

# DAVID L WILLIAMS SC

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## LEVEL NINE WENTWORTH CHAMBERS

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## Curriculum Vitae

### ADMISSIONS AND QUALIFICATIONS

1983: Bachelor of Arts (University of Sydney)

1984: Bachelor of Laws (University of Sydney)

6 July 1984: Called to the Bar (NSW)

1984 to date: Barrister practising in all Australian jurisdictions

2003 to date: Senior counsel practising in all Australian jurisdictions

2012 to 2014: Member of Bar Association Professional Conduct Committee

### PROFESSIONAL RECOGNITION

- Doyle's Guide – Leading Commercial Litigation and Disputes Resolution Senior Counsel NSW, 2016
- The Best Lawyers in Australia, 2018 – Insurance Law

### PRINCIPAL AREAS OF PRACTICE

Commercial and equity, corporations, insolvency, insurance and reinsurance, professional negligence, class actions

### EXPERIENCE AT THE BAR - OVERVIEW

- Practised at the Bar throughout Australia since 1984 in Federal and State courts.
- Came straight to the Bar where he has practised ever since.
- With more than 30 years experience at the Bar and having been silk more than 13 years, the areas of practice are extensive.
- Believes that a capable barrister should be able to and should appear in all jurisdictions and engage in a diverse range of case work.
- Particular interests are pre-trial case strategy and cross-examination.
- Appeared for defendants in ASIC v Rich – one of the longest NSW civil trials – (232 hearing days, 37 witnesses, 7500 paragraph judgment).
- Appearing for defendants in Queensland Floods class action.

PARTICULAR AREAS OF PRACTICE INTERESTS ARE AS FOLLOWS:

Insurance and reinsurance

- Regularly advises and appears for insurers, reinsurers and insureds in all classes of insurance and reinsurance business.
- Frequently engaged in professional indemnity and directors' and officers' liability disputes.
- Particular areas include misrepresentation and non-disclosure, aggregation, utmost good faith, statutory charge on insurance monies.
- Engaged by insurers and insureds to prepare binding legal opinions.
- Appeared for insurers in leading appellate case on statutory charge on insurance monies (*Chubb v Moore*).
- Appeared in leading appellate case on sections 40 and 54 of the *Insurance Contracts Act 1984* (Cth) (*Gosford City Council v GIO*).
- Appeared for Guy Carpenter in the HIH Royal Commission.
- Presented papers on insurance issues to Australian Insurance Law Association.

*Cases include:*

***Chubb Insurance Company of Australia Limited v Moore* [2013] NSWCA 212, (2013) 302 ALR 101, 17 ANZ Ins Cas 61-976**

(Liability insurance; statutory charge on insurance monies; section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW); extraterritorial operation of State Acts)

***Gosford City Council v GIO General Ltd* (2003) 56 NSWLR 542 (CA)**

(Sections 40 and 54 of the *Insurance Contracts Act 1984* (Cth); circumstances that may give rise to claims)

***Lambert Leasing Inc. v QBE Insurance Ltd* [2015] NSWSC 750**

(Dual Insurance, contribution, subrogation, utmost good faith, other insurance clauses, section 45 *Insurance Contracts Act 1984* (Cth))

***Lambert Leasing Inc. v QBE Insurance Ltd (No 2)* [2015] NSWSC 1196**

(Pay-to-be paid policy, costs orders, offers of compromise under Uniform Civil Procedure Rules 2005 (NSW))

***Lambert Leasing Inc. v QBE Insurance (Australia)* [2016] NSWCA 254**

(Insurance, double insurance and contribution, section 45 *Insurance Contracts Act 1984* (Cth))

***Rich v CGU Insurance Ltd; Silbermann v CGU Insurance Ltd* (2005) 214 ALR 370; (2005) 79 ALJR 856; (2005) 13 ANZ Ins Cas 61-642 (HC)**  
(Director and officer insurance policies)

***Wilkie v Gordian RunOff Limited & Anor* (2005) 214 ALR 410; [2005] NSWSC 873**  
(Director and officer insurance policies)

***QBE Insurance Ltd v Nguyen* (2008) 100 SASR 560 (FC)**  
(Insurance policy construction; conclusiveness of default judgment for purposes of legal liability policy; equitable doctrines; election)

