

DAVID SMALLBONE FCIArb
BARRISTER

FREDERICK JORDAN CHAMBERS

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David maintains a broad commercial and equity practice, with an interest in international commercial arbitration.

He regularly appears at first instance and on appeal (and often opposed to Senior Counsel) in a diverse range of State and Federal Courts and Tribunals throughout Australia. David's global reach has also seen him appear in the High Court of the Solomon Islands, the Solomon Islands Court of Appeal and the High Court of Fiji. He has also appeared in the High Court of Australia.

A highly experienced advocate and effective cross examiner, with or without interpreters, David advises and appears in disputes including fraud, forgeries, contracts, sales, trade practices, real and personal property, landlord and tenant, mortgages and securities, corporations, trusts, estates, partnerships, insolvency, franchising, trademarks, construction, restitution and administrative law.

David's client base comprises individuals (including professionals, such as solicitors and accountants) and corporate entities. With extensive experience acting for international clients, his practice extends to acting in matters involving Chinese, Japanese, Korean, Russian, United States, Solomon Islands and Fijian law. He obtained judgment in Australia enforcing at common law a Chinese judgment debt; the first time in a defended application.

Complementing his litigation practice, David's alternative dispute resolution practice encompasses international and domestic arbitration, stay applications, enforcement of Awards, applications for court orders in aid of the arbitral process, construction adjudications and expert determinations. He has considerable experience in both court-annexed and private mediation and has acted in an impartial capacity on several occasions, from appearing in domestic tribunals to participating in moot arbitrations in the Asia-Pacific region.

David is a Fellow of the Chartered Institute of Arbitrators (FCIArb) and member of the Australian Centre for International Commercial Arbitration (ACICA).

ADMISSIONS TO PRACTICE

- 1990 Admitted to the Bar of New South Wales, Australia
- 1988 Admitted as a Solicitor of the Supreme Court of New South Wales, Australia

PROFESSIONAL QUALIFICATIONS

- 2017 Fellow of the Chartered Institute of Arbitrators (FCIArb)
- 2016 CIArb Asia Pacific Diploma in International Arbitration
- 1988 Bachelor of Arts / Laws: Macquarie University

AREAS OF PRACTICE

- Building and Construction
- Commercial Law and Trade Practices
- Corporations and Partnerships
- Equity
- Fraud, forgeries & bribes
- Insolvency and Bankruptcy
- Legal Practitioners and Costs
- Private International Law & Foreign Judgments
- Real Property, Sale of Land and Leases
- Sale of Goods
- Succession and Family Provision
- Taxation
- Trusts and Estates
- Arbitration & Mediation
(Domestic and International)

PROFESSIONAL EXPERIENCE

- 1990 – present Barrister, Frederick Jordan Chambers
- 1989 Associate to Deputy President BJ McMahon, Administrative Appeals Tribunal

PROFESSIONAL MEMBERSHIPS

- Fellow, Chartered Institute of Arbitrators (FCIArb)
- Member, Australian Centre for International Commercial Arbitration (ACICA)
- Member, Asian Australian Lawyers Association
- Member, Hong Kong Australia Business Association
- Bar Councillor, New South Wales Bar Association (2011 – 2012)
- Member, New South Wales Bar Association

SPEAKING ENGAGEMENTS

- *Enforcing Chinese Judgments in Australia: Financial Cases* (2018, in Beijing during China Arbitration Week, at the China Forum on Financial and Investment Disputes)
- *What is Just and Equitable?* (2018)
- *Caveats: Essential Step or Tactical Weapon* (2015, updated 2017)
- *Sunset Clauses* (2015)
- *Some Recent Topics in Partnership Litigation* (2010)

SELECT CASES

ALTERNATIVE DISPUTE RESOLUTION

International Arbitration

- Before Arbitrator Rashda Rana – a World-wide franchisor terminated US Master franchise (unled)

Domestic Tribunals

- Counsel for a candidate in a pre-election dispute in the Liberal Party of Australia's Disputes Panel
- Acted (pro bono) as independent Experienced Lawyer under Church Discipline Ordinance of the Anglican Church Diocese of Sydney assessing disciplinary cases with respect to positions of leadership in the Diocese to find if there were prima facie cases

