what he described as the "slippery notions" of heritage. He mentioned in one case a Grade C heritage-listed house where he said the objectors' motives were "anti-McDonalds". In terms of your description of Erskine House a moment ago, do you agree there's a problem with the definition of heritage?

A Two things. Firstly, no long-standing client of mine would dare come in here and say he'd bought heritage, because heritage is not rationally administered in this state. Because as you were saying earlier, it's a tag for objector groups to drive a giant harpoon into my side, often illogically. Secondly there's an element of cultural cringe so that we attempt to preserve things that are at best

marginal – you've got me on a subject I really have something to say about! Thirdly, the pendulum's swung too far in favour of protecting the trivial. I predict that it will swing back and we are likely to lose good heritage (that's) worthy of preservation. In the last month, I've done the Windsor (Hotel) which is a Denton Corker Marshall (project) and will be a great outcome, and I'm waiting on the decision for the demolition of the Palace. That's not a good building. From a heritage point of view, (the Palace is) garbage. We've agreed to keep the front facade, but if it has significance - it's a social significance - the state should buy it. Let the community buy it and keep it, if it's that important.

Q That gets tricky, though, as you know….!

A I'll give you another example. One of my client's sons wanted to buy this house in Toorak last year. It had been the subject of a heritage study in 2001 and Bryce Raworth had recommended it get heritage protection. Council had rejected this. Ashley bought it and applied to demolish it; and on the same day Stonnington (Council) applied to the minister to give it interim heritage protection. How can you buy something and then the council changes its mind the minute you do something about it? The (planning) minister refused to give it interim heritage protection and Ashley's house is halfway up now.

Q Is part of the problem because people haven't come up with a satisfactory definition of heritage, even now?

A I think they have. I cross-examined (Professor) Graeme Davison recently in the Palace case. He says heritage buildings can be important because they are very old, or heritage books which tell us something of our past. No-one would argue that Ned Kelly's hut in Glenrowan where he grew up shouldn't be kept, but the trick is to translate that into everyday language. Lindsay's house in Toorak was a very good house by a very good architect of its period, but you get Boroondara protecting every Californian bungalow / Spanish Mission building of the 30s. Keep some but not all of them; keep the best books, not the paperbacks.

Q Maybe this all comes back to (councils and politicians) thinking of their constituencies?

A To be fair to them, I think councils are a tick ahead of the community in heritage terms. The going rate now is inter-war and 1950s buildings; I've just had a case for Mount Scopus for the first building on its site, done by émigré architects in 1950. Councils and heritage consultants are a bit ahead of the community on that front. I have no trouble with 120 or 101 Collins Street being put up for protection in the future, but I think 120 would be marginal.

Part 11 – Dealing with objectors

Q Do any (clients) ever come back to you and say "you were right"?

A No, but do you know what sometimes does happen? Objectors will say after something's built, "oh, I didn't know it was going to be like that – that would have been alright". It's an example of what I was talking to you about before - that principle of the future, which injects complication in the process. See, I reckon the community's going to love that development in Orrong Road. The buildings are all designed by Denton Corker Marshall who are world-class. The building's square – each apartment has two frontages in a great setting. There's fantastic views, the (train) station's on the doorstep. It's perfect.

Q That of course is a fairly recent case. For the benefit of those viewing this, you're acting for Lend Lease and this (their proposed Orrong Road application) has been a contentious development. You are speaking optimistically about how it's going to come out in the wash. How typical is this of the sort of cases that you do?