***Grimson v Aviation & General (Underwriting) Agents Pty Limited* (1991) 25 NSWLR 422; (1991) 7 ANZ Ins Cas 61-095 (CA)**  
(Statutory charge on insurance monies; leave to proceed under section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW); limitations of actions)

***Smart v Westpac Banking Corporation* (2011) 282 ALR 400; [2011] FCA 829**  
(Insurance; duty of utmost good faith)

***Drayton v Martin* (1996) 67 FCR 1; (1996) 137 ALR 145; (1996) 9 ANZ Ins Cas 61-322**  
(Professional indemnity insurance; claims made policies; section 54 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW))

***BOS International (Australia) Ltd v Babcock & Brown International Pty Ltd* [2011] NSWSC 1382**  
(Commercial law; contracts; construction; directors and officers insurance policies)

***Insurance Superannuation Commission v Regal Life Insurance Ltd* (1994) 121 ALR 513**  
(Life insurance; powers of judicial manager)

***Tropical Reef Shipyard Pty Ltd v QBE Insurance (Australia) Ltd (No 3)* [2010] FCA 1439**  
(Business interruption insurance; summary dismissal; amendment)

## **Advised and appeared for directors in a number of the leading civil penalty proceedings**

- Appeared in the leading High Court case on privilege against self-exposure to a penalty (*Rich v ASIC*).
- Appeared for defendant directors in civil penalty proceedings concerning the GIO/AMP takeover (*ASIC v Vines*), the One.Tel liquidation (*ASIC v Rich*), the MFS/Octaviar liquidation (*ASIC v Managed Investments; White v ASIC; Anderson v ASIC*).

*Cases include:*

***Australian Securities & Investments Commission v Rich* (2010) 75 ACSR 1; (2009) 236 FLR 1**  
(Directors' duties, business judgment rule, insolvency, evidence)

*ASIC v Rich* interlocutory decisions include - opinion evidence (2005) 190 FLR 242; (2005) 218 ALR 764; 54 ACSR 326; search warrants, evidence (2005) 188 FLR 416; 220 ALR 324; 52 ACSR 324; use of ASIC examinations (2006) 201 FLR 207; expert evidence, documentary evidence (2005) 191 FLR 385; penalty privilege (2003) 183 FLR 361; 203 ALR 671; 48 ACSR 6; evidence in reply (2006) 235 ALR 587; leave to tender new evidence [2005] NSWSC 706; amendment, new evidence [2005] NSWSC 940; opinion evidence [2005] NSWSC 296; pleading and cross-examination [2006] NSWSC 712; compulsory mediation [2005] NSWSC 489; opinion evidence [2005] NSWSC 939; legal professional privilege, waiver [2004] NSWSC 1089; privilege, issue waiver [2004] NSWSC 969; privilege, waiver [2004] NSWSC 923; adjournment [2006] NSWSC 266; disqualification for apprehended bias [2004] NSWSC 970; adjournment and amendment (2004) 50 ACSR 521; unlawfully obtained evidence [2004] NSWSC 951; penalties, remedies for breach of directors duties (2003) 44 ACSR 682; privilege [2004] NSWSC 1017; documentary evidence and discretionary exclusion [2005] NSWSC 1022; privilege, disclosure waiver [2004] NSWSC 1090; privilege, waiver [2004] NSWSC 1104; evidence by audiovisual link, evidence on commission (2004) 49 ACSR 578; 22 ACLC 1125; documentary evidence, section 1305 of the *Corporations Act 2001* (Cth), business records (2005) 54 ACSR 28; expert evidence [2005] NSWSC 256; adjournment (2004) 50 ACSR 357; business records, s 1305 of the *Corporations Act 2001* (Cth) [2005] NSWSC 1031; evidence in chief [2005] NSWSC 1187; leave to appeal interlocutory rulings (2005) 54 ACSR 365; privilege, waiver [2004] NSWSC 934; evidence in re-examination (2005) NSWSC 1015; access to court file by non-parties [2002] NSWSC 198; subpoena, discovery, abuse of process (2003) 46 ACSR 86; burden and onus of proof (2003) 176 FLR 106; appeals as to costs [2003] NSWCA 194; expert evidence [2005] NSWSC 1170; costs [2003] NSWSC 293; penalty privilege (2003) 45 ACSR 305; media access to court files (2001) 51 NSWLR 643; evidence on voir dire (2004) 213 ALR 338; 51 ACSR 563.