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- Expert determination – Lessee’s counsel in site remediation dispute between a national carpark operator and its landlord
 - Construction adjudication – Developer’s counsel in a series of adjudications between a developer of industrial units and a concreter – and also in related Court proceedings concerning termination of the contract and the concreter’s Caveat over the building site

COURTS OF THE PACIFIC

High Court of the Solomon Islands; Solomon Islands Court of Appeal

- *Austree Enterprises Pty Ltd & Ors v Guo & Ors* – Corporations – Specific performance – Shareholders’ agreement – Restitution – Private international law – Chinese law (led B Buckland, opposed to J Sullivan QC with Jason Ward)

High Court of Fiji

- *Lodhias Ltd v Mainland Products Ltd & Ors* – Trade Marks & distribution agreement dispute – milk powder

AUSTRALIAN COURTS

Federal Court of Australia

- *Xu v Wan Ze Property Development (Aust) Pty Ltd (in liq), Ren v Wan Ze Property Development (Aust) Pty Ltd (in liq)* [2014] FCA 461; (2014) 315 ALR 523 – Bankruptcy notice – Allegation judgment obtained by fraud – property investment dispute between Chinese investors (unled)
- *Weimann v Allphones Retail Pty Ltd* [2009] FCA 673 – Practice & Procedure – Class action – franchising dispute (unled)
- *Allphones Retail Pty Ltd v Hoy Mobile Pty Ltd* (2009) 178 FCR 57; [2009] FCAFC 85; *Hoy Mobile Pty Ltd v. Allphones Retail Pty Ltd* [2008] ATPR 42-240; [2008] FCA 810 – Fraud – Franchising – Contracts – Unconscionable conduct (unled, opposed to D Pritchard SC with E Muston)
- *Hoy Mobile Pty Ltd v. Allphones Retail Pty Ltd* (2008) 167 FCR 314; [2008] FCA 369 – Evidence – Admissions (unled, opposed to D Pritchard SC with E Muston)
- *Perdikaris v Deputy Commissioner of Taxation* (2008) 172 FCR 412; [2008] FCAFC 186 – Taxation (led by D Grieve QC, opposed to N J Williams SC and G T Johnson)
- *Asia Television Ltd v Yau’s Entertainment Pty Ltd (No 2)* (2000) 49 IPR 264; [2000] FCA 838 – Trade marks & Distribution contract dispute between Hong Kong film & video producer and Australian distributor (unled)
- *Asia Television Ltd v Yau’s Entertainment Pty Ltd* (2000) 48 IPR 283; [2000] FCA 254 Video Distribution Contract where Hong Kong producer terminated licence of Australian distributor – Implied terms – Termination (led by D Murr SC)

Supreme Court of Victoria

- *Suzhou Haishun Investment Management Co Ltd v Zhao* [2019] VSC 110 – Appeared to obtain Summary judgment for Chinese corporation in common law action on Chinese judgment debt (unled)
- *Suzhou Haishun Investment Management Co Ltd v Zhao (No 2)* [2018] VSC 176 – Appeared for Chinese corporation to obtain Freezing Orders against defendant and non-parties – Application in aid of action on Chinese judgment debt, and right to avoid dispositions in fraud of creditors – (unled)

