

DUNCAN MARTIN MACFARLANE

I was called to the bar in 2006. My practice involves predominantly building and construction, general commercial litigation, professional negligence and insurance matters.

I have been listed as a leading construction junior counsel in the Doyle's Guide *Leading Construction Barristers – NSW* in 2012 and 2014.

I have conducted trials unled in the Supreme Court, District Court, Local Court, NCAT and arbitrations as well as appearing as junior counsel to senior counsel in the District Court, Supreme Court and NSW Court of Appeal.

A significant component to my practice involves advising and appearing on matters involving the operation of the *Building and Construction Industry Security of Payment Act 1999* (NSW).

Before commencing at the bar I was tipstaff to Justice Sheller and then Justice Basten in the New South Wales Court of Appeal. I also worked as a solicitor at Minter Ellison Canberra and Malleson Stephen Jaques Sydney.

Recent building and construction matters

In the last five years I have worked extensively on large building and construction matters which have involved many aspects to building and construction law including for example, issues of termination and repudiation, extensive defective and incomplete work claims, variation claims, extension of time claims and delay and disruption claims. Such matters include:

- *Illawarra Retirement Trust v Denham Constructions Pty Ltd* [2015] NSWSC 1173

I appeared unled in the above matter to successfully oppose an urgent application to quash an adjudication determination under the *Building and Construction Industry Security of Payment Act 1999* (NSW).

- *Illawarra Retirement Trust v Denham Constructions Pty Ltd* [2015] NSWSC 823

I appeared as junior counsel to Mark Dempsey SC for the successful respondent in successfully opposing an application to restrain the contract from having a payment claim made under the Act from proceeding to adjudication.

- *AJ Lucas Operations Pty Ltd v Gladstone Area Water Board & Gladstone Regional Council*

I am currently briefed (and have been since February 2013) to act for AJ Lucas in an expert determination involving a large and complicated dispute over the construction of a water and sewer pipeline and access road in Queensland. I was also briefed in related proceedings in the Queensland Supreme Court as junior counsel to Mark Ashhurst SC (*Gladstone Area Water Board & Anor v AJ Lucas Operations Pty Ltd* [2014] QSC 311) and on appeal as junior counsel to Brian O'Donnell QC.

- *PowerServe Pty Ltd v Abengoa Australia Pty Ltd*

In 2013 I was briefed by Squire Sanders for Abengoa as Junior Counsel to Duncan Miller SC in Supreme Court proceedings involving a complicated dispute over the construction of a high voltage power line in Tomago NSW. The issues involved included alleged repudiation, variation claims, defective work claims and entitlements surrounding letters of credit. I also appeared unled in a reference hearing as part of the proceedings for which Abengoa was successful. That reference involved the interrelationship of the parties' respective obligations under the *Work Health & Safety Act 2011* (NSW) and the basis upon which Abengoa could retrieve its plant and equipment post termination.

- *GR Engineering Services Limited v Gold Ridge Mining Limited*

In the period July 2012 to October 2012 I was briefed by Clifford Chance as junior counsel to Duncan Miller SC acting for GR Engineering in an international arbitration involving a gold mine and processing plant located in the Solomon Islands. The issues involved the proper use, operation and maintenance of the processing plant.

- *Boulderstone Pty Ltd v QIC Ltd*

In the period October 2010 to June 2012 I was briefed by Clayton Utz as junior counsel to Simon Kerr SC and to Duncan Miller SC to act for Boulderstone in a large and complicated construction dispute in the Supreme Court which concerned the construction and refurbishment of a large shopping centre.

Selection of matters which proceeded to judgment

- *Illawarra Retirement Trust v Denham Constructions Pty Ltd* [2015] NSWSC 823

I appeared with Mark Dempsey SC for the successful defendant contractor in opposing permanent injunctive relief on the basis that a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) was invalid.

- *Gladstone Area Water Board & Anor v AJ Lucas Operations Pty Ltd* [2014] QSC 311

I appeared with Mark Ashhurst SC for the Defendant in the QLD Supreme Court in relation to the question of whether an agreement to settle substantial matters had been reached. This involved a close examination of the law relating to intention to be bound.

- *Omega House Pty Ltd v Khouzame* [2014] NSWSC 1837

I appeared unled for the successful Plaintiff/Principal in relation to a dispute under the *Building and Construction Industry Security of Payment Act 1999* (NSW). The Plaintiff succeeded in having an adjudication under the Act quashed on the basis that there was no applicable reference date to which the alleged payment claim could attach.

- *Ball v McInerney* [2014] NSWCA 331

I appeared with Duncan Miller SC for the successful respondent. The proceedings concerned the design and construction of a horse arena and the issues on appeal concerned the function of pleadings in the context of procedural fairness, the use of Scott Schedules and the proper conduct of the trial judge.