*Australian Securities & Investments Commission v Vines* (2006) 58 ACSR 298  
(Civil penalty orders; disqualification of directors; pecuniary penalties)

*Australian Securities & Investments Commission v Managed Investments Pty Ltd (No 6)*  
(2013) QSC 355  
(Witnesses, competence and compellability, privilege against self-incrimination)

*White v Australian Securities and Investments Commissions* [2013] QCA 357  
(Stay of civil penalty proceedings pending criminal proceedings; sections 19 and 79 of the *Australian Securities and Investments Commission Act 2001* (Cth))

*Anderson v Australian Securities and Investment Commission* (2013) 2 Qd R 401; (2012) 91 ACSR 452; (2012) 297 ALR 546; [2012] QCA 301  
(Penalty privilege; privilege against self-incrimination; pleading rules)

## Insolvency

- Advises and appears in all aspects of corporate and personal insolvency.
- Experience includes winding up, deeds of company arrangements, preferences, bankruptcy settlements.

- Appeared in leading High Court and intermediate appellate cases on deeds of company arrangement (*Lehman Brothers v City of Swan*; *BE Australia v Sutton*).

Cases include:

***Lehman Brothers Holdings Inc v City of Swan & Ors; Lehman Brothers Asia Holdings Limited (in liq) v City of Swan & Ors* (2010) 240 CLR 509; (2010) 84 ALJR 275; (2010) 265 ALR 1; [2010] HCA 11**

(Corporations law, deeds of company arrangement, releases of claims, section 444D of the *Corporations Act 2001* (Cth))

***BE Australia (Subject to a Deed of Company Arrangement) v Sutton* [2011] NSWCA 414**

(Corporations law; deeds of company arrangement; creditors admissible to proof; scope of section 447A of the *Corporations Act 2001* (Cth); industrial law; claims under section 106 of the *Industrial Relations Act 1996* (NSW))

***Re Credit Reference Association of Australia Ltd* (1998) 16 ACLC 491**

(Company arrangements and reconstructions)

***Re ACN 076 673 875 LTD (receiver and manager appointed) (in liq) Bendeich as liq, Greatorex & Ors intervening by leave* (2002) 42 ACSR 296**

(Liquidators; liquidation funding)

***Re G.B. Nathan & Co Pty Limited (In Liq)* (1991) 24 NSWLR 674; (1991) 5 ACSR 673; (1991) 9 ACLC 1291**

(Powers of court on liquidator's application for directions; liquidators control over trust property)

***Weston v Carling Constructions Pty Ltd* (2000) 175 ALR 202; (2000) 35 ACSR 100**

(Administrators' liens in company liquidation)

***Wily v Rothschild Australia Ltd* (1999) 47 NSWLR 555; (1999) 17 ACLC 1643**

(Preferences; set-off; securities)

***Mineral & Chemical Traders Pty Ltd v T. Tymczyszczym Pty Ltd (in liq.) & Horn* (1994) 15 ACSR 398; (1994) 13 ASC 40**

(Effect of liquidation on floating charge)

***Re Spedley Securities Ltd (in Liq)* (1992) 9 ACSR 83**

(Liquidators' compromise with creditors; liquidators' application for directions)

***Grace v Grace* (2007) 25 ACLC 141; [2007] NSWSC 6**

(External administration; provisional liquidation; oppression; just and equitable ground)

***Clemada Pty Limited v Hire-it Pty Limited (No. 2)* (1990) 3 ACSR 202**

(Appointment of provisional liquidators)

***Stanham v National Trust of Australia (NSW) (1989) 15 ACLR 87; (1989) 7 ALLC 628***  
(Rights of members at extraordinary general meeting; rights of members of corporations)

***Peter Nobbs Consultancy Pty Limited (In Liq) v Brambles Holdings Limited & Ors (1987) 8 NSWLR 231; (1987) 11 ACLR 460***  
(Settlements in bankruptcy; settlements under Companies Code)

***Re Ward; ex parte Official Trustee & Bankruptcy v Dabnas Pty Limited (1984) 55 ALR 395; (1984) 3 FCR 112***  
(Settlements in bankruptcy; assignments of choses in action; promissory estoppel)

## Companies Law

- Areas of practice include directors' duties, deeds of company arrangement, oppression, winding up.