NSW Court of Appeal

- **Mehmet v Carter** [2018] NSWCA 305 – Sale of Land – whether existence of Aboriginal objects capable of constituting a defect in title (led by D H Murr SC, opposed to T Alexis SC with M Southwick)
- **Stojic v Stojic** [2018] NSWCA 28 – Succession – Whether the deceased knew and approved the contents of the will – Where suspicious circumstances exist – Where testator has read the will – Where findings of fact insufficient to determine testator’s knowledge and approval of the will – More findings necessary to resolve disputed questions of fact – New trial ordered (led D W Rayment, opposed to R D Wilson SC with S Birtles)
- **Calvo v Ellimark Pty Ltd** [2016] NSWCA 136 – Legal practitioners – Contingency Fees – Champerty – Estoppel (unled, opposed to Noel Hutley SC with P Newton)
- **Pymont Point Pty Ltd v Westacott** [2016] NSWCA 33; (2016) 91 NSWCA 170 – Statutory interpretation – *Retail Leases Act 1994* (NSW), s 6(1)(b) – Jurisdiction of NCAT re. retail rent review (unled, opposed to D Murr SC)
- **Salmon v Osmond** [2015] NSWCA 42 – Succession – Family provision – Testator’s reasons – Effect of breaking up family farm – Appeal – Legal principles – Claim by adult child of testator (unled, opposed to M Meek SC)
- **Day v Harness Racing New South Wales** [2014] NSWCA 423; (2014) 88 NSWLR 59 – Administrative law – Procedural fairness – Delegated legislation (led D W Rayment, opposed to A S Bell SC with A T S Dawson)
- **Xu v Jinhong Design & Constructions Pty Ltd** [2011] NSWCA 277 – Contract – Misrepresentation – Fact finding appeal (led by B W Rayment QC, opposed to J J J Garnsey QC with C Mouschoudis. At trial, led J M Baxter, who also appeared as second junior on appeal)
- **Darkinjung Local Aboriginal Land Council v Darkinjung Pty Ltd (In Liq) & Anor** [2010] NSWCA 351 – Restitution – Quantum meruit – Request for services (unled, opposed to R D Shepherd with L E P Magowan)
- **Pennimpede v Pennimpede** [2010] NSWCA 121 – Trusts – Transfer between family members – Whether trust created (unled, opposed to M Aldridge SC with M Evans)
- **Hillig v Darkinjung Pty Ltd & Ors** [2008] NSWCA 75 Corporations – Meetings – Aboriginal Land Councils – Functions and powers (led by D Murr SC, opposed to S D Epstein SC)
- **Milltec Australia Pty Ltd v Burnes & Anor** [2006] NSWCA 13 Company directors – Profit rule (unled, opposed to N Cotman SC with K Odgers)
- **Galaxidis v Galaxidis** [2004] NSWCA 111 – Proprietary estoppel (unled, opposed to J E Thomson with M J Watts)
- **Ellmore (Maitland) Pty Ltd v Tull** (1995) 7 BPR 14,305 – Contract for subdivision of land – Implied term – Restraints on alienation – Request for subdivision was not made within a reasonable time (unled, opposed to P M Greenwood)

Supreme Court of NSW

- February, 2019 - Obtained an injunction for a Taiwanese franchisor to restrain an ex-franchisee from publishing injurious falsehoods worldwide (led D Ratnam)
- **James v Wilson** [2019] NSWSC 17 – Appeared for a candidate in a dispute concerning preselection for a political party in the forthcoming NSW State election (unled, opposed to S Duggan and M J Davis)
- **In the matter of Statewide Office Furniture Pty Ltd** [2018] NSWSC 1393 – Equity – Equitable remedies – Restitution – whether funds dealt with contrary to Asset Preservation Order should be repaid – Civil Procedure – Probate and administration of estate – Supervision of administration - Corporations – Voluntary Administration – Approval of Share Transfer (unled)

