

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.

For 30 years he has appeared at first instance and on appeal (often opposed to Senior Counsel) in superior State and Federal Courts in Australia. David has also appeared in Courts of the Pacific: the High Court of the Solomon Islands, the Solomon Islands Court of Appeal and the High Court of Fiji.

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

David's client base comprises corporations as well as individuals including professionals, such as solicitors and accountants. With extensive experience acting for international clients, his practice has extended to acting in matters involving Chinese, Japanese, Korean, Russian, United States, Solomon Islands and Fijian law. Notably, he obtained the first defended judgment in Australia enforcing at common law a Chinese judgment debt.

David has extensive mediation experience. His alternative dispute resolution practice has encompassed arbitration, stay applications, enforcement of Awards, court applications in aid of the arbitral process, construction adjudications and expert determination. He has acted in an impartial capacity in domestic tribunals.

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

David assists in the professional development of younger practitioners and law students as pupil master in practical legal training and acting as moot arbitrator at the 16th and 17th Vis East moot in Asia.

ADMISSIONS TO PRACTICE

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

PROFESSIONAL QUALIFICATIONS

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

AREAS OF PRACTICE

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

PROFESSIONAL EXPERIENCE

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

PROFESSIONAL MEMBERSHIPS AND APPOINTMENTS

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

INTERNATIONAL AND DOMESTIC SPEAKING ENGAGEMENTS

- *Arbitration in Hong Kong* (August 2019 for the Hong Kong Australia Business Association at the Art Gallery of New South Wales)
- *Enforcing Chinese Judgments in Australia: Requirements and Difficulties* (April 2019 at Global Law Office in Shenzhen)
- *Enforcing Chinese Judgments in Australia: Financial Cases* (September 2018 in Beijing during China Arbitration Week, at the China Forum on Financial and Investment Disputes in association with Zhong Lun Law Firm)
- 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 – Counsel for a world-wide franchisor terminating US Master franchise
- 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
- 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 in related Court proceedings concerning termination of the contract and a 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

Victorian Court of Appeal and 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. This was the first time in a defended application that an Australian Court has enforced a Chinese judgment (unled – opposed to A Silver)
- Appeared during 2019 in the same matter for the judgment creditor on enforcement applications
- Appeared for judgment creditor as Respondent in the Victorian Court of Appeal, opposed to P Ehrlich QC and A Silver. The appellate application was recently abandoned
- Appeared in related proceedings for the same creditor in the Supreme Court of Victoria against the judgment debtor, her son and his company, in a claim to avoid dispositions to defeat creditors (opposed to A Silver)
- *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, 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; (2018) 98 NSWLR 977 – 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) – remitted for new trial
- *Stojic v Stojic* [2018] NSWCA 28 – Succession – appeared for appellants to overturn admission of penultimate will to Probate and obtain new trial (led D W Rayment, opposed to R D Wilson SC with S Birtles)

(Following this appeal, appeared for the same parties in associated matters (*Stojic and Statewide Office Furniture Pty Ltd*) in the Supreme Court of NSW, Probate List, Corporations List and Family Provision List. Also appeared for the same parties as interveners in proceedings in the Family Court of Australia. Obtained orders implementing deed of company arrangement and settlements returning control of the family company and business to the beneficiaries)

- ***Calvo v Ellimark Pty Ltd*** [2016] NSWCA 136 – Legal practitioners – Contingency Fees – Champerty – Estoppel (unled, opposed to Noel Hutley SC with P Newton)
- ***Pyrmont Point Pty Ltd v Westacott*** [2016] NSWCA 33; (2016) 91 NSWCA 170 – Statutory interpretation – *Retail Leases Act 1994* (NSW), s 6(1)(b) – Jurisdiction – 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 – 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 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