*Cases include:*

***Lehman Brothers Holdings Inc v City of Swan & Ors; Lehman Brothers Asia Holdings Limited (in liq) v City of Swan & Ors (2010) 240 CLR 509; (2010) 84 ALJR 275; (2010) 265 ALR 1; [2010] HCA 11***  
(Liquidation; Deeds of Company Arrangement; statutory interpretation)

***BE Australia (Subject to a Deed of Company Arrangement) v Sutton [2011] NSWCA 414***  
(Corporations law; deeds of company arrangement; creditors admissible to proof; scope of section 447A of the *Corporations Act 2001* (Cth); industrial law; claims under section 106 of the *Industrial Relations Act 1996* (NSW))

***Registrar-General v Northside Developments Pty Limited (1988) 14 NSWLR 571; (1988) 14 ACLR 543; (1988) 7 ACLC 52 (CA)***  
(Companies' indoor management rule)

***Australian Securities and Investments Commission v Rich (2010) 75 ACSR 1***  
(Corporations; civil penalty proceedings; directors' duty of care and diligence; standard of care; business judgment rule; pleadings and particulars; evidence)

***Australian Securities & Investments Commission v Vines (2006) 56 ACSR 528; (2006) 24 ACLC 165***  
(Directors' duties; relief from liability)

***In the matter of Wollongong Coal Ltd [2017] NSWSC 201***  
(Corporations law, share capital reduction, share buy-back)

***Downer EDI Limited v Gillies (2012) 92 ACSR 373; [2012] NSWCA 333***  
(Employment law; directors duties)

***Spika Trading Pty Limited v Harrison* (1990) 19 NSWLR 211; (1990) 1 ACSR 609; (1990) 8 ACLC 310**  
(Directors liabilities under section 556 of the Companies Code; contribution between directors)

***Grace v Grace* [2012] NSWSC 976**  
(Undue influence; unconscionability; laches; trusts; oppression; winding up; family law; family provision)

***Grace v Grace* (2007) 25 ACLC 141**  
(External administration; provisional liquidation; oppression; just and equitable ground)

***Maurice Dry Cleaners Pty Ltd (in liq) v National Australia Bank Ltd* (1990) 8 ACLC 798**  
(preferences, interest on preferences)

***Portfolio Projects Pty Limited v Oakes Building Co Pty Limited* (1987) 5 ACLC 911**  
(Company winding-up; abuse of process)

## General Commercial

- Appeared in several recent decisions on enforcement of arbitral awards.
- Other commercial cases appear under other headings.

*Cases include:*

***APS Satellite Pty Ltd v IPSTAR Australia Pty Ltd* [2016] NSWSC 1898**  
(Sale of goods, merchantable quality, fitness for purpose, unconscionability)

***Clipsal Australia Pty Ltd v Clipso Electrical Pty Ltd (No 3)* [2017] FCA 60**  
(Intellectual property, trade marks, passing off, misleading and deceptive conduct)

***Sahade v The Owners – Strata Plan No 62022* [2014] NSWCAT (13 January 2015)**  
(Strata titles, unit reallocation, management and control)

***Obeid v Australian Competition and Consumer Commission* [2014] FCA 839**  
(Restrictive trade practices, validity of section 155 Notices, anti-competitive contracts, cartel conduct, definition of “services” under the *Competition and Consumer Act 2010* (Cth))

***Armada (Singapore) Pty Ltd v Gujarat NRE Coke Ltd* [2014] FCA 636**  
(Enforcement of international arbitral award, composition of arbitral tribunal, declaration as to future breaches)

***Traxys Europe SA v Balaji Coke Industries Pty Ltd (No 2)* (2012) 201 FCR 535; (2012) 291 ALR 99; [2012] FCA 276**  
(International arbitration; public policy; enforcement of arbitral awards)