- *Horsell International Pty Ltd v Divetwo Pty Ltd* [2013] NSWCA 368; *Rian Lane v Dive Two Pty Ltd* [2012] NSWSC 104

I appeared with Julian Sexton SC for the second cross defendant insurer, Liberty International. Liberty succeeded on a cross claim in denying indemnity under a business purpose policy and obtained a Sanderson Order against the insurance broker, the first cross defendant such that Liberty had its costs of the proceedings paid by the insurer for the broker. This decision was upheld on appeal.

- *Ball & Ball v Martin McInerney t/as Wildthorn Landscapes (unreported)* 3 May 2013 NSWDC 2013

I appeared unled in the District Court for the successful defendant in this case which involved a 6 day trial concerning the construction and maintenance of a commercial horse arena. A significant aspect to the result was the cross examination of the plaintiff's geotechnical engineer.

- *Cardno ITC Pty Ltd v 33 York Street Pty Ltd* [2013] NSWDC 312

I appeared unled for the successful plaintiff in a dispute over entitlements under a lease upon termination.

- *The Trustees of the Roman Catholic Church for the Diocese of Lismore v T F Woollam and Son* [2012] NSWSC 1559

I appeared unled for the successful plaintiff in having an adjudication quashed on the basis that compliance with s13(5) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) was a jurisdictional question and the effect of *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2011) 78 NSWLR 393 was that previous cases which held to the contrary were no longer good law.

- *Lew v Bluescope Distribution Pty Ltd* [2010] NSWSC 794

I appeared unled for the successful applicant in setting aside a caveat to facilitate an urgent sale notwithstanding the caveatable interest.

- *Gordon v The Trustees of the Roman Catholic Church of the Diocese of Lismore* [2010] NSWADT 230

I appeared unled for the successful respondent landlord on an application for the return of monies alleged to be 'key money' in contravention of the Retail Leases Act.

- *Shepherds Producers Co-operative Limited v John Scott Lamont & Ors* [2009] NSWSC 294

I appeared with Robert Newlinds SC for the successful defendant directors of a company which involved allegations of professional negligence case and the operation of a release.

- *Johnson v Hansen (Home Building)* [2009] NSWCTTT 560

I appeared unled for the successful applicant home owner in a 4 day trial on a pro bono basis in a complicated residential defective building case.

- *Allen v Tweed Shire Council* [2008] NSWSC 937

I appeared unled for the successful appellant in the Supreme Court from a decision of the Local Court involving whether an engineer engaged by an applicant on a DA owed the council a duty of care to prevent economic loss.

- *RCM Constructions Pty Ltd v S & Y Painting and Decoration Pty Ltd* [2008] NSWDC 247

I appeared unled for the successful plaintiff company in a two week trial concerning defective painting and surface preparation in a large residential development.

A selection of other matters in which I have appeared and which have proceeded to judgment include:

- *Stonestreet v Stonestreet* [2015] NSWSC 477
- *Built NSW Pty Ltd v Politic Pty Ltd* [2015] NSWSC 380
- *National Australia Bank v Savage (No. 2)* [2013] NSWSC 1927
- *Baden Cranes Pty Ltd v Smith; Brambles Australia Ltd v Smith* [2013] NSWCA 136
- *Rian Lane v Dive Two Pty Ltd (No 2)* [2012] NSWSC 209
- *Rian Lane v Dive Two Pty Ltd* [2012] NSWSC 104
- *McLeod v McKendry* [2012] NSWSC 1646
- *Smith v Brambles Australia Ltd* [2011] NSWSC 963
- *Shepherds Producers Co-Operative Ltd (In Liquidation) v Lamont* [2009] NSWSC 798
- *Alexander v Blue Pie* [2008] NSWSC 189
- *3WJ Pty Ltd & Anor v Kanj* [2008] NSWCA 321
- *Richards v Patras Pty Ltd* [2009] FCA 380
- *Wilson v Interhealth Energies Pty Limited & anor* [2008] NSWSC 1137

- *Hyatt v Public Trustee; Public Trustee v Hyatt* [2007] NSWSC 1525

I have also presented papers to the New South Wales State Legal Conference on “*Security for costs*”, “*The Duty of the Liquidator to Act Impartially*”, “*Settlement Considerations*” and “*Commercial Arbitration – Recent Developments.*” I have published an article on caveats in the NSW Law Society Law Journal– see Vol 58 No 10 November 2010 at page 68. I served as a member of the NSW Bar Association New Barristers Committee in the period January 2011 – June 2012.