- ***Broadway Plaza Investments v Broadway Plaza Pty Ltd; In the matter of Combined Projects (Arncliffe) Pty Ltd*** – November 2019 to February 2020 – 6 week fraud, forgery, bribery, misappropriation and oppression trial before Ward CJ in Equity (hearing continues) – partnership – banking – corporations (leading J Gatland, J M Wheeldon and R Y L Chen (for the defendant / cross-claimant), opposed to N Hutley SC with C Bova SC, B Michael & D Reynolds (for the plaintiff / cross-defendants); M Einfeld SC with P Jammy (for the Commonwealth Bank); T Faulkner SC (for HWL Ebsworths); V Bedrossian with A Smith (for Deicorp Constructions and Others); J Morris SC (for a cross-defendant); H Woods (for a cross-defendant)
- ***Realtek Holdings Pty Ltd v Westamast Pty Ltd*** [2019] NSWSC 1869 – Contracts— Breaches of implied obligations of vendor under contract for the sale of business and sublease — suite of transaction documents at the same time to give effect to a bargain — transaction documents to be read together — derogation from the relevant grants where purchaser was denied possession and use of the premises and was prevented from conducting the business purchased, and where the vendor sought to recapture as much of the benefit of the goodwill sold as possible — Transaction

documents validly terminated in the circumstances (unled for the plaintiffs and cross-defendants, opposed to M Loewenstein for the defendants and cross claimant)

- ***Mehmet v Carter*** – Sale of land – Defect in title – Aboriginal objects – new trial before Ward CJ in Equity – Judgment reserved (led R Y L Chen, opposed to T Alexis SC with M Southwick)
- ***In the matter of Hillsea Pty Limited*** [2019] NSWSC 1152 – Contracts – intention to create legal relations – where evidence of conversations with deceased party to alleged oral agreement was unsatisfactory – held there was no legally binding obligation to pay interest. Corporations – claim for overpayment of director’s remuneration – family company – where informal arrangements for remuneration of directors –where no challenge to earlier informal arrangements in respect of another director – where director made payments from company funds to third parties – remuneration paid to director and payments to third parties validated under s 1322 of the Corporations Act 2001 (Cth) – winding up – solvent company – original purpose of company no longer implemented – failure of personal shareholder relationships –company wound up on just and equitable ground (leading D Edney for the first defendant, opposed to A J Grant for the plaintiffs and M R Tyson for the 2nd defendant) (Subsequent appearances in the NSW Court of Appeal on stay application, leading D Edney, opposed to B A J Coles QC with M R Tyson)
- ***An v Joo*** [2019] NSWSC 39 – Associations and clubs – incorporated associations – church – Court declared current committee validly elected notwithstanding irregularities on condition that new elections be held under supervision of independent accountant after independent audit – Corporations Act 2001 (Cth), s 1322(4)(a) (unled appearing for the 5th, 6th and 7th defendants, opposed to M Condon SC with N Kabiflakas (plaintiff), with other parties represented by D Creais (solicitor) (1st and 2nd defendants), Dr C Birch SC with J Mack (10th to 16th defendants) and P Singelton (17th defendant – Attorney General for NSW)
- **Chinese Franchisor** February, 2019 – Appeared for franchisor to obtain an injunction restraining ex-franchisee and associated parties from publishing injurious falsehoods worldwide against franchisor trading in mainland China, Taiwan, Hong Kong, Australia and USA (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, opposed to C Birtles)
- ***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 – Application for plaintiffs to be appointed as special administrators of estate pending probate hearing – Consideration of principle in *De Chatelain* that a party to the proceedings will ordinarily not be appointed administrator – urgency – no proper alternative other than 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 C Birtles)

- **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)
- **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)
- **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)
- **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)
- **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 - Costs (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, opposed to R R I Harper)
- ***St George Bank Ltd v The Rangers Club of New South Wales Inc*** (1995) 18 ACSR 370 – Corporations – Meetings (unled, opposed to G A Sirtes)
- ***Webeck v Foley*** (1992) 5 BPR 11,694; (1992) NSW ConvR 55-650; [1993] ANZ ConvR 388 – Adverse possession – Torrens system (unled, opposed to T Alexis)

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, opposed to M Ellicott)
- ***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 – Trademarks & Distribution contract dispute between Hong Kong film & video producer and Australian distributor (unled, opposed to S D Epstein)
- ***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, opposed to S D Epstein)