***Lowe v Pascoe (No 4) [2012] NSWSC 1493***  
(Partnership and joint ventures)

***BOS International (Australia) Ltd v Babcock & Brown International Pty Ltd [2011] NSWSC 1382***  
(Commercial law; contracts; construction; directors and officers insurance policies)

***Caason Investments Ltd v Cao [2014] FCA 410***  
(Class actions, pleading, causation, fraud on the market theory)

***Gillies v Downer EDI Ltd [2011] NSWSC 1055***  
(Employment law; contracts; damages)

***Garde v Workcover Authority (NSW) (1992) 35 AILR 103***  
(Termination of SES employees; *Public Sector Management Act 1988* (NSW); section 88F of the *Industrial Arbitration Act 1912* (NSW); unfair dismissal)

***Henderson v Australian Chamber of Manufactures (1991) 34 AILR 10***  
(Employment termination packages; redundancy; eligible termination payments; implied terms; estoppel)

***Fisons Pty Ltd v Rostinga Pty Ltd (1989) NSW Conv R 44-589***  
(Leases, rent review causes; declarations)

***Kitt v Tourism Commission of NSW (1987) 11 NSWLR 686; (1987) EOC 92-196***  
(*Public Service Act 1999* (Cth); anti-discrimination legislation)

***Bective Station Pty Ltd v AWB (Australia) Ltd [2006] FCA 1596***  
(misleading and deceptive conduct, termination of contract, similar fact evidence)

***Garcia v National Australia Bank Ltd (1998) 194 CLR 395; (1998) 72 ALJR 1243; (1998) ALR 614***  
(Unconscionable conduct, guarantees; rule in *Yerkey v Jones*)

***National Australia Bank Ltd v Garcia (1996) 39 NSWLR 577; (1996) 21 ACSR 309 (CA)***  
(Unconscionable conduct; guarantees)

***Portacomm Building Systems Pty Ltd v Southern Sheet [2013] NSWCA 123***  
(Practice and procedure; stay of proceedings)

***Southern Sheet & Coil Pty Limited v Portacomm Building Systems Pty Limited [2013] NSWSC 38***  
(Contracts; failure to pay; guarantee; misleading and deceptive conduct; misrepresentation)

***Lee Gleeson Pty Limited v Sterling Estates Pty Limited (1991) 23 NSWLR 571; (1991) ATPR (Digest) 46-072 (1991) ASC 56-083***  
(Misleading and deceptive conduct; promissory estoppel; enforceability of oral building contracts, procedure before referee)



***Edward Keller (Australia) Pty Limited v Henelly*** (1990) 35 IR 464; 33 AILR 79 (CA)  
(Employment contracts; reasonable notice)

## Equity

- Appears in all aspects of equitable claims, fiduciary relations, estoppel.
- Appeared in *Garcia v National Australia Bank* – one of the leading High Court cases on unconscionability in a husband/wife/guarantee situation.
- Appeared in *Aid/Watch v Commission of Taxation* – a High Court case defining the boundaries of charitable trusts.
- Appeared in *Sze Tu v Lowe* – an appellate decision on trusts, tracing, partnerships and indefeasibility of title and limitation of actions.

*Cases include:*

***Garcia v National Australia Bank Ltd*** (1998) 194 CLR 395; (1998) 72 ALJR 1243; (1998) ALR 614  
(Unconscionable conduct, guarantees; rule in *Yerkey v Jones*)

***Aid/Watch Inc v Commission of Taxation*** (2010) 241 CLR 539; (2010) 85 ALJR 154; (2010) 272 ALR 417; [2010] HCA 42  
(Charitable trusts; taxation; charitable institutions; political purposes)

***Sze Tu v Lowe*** [2014] NSWCA 462  
(Equity, trusts, tracing, limitations of actions, partnerships and joint ventures, Real Property Act 1900 (NSW) – indefeasibility of title)

***Griffin v Coe*** [2012] NSWSC 412  
(Probate; devastavit; procedure)

***Grace v Grace*** [2012] NSWSC 976  
(Undue influence; unconscionability; laches; trusts; oppression; winding up; family law; family provision)

***Grace v Grace (No 6)*** [2013] NSWSC 897  
(Equity – taking of accounts)

***Westpac Banking Corporation v Billgate Pty Ltd*** [2013] NSWSC 1304  
(Equity – implied and constructive trusts; unconscionable dealings; equitable fraud; unjust contracts; trade practices; misleading and deceptive conduct)

***Phoenix Rising Investments Pty Ltd, Re: Grace v Grace*** [2010] NSWSC 758  
(Superannuation; trustee's duties; practice and procedure)

## Negligence

- Practice has a particular focus on professional negligence.
- Has been briefed on behalf of professional indemnity insurers for over 20 years.