A Stuey (Morris QC)'s on the other side of this case. There are 453 apartments, about eight towers, 3 - 4 storeys, one residential abuttal to its north – a housing commission which will be redeveloped. It's 30 metres from a railway station. It's got Beatty Avenue which is a great little food and drink street 50 metres away. Initially council officers thought the Orrong development a good idea. Unfortunately, the sister of one of the residents opposite in Beatty Avenue was one of the original Albert Park objectors to the Grand Prix and she did an extraordinarily effective job generating local opposition. Nice lady – I've forgotten her name. And one thing all councillors can do is count. It's a giant parcel of dead land where we've got this choice of building concentrated development around the local train station and shops, or committing (to) urban sprawl where mums are pushing prams several kilometres to the local health centre. There's a very strong push (by the developer) to maximise sites like that. Council knocked us back – we had a ten day hearing - and one of the arguments that Stuey ran was the sheer level of opposition – there's at least 2000 objectors – and he argued that this in itself was grounds for knocking the proposal off, because it distressed the community. (Justice) Karin Emerton at the Supreme Court gave them leave, but then when the hearing came along, she ultimately decided that the views of residents was a relevant matter, but that in this case, it would never have justified the decision other than the one that was made. It was after that that the Labor Government incorporated tthose sort of principles in its legislation. There's now a provision that says you've got to take the views of the community into account, though the Tribunal's read that down.

Q But I thought there's always been third party rights?

A The point that Stuey was trying to push in Lend Lease was that the sheer number of objectors was relevant – you could rely on it to knock (the Orrong Road proposal) back - and Karin – Justice Emerton - wasn't prepared to accept that.

Q In your years of dealing with objectors and groups like Save Our Suburbs, have they ever put forward a convincing argument as to what they think is good development?

A Status quo.

Q Always?

A That's some people's view. I don't think you can generalise. There are more sensible people and less sensible people in Save Our Suburbs. (Barrister) Michelle Quigley was influential in the early years (of SOS) – Quig's pretty sensible – she understands the demands of urban consolidation. I think SOS place too much emphasis on existing neighbourhood character at the expense of urban sprawl, but there's room for more than one view on that.

Q You said before with respect to the Orrong Road development, that it's going to be terrific. Whose fault is it if the residents and people affected by developments don't like it? Is it the developer's for not selling (the merits of a proposal) better?

A Ok. You can't generalise; every case depends on its merits. Dealing with the future is a big complication. Lend Lease at Orrong Road were terrific – they had information meetings, they had leaflets dropped around the suburb and what-have-you. But in many cases, there's a level of opposition that a proposal's never going to be acceptable. We had objections from 2k away on the basis that "this is an unacceptable development for Armadale and Prahran". Aristotle said once there are some propositions so basic that you can't break them down. "You can't have towers there" – where can you have them? Questions then arise about how many. I don't think height per se is a problem, but I think developers should be prepared to provide commensurate space separating towers. Who cares whether it's 10 or 15 storeys if it's in a parkland setting? Why wouldn't you do it?

Part 12 – "You don't know what you got till it's gone"

Q I was looking at a photo of a beautiful building that used to be on Elizabeth Street in Melbourne a long time ago. For a time, it was the tallest building in Melbourne. There were lots of objections when it was first put up – "a dangerous building" because of its height – I think it was on the corner where

the Commonwealth Bank is now, but there were lots of lamentions when it was demolished. It was a piece of "Marvellous Melbourne" –

A And replaced by a lousy building.

Q Hindsight's a wonderful thing.

A In the 1970s and 80s, I didn't think Save Collins Street was right. I thought they were being extremist. I now regret some of the buildings that were lost and some of the towers built on the north side of the street. There should have been a separation between north (Collins Street) and south and a (limit) of four or six storeys on the north side to allow sunlight access. Nauru House is on the northern side. I think there's another (tower) going up in that vicinity and that's a pity.

Q The "Paris end" (of Collins Street), you're talking about.

A I've been looking for the Melbourne end of Paris for years, but I've never found it!

Q I haven't either. Does that have any bearing on the complicated rating valuations cases you did in Collins Street?