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- ***Devine v Liu; Devine v Ho*** [2018] NSWSC 1453 – Struck out statement of claim concerning a director’s duty to prevent insolvent trading under *Corporations Act* 2001 (Cth), s588G – Where statement of claim did not plead how and when company incurred relevant debts – Nor particularise the nature of reliance on the presumption of insolvency under *Corporations Act* 2001 (Cth), s588E(4). Security for costs – General principles as against plaintiff liquidator – litigation funding – Solicitors for the liquidator conducting proceedings on a “no win, no fee” basis (unled, opposed to A P Cheshire SC and T D Castle leading S Alexandre-Hughes)
 - ***Stojic v Stojic*** [2018] NSWSC 1268 Equity – Judicial advice – Probate – Interim Grants – Freezing Orders – Corporations – Insolvency – Plaintiffs as special administrators – Grant of additional powers to enter into and carry out Deed of Company Arrangement; to prosecute summary proceedings to recover money paid in breach of freezing orders; to intervene on behalf of estate in Family Court proceedings (unled)
 - ***Stojic v. Stojic*** [2018] NSWSC 723 – Wills and Estates – Disputed probate hearing – Application for plaintiffs to be appointed as special administrators of estate pending hearing – Consideration of principle in *De Chatelain* that a party to the proceedings will ordinarily not be appointed administrator – Where any risk of conflict is more theoretical than real – Where urgency surrounds the application – Where no proper alternative other than plaintiffs – Discretionary exercise tips in favour of appointing the plaintiffs – Application granted – Contempt – Defendant in significant contempt of court orders – Where no attempt made to purge the contempt – Where the contempt relates directly to subject matter of proceedings – Defendant can oppose relief sought by plaintiffs but cannot be heard to propound himself as candidate for administrator (unled, opposed to R D Wilson SC with S Birtles)
 - ***Power v. Ekstein & Ors*** (2010) 77 ACSR 302; [2010] NSWSC 137 – Corporations – Derivative suit – Oppression – Independent Representation – Use of corporate funds for shareholder litigation – Injunction (led D W Rayment and D Petrushenko, opposed to B Walker SC with S Burchett. Also opposed to J Ireland QC with J Burn)
 - ***Vella v. Permanent Mortgages Pty Ltd*** (2008) 13 BPR 25,343; 3 BFRA 269; [2008] Q ConvR 54-692; [2008] NSWSC 505 – leading case on Forged mortgages – Torrens system – Banking – Restitution (led by M J Slattery QC with second junior barrister L M Wilson, opposed to B A J Coles QC with G A Sirtes and R A Parsons, R J Forster SC with P Dowdy, J Stevenson SC with N Kabilafkas and R Marshall, S Burchett, and P Morris)
 - ***ML Ubase Holdings Co Ltd v Trigem Computer Inc*** (2007) 69 NSWLR 577; [2007] NSWSC 859 – Enforcement of foreign award – Garnishee – Recognition of Korean insolvency – Legal professional privilege in communications with experts (unled)
 - ***Sayour v Elliott*** [2018] NSWSC 59 Equity – Trusts and trustees – Misappropriation of trust funds – Deposit of funds to bank account styled as trust account (led J Gatland)
 - ***Yarraford Pastoral Co Pty Ltd v Lewington*** [2017] NSWSC 316 – Procedural appeal – When is it too late to apply for costs? (unled, opposed to M Henry SC with T Flaherty)
 - ***In the matter of Condor Blanco Mines Ltd (No. 2)*** [2016] NSWSC 1304 – Costs against Voluntary Administrator (led J Wheeldon)
 - ***In the matter of Condor Blanco Mines Ltd*** [2016] NSWSC 1196 – Appointment of Voluntary Administrator of Listed Company declared invalid (led J Wheeldon)
 - ***Parkes v Mamo*** [2016] NSWSC 1129; (2016) 18 BPR 36,161 – Deposit bonds – Expiry – Specific performance (unled)
 - ***Ma v Adams*** [2015] NSWSC 1452; (2015) 18 BPR 35,557; [2015] NSW ConvR 56-356; [2015] ANZ ConvR 15-037 – Deposits – Post-dated cheques (unled)
 - ***TNT Building Trades Pty Ltd v Benelong Developments Pty Ltd (admins apptd)*** (2012) 91 ACSR 17; [2012] NSWSC 766 – Insolvency – Corporations – Creditors’ meetings – Application to terminate Deed of Company Arrangement (unled)