*Cases include:*

***King v Benecke* [2013] NSWSC 568**

(Solicitor's negligence; lack of formal retainer, conflict of interest)

***Watkins (t/as Watkins Tapsell) v De Varda* [2003] NSWCA 242**

(Duty of care in absence of retainer, conflict of interests)

***Studer v Boetcher* [2000] NSWCA 263**

(Solicitors' negligence, pressure to settle)

***Amaca Pty Ltd v Hicks* [2011] NSWCA 295;**

(Damages; gratuitous care)

***Collingwood Hotel Pty Ltd v O'Reilly; Night Knowledge Security Pty Ltd* (2007) NSWCA 155**

(Negligence; duties of licensees and security guards)

***Amaca Pty Ltd v Banton* (2007) 5 DDCR 314; (2007) NSWCA 336**

(Exemplary and aggravated damages; dust diseases)

***Snorkel Elevating Work Platforms Pty Ltd v Nominal Defendant* [2007] ACTCA 14**

(Legal practitioners; challenge to retainer; indemnity costs)

***Lowns & Anor v Woods & Ors* (1996) Aust. Torts Rep.81-376 (CA)**

(Medical negligence, urgent request for medical assistance)

## Class Actions

- Currently appearing for defendant in Brisbane Floods class action (*Rodriguez & Sons Pty Ltd v Queensland Bulkwater Supply t/as Seqwater*) and for defendant auditors in a securities class action (*Caason Investments Pty Ltd v Cao & Ors*) and appeared for cross defendants in Blue Mountains Bushfires class action (*More v Endeavour Energy; Johnston v Endeavour Energy*)

*Cases include:*

***Rodriguez and Sons Pty Ltd v Queensland Bulkwater Supply Authority t/as Seqwater* [2015] NSWSC 1771**

(Class actions, group members, sub-groups and sample members, common questions, duty of care)

**Caason Investments Ltd v Cao [2014] FCA 410**  
(Class actions, pleading, causation, fraud on the market theory)

## Property

- Advises and appears in property and conveyancing matters.

*Reported cases include:*

**Franz Boensch as trustee of the Boensch Trust v Scott Darren Pascoe [2015] NSWSC 1882**  
(Caveats, lodgement without reasonable cause)

**Pedula v Panetta (2011) 16 BPR 30, 229; [2011] NSWSC 1386**  
(Real property; Torrens Assurance Fund; negligence; fraud; insurance; proportionate liability; amendment)

**Chandra v Perpetual Trustees Victoria Ltd (2007) 13 BPR 24,675; (2007) ANZ Conv 12481; (2007) Aust Torts Reports 81-896; (2007) NSW Conv R 56-187; [2007] NSWSC 694**  
(Torrens system; assurance fund; indefeasibility of title; professional negligence)

**Drulroad Pty Limited v Gibson (1993) ANZ Conv Rep 115**  
(Oral agreement for mortgage; priorities)

## Family

*Cases include:*

**F Firm v Ruane & Ors [2014] Fam CAFC**  
(Accrued jurisdiction of Family Court, professional negligence claim in Family Law proceedings, single justiciable controversy, intermediate appellate courts departing from their own earlier decisions)

**Grace v Grace (No. 9) [2014] NSWSC 1239**  
(Interest on costs, costs in cross-vested *Family Law Act 1975* (Cth) proceedings)

**Ruane & Bachmann-Ruane and Ors (Accrued jurisdiction) (2012) 48 Fam LR 131; [2012] FamCA 369**  
(Constitution; Accrued jurisdiction of Family Court)

**Grace v Grace [2012] NSWSC 976**  
(Undue influence; unconscionability; laches; trusts; oppression; winding up; family law; family provision)