A I did the rating valuations cases for 101, 525 and 530 Collins Street. There were two sets of issues: there was a legal point of contruction about the Local Government Act and virtually a floor by floor valuation for the purpose of rating the other three buildings, turning in part on whether you took into account outgoings... a nightmare case. Robbie Osborn was my junior – he's now the second-longest serving judge on the Supreme Court - makes me feel old. He was a very good legal argument advocate, so I gave him the legal point and I did the valuation. Stuey was on the other side. We worked for 12-14 hours a day, seven days a week – it was just a nightmare. Justice Batt heard the case. At the end of the case, he delivered a judgment which accepted all our arguments but came to the wrong conclusion. Eventually we had to go back and argue costs. I explained to him where he'd gone wrong. He knew I was right - and then Stuey (Morris) gave him an intellectually justifiable way out of what he'd done. To John Batt's credit, he said, "I've made a mistake. I can't fix it, because it's my judgment, but the Court of Appeal will". Eventually we lost on the legal point, but won on the valuation issue. John Batt was so intellectually honest (that) it made me proud to be a barrister.

Q That is interesting. Does it often happen that despite (legal) casuistry, someone is prepared to be that honest at that level?

A It's a one-off case because (Batt) knew he'd made a mistake; Stuey offered him an intellectually defensible escape route, but to his credit, Batt wouldn't

take it because he knew it was wrong. Usually it never occurs to judges that they may be wrong - they certainly give the impression they think they're right.

Part 13 - Judges and readers

Q You never wanted to be a judge, did you?

A Um – no, I didn't.

Q Are you sure?!

A An Attorney-General I sat next to once asked me if I'd like to go on the Bench, but I said no, because what I loved most about the Bar was its complete freedom but complete responsibility. If you are on the bench, you have complete responsibility, but no freedom. You don't have intellectual freedom because you don't get to choose the cases you want to hear. You don't have economic freedom; you don't earn as much as successful barristers do. You don't have friendship freedom – you've got to be careful who you go with and where, and effectively you've got to sit 10 am – 4.15 pm, 5 days a week. Finally, you've got to do a lot more writing than I like to do. They were the reasons.

Q The late Philip Opas QC told me an Attorney-General said to him that the only bench he'd ever see would be a park bench.

A That would be (Arthur) Rylah, when (Opas) did the Tait trial. He was a nice man, Philip.

Q Being a judge is a weighty job. No-one goes into it lightly.

A There are barristers on this floor who would love to be Supreme Court judges. Very few people today would want to be a Supreme Court judge, other than for the sense of giving back to the community. That's a strong influence in virtually everyone making that decision.

Q Well, speaking of the Supreme Court of Victoria, its Chief Justice Marilyn Warren was one of your readers.

A She was.

Q How many readers did you have?

A I think I had about eight or nine but I remember her. She arranged to come and see me. In those days, I used to play squash with Garth (Buckner). I'd managed to get rid of three applicants and wasn't sure I could take Marilyn on and said so. I went on for quite a while and she sat there quietly, then she said

her father's best friend (Garth Buckner) would be very disappointed if I couldn't take her on. I looked at her and said "I give up!" So that's how she became my reader. She and I did a lot of cases together. She's been a very successful administrative / political Chief Justice who has created a very happy Court.

Q You must be proud of her.

A I am. I'm proud of all of my readers.

Q So who were your other readers?

A David Brown read with me. He learned a very important lesson early. You met Sandy out the front there - she's been my secretary for 39 years. He had a desk behind my door, and I asked her one morning for one of her "famous cups of tea". She said "Yes, of course" and as she walked out, David said "I'll have one, too". She stopped and took two steps back, looked down at him and said "Readers say 'please'!" I still remind David of that. I haven't had a reader since the mid 1980s – Marilyn was my last reader.

Part 14 - Taking Silk

Q So you took silk in 1987 – had you applied previously?

A Yes. I'd applied two years before. It was a great feeling (to get it).

Q Were you worried about financial security when you took silk?

