

Equity judge was respected by both sides

By MALCOLM BROWN

SMH November 27, 2009

John Kearney, 1921-2009

For any judge sitting aloof from the battle raging before him (or her) there must be a time when he feels grateful for being on the bench above and not in the fray.

Such was probably the feeling of John Kearney, presiding over a bitter five-year wrangle in the NSW Supreme Court among factions of the Waterhouse bookmaking family.

The dispute, over how the will of Charles Waterhouse had been executed, resulted in a loss for brothers Bill and Jack Waterhouse, against whom Justice Kearney made some adverse findings. In the 1992 case, the last he presided over, Kearney imposed on them the bulk of the multimillion-dollar costs. But such was the reputation of Kearney for fairness and objectivity that very little of the flak flew his way.

John Basil Kearney was born on December 11, 1921, the son of a solicitor, Cyril Kearney, and his wife, Mary Taylor - and virtually born into the law. His father, his uncles and his grandfather had all practised as solicitors. Kearney attended St Aloysius' College at Milsons Point, obtaining his Leaving Certificate in 1938. He was pursuing his legal studies when World War II broke out.

Kearney enlisted and served with the 2/9 Armoured Regiment in New Guinea and Borneo and became a commissioned officer. Returning to his studies, he graduated in law from the University of Sydney in 1946 and worked for a time as a judge's associate. Called to the bar in February 1947, he quickly gravitated towards cases in equity, which became his forte. Also that year, Kearney married Nona Sherlock.

He became a leading exponent in testator's family maintenance matters. When he became queen's counsel in 1974, his opinion on charitable trusts was readily accepted by both sides to most arguments. Justice Clifford Einstein said at his swearing-in: "John Kearney's considerable intellect, coupled with a deep knowledge of and interest in equity principle, his courtesy and humility, set him apart as a very special person."

Kearney's career took him twice to the Privy Council in London and over the years he represented a wide variety of clients, including Harry M. Miller, the Greek Orthodox Church and the South Sydney Rugby League Football Club. He served on the NSW Bar Council for many years, including a term as president in 1977-78. At his swearing-in as a Supreme Court judge in 1978, Roddy Meagher, QC, praised him for his kindness to other

members of the bar. "Many of us took our apparently insoluble problems to you and, no matter how esoteric the material, no matter how busy your honour was, you would not gorgonise the inquirer with a stony stare, but by quiet discussion elucidate both question and answer."

Kearney's service as a judge did nothing to detract from Meagher's portrayal of him. His reputation for politeness, grace and humility became legendary. Kearney went on to make judgments which were of such excellent quality that they became leading cases. In one case, a retailer was pressuring a couple who owned land. In the case, *Waltons Stores (Interstate) Limited and Maher*, there was an appeal to the High Court against his judgment. The appeal was dismissed and the case became a leading case in the law of estoppel in Australia.

Kearney in private life lived quietly. He rented a small hut at Mount Wilson in the Blue Mountains, where he and his wife went for retreats and to enjoy nature. He once declared that when he died, he would prefer to be buried in a hollow log there. He enjoyed Gilbert and Sullivan and would sometimes burst into a G&S song.

Sadly, in 1982, Nona died of cancer. Three years later, Kearney married Mary Daly and became stepfather to four children.

When he retired from the Supreme Court in 1992 he refused an official farewell ceremony. But the legal profession organised its own gathering on his last day on the bench and there was standing room only in the court.

In his speech, Kearney said that the law academic Sir Robert Megarry had once told him the identity of the most important person in the courtroom: the party which was to lose. What was crucial was a clear, coherent and readable expression as to why the state, through the court, was not exercising its power for or against individuals.

In retirement, Kearney accepted an invitation from St Aloysius' to become the inaugural chairman of the college council. He held the position for seven years, at a time when Jesuit schools in Australia were changing their way of governance and appointing school councils. Kearney produced a model which became a template for all Jesuit schools.

Praising his performance, the then principal, Father Tony Smith, remarked how much at ease Kearney was on the playground, in the staff room or at council meetings.

He was patron of the Kirribilli RSL, served on the local volunteer fire brigade and did a term as president of the Mosman Croquet Club. The Catholic Church awarded him a papal knighthood in the Order of Knight Commander of St Gregory the Great.

Kearney is survived by Mary, children Gail, Linda, Carolyn, Marian and James, and stepchildren Tim, Anne, Margaret and John. The funeral service will be held at St Aloysius' College chapel at 2pm on Monday.