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- **Zhang v VP302 SPV Pty Ltd** (2009) 223 FLR 213; 14 BPR 26,489, [2009] NSW ConvR 56-234, [2009] ANZ ConvR 9-013, [2009] NSWSC 73 – Misrepresentation – Sale of land (led D O’Connor)
 - **Wentworth Partners Estate Agents Pty Ltd t/as RE MAX Gold v Gordony** (2007) 60 AILR 200-348; [2007] NSWSC 1135 – Restraint of trade – Injunction (led J Cohen)
 - **Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council & Ors; Hillig v Darkinjung Pty Ltd & Ors; Darkinjung Local Aboriginal Land Council v Warner & Ors** (2006) 203 FLR 394; [2006] NSWSC 1008 – Corporations – authority – Aboriginal Land Councils – Evasion of statute – Trusts & powers – Appointment of Voluntary Administrators declared invalid (led by D Murr SC, opposed to S D Epstein SC with D A C Robertson and also opposed to T L Jowett and G Lucarelli. Dr J K Kirk appeared for allied party)
 - **Redglove Projects Pty Ltd v Ngunnawal Local Aboriginal Land Council (No 2)** [2005] NSWSC 1048 – Criminal Law – Bribery – Joint venture between Local Aboriginal Land Council and developer to develop land – Officer of Land Council received personal benefits from developer for purpose of furthering developer’s interests with Council – Whether benefits constituted bribes. Procedure Costs – Case effectively specific performance suit – Normally only parties to contract should be parties to proceedings (unled, opposed to T S Hale SC. Dr J K Kirk appeared for allied party)
 - **Redglove Projects Pty Ltd v Ngunnawal Local Aboriginal Land Council** (2005) 12 BPR 23,381; (2005) Aust Contract R 90-219; [2005] NSWSC 892 – Contracts – Aboriginal land – Corporations – Aboriginal Land Councils (led by Murr SC, opposed to T S Hale SC with J M White. Dr J E Griffiths SC with Dr J K Kirk appeared with allied party)
 - **Crowe v Rindock Pty Ltd** (2005) 12 BPR 22,823; [2005] ANZ ConvR 323; (2005) NSW ConvR 56-126; [2005] NSWSC 375 – Sale of land – Requisitions (unled, opposed to D Murr SC with I E Davidson)
 - **Graham v Moree Local Aboriginal Land Council** [2005] ANZ ConvR 377; (2005) NSW ConvR 56-121; [2004] NSWSC 1178 – Conditional specific performance – Crown land – Aboriginal land (unled)
 - **Georgeski v Owners Corporation SP49833** (2004) 62 NSWLR 534; (2004) 12 BPR 22,573; [2004] NSWSC 1096 – Crown lands – Licence – Trespass – Injunction (unled, opposed to M Holmes QC with K Richardson. T Barrett appeared for the Crown)
 - **Redglove Projects Pty Ltd v Ngunnawal Local Aboriginal Land Council** (2004) 12 BPR 22,319; [2004] NSWSC 880 – Caveatable interests (led D W Rayment, opposed to L Aitken)
 - **Truefilm Pty Ltd v JR Investment Holdings Pty Ltd** (2004) 12 BPR 22,769; (2004) NSW ConvR 56-096; [2004] NSWSC 372 – Caveats – Damages (unled)
 - **Sutherland v NRMA** (2003) 47 ACSR 428; [2003] NSWSC 829 – Corporations – Oppression – Discrimination (unled, opposed to J McCarthy QC with J Oakley)
 - **Investmentsource Corp Pty Ltd v Knox Street Apartments Pty Ltd** (2002) 56 NSWLR 27; [2002] NSWSC 710 – Agents’ remuneration – Quantum meruit – Statutes (unled, opposed to M R Aldridge SC with C D Freeman. T G R Parker and B A J Coles QC with M R Pesman appeared for allied parties)
 - **Energy & Resource Conservation Co Ltd (in liq) & Ors v Abigroup Contractors Pty Ltd & Ors** (1997) 41 NSWLR 169; 22 ACSR 721; 15 ACLC 336 – Corporations – Insolvency – Liability of administrator who becomes liquidator (unled)
 - **St George Bank Ltd v The Rangers Club of New South Wales Inc** (1995) 18 ACSR 370 – Corporations – Meetings (unled)
 - **Webeck v Foley** (1992) 5 BPR 11,694; (1992) NSW ConvR 55-650; [1993] ANZ ConvR 388 – Adverse possession – Torrens system (unled)