A I wasn't because I never lacked confidence. I'm not sure Marilyn (Warren) would agree with this: I don't think taking silk now is anything like it was. In those days, the 2/3's rule applied and you had to have a junior. Now, it's too much like a marketing tool – you don't need to have a junior, there's no fee constraint and you've got the letters at the end of the name. There is some substance in John Riordan's criticisms. Not that I'm giving mine back – I'm proud to have it. I can see why things have changed – the advantages of not having juniors and not-too-elevated fees improves access to justice for people who might not be able to get it, so I can accept that but I worry about the competitive advantage it delivers. Marilyn would argue that it is an important tool to inform the public about who are the leaders of the Bar.

Q Are there other developments at the Bar, broadly speaking, that you're concerned about?

A No. In fact, it's the reverse. Juniors now are sensational. One of the good things about still working is your access to young people. They're so much better barristers than I was at their age. Their IT skills, their access to

material. I had a junior cross-examine a witness last Friday – she did a fantastic job, writes beautifully. Even the young silks. I taught Adrian Finanzio at university. I remember Susie Brennan as an articled clerk and Nick Tweedie. It's great to seeing them all doing so well. I fought them all in the last six months; they're very good barristers. There seems to be less friction than there used to be. When Jeremy (Gobbo) first took silk, I went out my way to make it difficult for him and I sort of regret it, but he bears no ill will.

Part 15 - Final Thoughts

Q Are you teaching at university?

A No, I've gone back to study.

Q What are you studying?

A I'm doing a major in French language and culture. I speak fairly fluent domestic French – in fact, I've got a French passport.

Q You visit France a lot?

A Oh, yes, a couple of times a year. I ski there in January and I'll be back there for a few days in July. When I started law, I started a law-arts degree. After twelve months, I knew I wouldn't last the five years at university, so I switched to straight law. I've always vowed to go back. So, I've gone back to Monash and the kids (at the university) are great. I'm not loving the subject I'm doing this semester, but it's going ok.

Q When you've gone over to France, Chris, do you spend much time examining their (inquisitorial) system of justice which is very different to our adversarial system?

A I'm not sure it's that different. I've had dinner with a barrister who does similar work there. While the starting point is different, you probably get the same result 95 times out of 100, whether you use our system or theirs –

Q Even though they rely more on written submissions?

A True, true. I haven't made a great study of it. I've had to translate a couple of statutes for this (university) course, actually, because you do quite a bit of political philosophy. I speak fluent domestic French, but I struggle in technical areas. If you go to see a banker or talk politics (over there), there's about twenty sets of initials (acronyms) and difficult nomenclature you need to know.

Q Conversely, are they interested in our system?

A Not really. They think their system's the best!

Q What happened to your gliding ambitions?

A Gee, how did you know that? I went up to Benalla for a week and soloed in a glider and but didn't find it exhilarating like I do skiing. Gliders now are so much more supple and agile, but (my experience) was what it was.

Q Your curiosity was satisfied.

A I loved the week I did, flying solo, but it was more technically interesting than exhilarating. Same with sailing – so much bloody stuff to get ready before you sail – so that never went anywhere either. Skiiing is the thing I love, as you can see from the photos around the room.

Q Indeed. What about your family, do you have children in the law?

A No, but I have three kids that ski very well! (My youngest daughter) Julia got into law school at Monash, but it wasn't her first choice. You see some kids here who did law because their folks did, and they really enjoy it. I've got a mate from school, though, a doctor, who admitted to me the other day he never liked his job. How bad's that? I still get up at 6 o'clock to make sure I get here on time!

Q So looking both forward and back, you'd happily keep practising, wouldn't you?

A I used to think I'd retire at 50 because I didn't know any 55 year old silks looking for a fight. Then I kept changing my mind, and now I'm 70 and it'll be 50 years for me when I turn 74. My juniors have all promised that they'll tell me when it's time!

Q Just briefly, too, Brian Bourke's recently celebrated 60 years (at the Bar).

A Bourkey is a great example of charm; he gets away with murder because he's charming. He could have been anything. He loved the liquor law, he did murder trials extraordinarily well. I did law, but he did lore. He's a one-off.

Q Well, here's to many more years for you, Chris. Thank you very much.

A A pleasure.

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