

David Stewart
Barrister

Curriculum vitae - March 2025

Level 9 Wentworth Chambers
180 Phillip Street, Sydney, NSW 2000

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From 5 May
2008 to date

Barrister

Experience:

Masti v Finohelp Support Pty Ltd [2025] FedCFamC2G 134

Practice and procedure – Pleading – embarrassing pleading – failure to disclose reasonable cause of action – failure to plead component elements of cause of action

Industrial Law – *Fair Work Act 2009* (Cth) – General protections – workplace rights – requirement to identify source of ability to complain or inquire – requirement to identify nature and source of benefit, role or responsibility imposed by workplace law or instrument

Mendonca v Tonna [2024] NSWCA 288

Civil procedure – appeal – application for costs capping order – need to show reason to anticipate disruptive or obstructive conduct by other party – insufficient to seek to protection from reasonable costs of other party to unsuccessful appeal

Civil procedure – appeal – requirements for leave – challenge to

interlocutory orders and costs orders – challenge to orders in working out of final judgment interlocutory

Mendonca v Tonna; *Mendonca v Hathaway*; The application of *Hathaway and Hosking* [2024] NSWSC 1024 (15 August 2024)

Costs — Party/Party — Exceptions to general rule that costs follow the event — Costs of trustees for sale — Whether plaintiff capitulated — No issue of principle

Towill v Towill [2024] NSWSC 1384

Succession — Family provision — Claim by adult grandchild – notional estate – plaintiff aged 33 brings a claim for family provision against the estate of his deceased grandmother – the deceased’s will gives the whole of her estate to her son, who is both the defendant and the plaintiff’s father but for a bequest of \$30,000 to the plaintiff – the plaintiff lived much of his life in a household at a four-bedroom house in Woollooware with his grandmother and his father – severe tensions arose within the household and especially between the plaintiff and the defendant in the last five years of the deceased’s life – defendant takes out ADVO against plaintiff – plaintiff presently homeless, unemployed, with a gambling addiction, and being treated for psychiatric illness – defendant remains in the Woollooware property – defendant unemployed – defendant unwilling to commit to provide for the plaintiff in his will – estate consists of the Woollooware property and cash and was distributed before the hearing – dependency not in issue and plaintiff conceded to be an eligible person – whether there are factors warranting the making of an order for provision – whether an order for provision should be made out of the estate of the deceased and if so on what sum – whether any property and if so what property should be designated as the notional estate of the deceased

In the matter of Earl Courtenay Pty Ltd [2024] NSWSC 430

Corporations — winding up — just and equitable ground — where the relationship between members of the corporations has irretrievably broken down — appointment of liquidators with consent

Colburn & Cleese (No 3) [2024] FedCFamC1F 221

Family Law – De Facto Relationships – Existence of relationship – Where the applicant asserts the parties were in a de facto relationship over three periods – Where the respondent asserts the parties had a business relationship and friendship but not a de facto relationship – Where the applicant bears the burden of proving the existence of a de facto relationship – Where it is conceded that the parties had periods of common residence – Where the parties exhibited a mutual commitment to a shared life – Where the parties had a relationship as a couple living together on a genuine domestic basis – Where the court finds a de facto relationship existed between the parties during two of the claimed periods

Jones v Hamilton Island Enterprises Limited [2024] FedCFamC2G 6

Industrial law - alleged contraventions of a modern award in breach of the Fair Work Act 2009 (Cth) – alleged underpayment of award entitlements to overtime, penalty rates and meal allowance – whether the correct job classification under the award was “Cook (tradesperson)” or “Managerial staff”

Knox Farms Pty Limited v Upper Lachlan Shire Council & Ors [2023] NSWSC 1601

Real property - costs – party/party —no hearing on the merits —claims against particular party discontinued —effective discontinuance of claims against other parties — whether capitulation on dismissed cross-claim and notice of motion

Tutzring Pty Ltd v Upper Lachlan Shire Council & Ors [2021] NSWSC 1221

Real property - parties – joinder – proceedings for specific performance of a Deed – application by third parties to become defendants – whether applicants are necessary parties to the proceedings – order sought by plaintiff would require defendant Council to proceed to close a public road that adjoins land owned by applicants

Re Estate Miletic; Strbik v Strbik [2023] NSWSC 371

Succession & Probate - construction of a deceased testator’s will and the determination of competing entitlements of members of his family (a daughter and her children, his grandchildren) to property consequent upon a determination of the proper construction of the will

John Patrick Bracken v OFX (OzForex Limited) [2023] FWCFB 174

John Bracken v OzForex Limited [2022] FWCFB 95

John Patrick Bracken v OzForex Limited [2022] FWCFB 172

Employment & Industrial - appeals – unfair dismissal – serious misconduct
- remittal

Hefferman v Law Society Northern Territory [2023] NTCA 10

Legal practitioners – cancellation of unrestricted practising certificate –
whether appellant fit and proper person – failure to disclose suitability
matters – good fame and character

Walker v Walker [2022] NSWSC 1104

Contracts – construction – interpretation – deed of settlement

Last v Lewis [2022] NSWSC 791

Succession & Probate - deed of family arrangement - family provision –
claim by adult daughter

Bachman & Donohoe [2021] FedCFamC1F 240

Family law – de facto relationship – binding financial agreement -
independent legal advice in executing the financial agreement –
mandatory conditions of the *Family Law Act 1975* (Cth) s
90UJ(1)(b) were not satisfied –unjust or inequitable on either party to
render the agreement not binding

Bachman & Donohoe (No. 2) [2021] FedCFamC1F 286

Family law – de facto relationship – stamp duty

Bachman & Donohoe (No 3) [2022] FedCFamC1F 185

Family law – costs

Colburn & Cleese [2022] FedCFamC1A 147

Family law – de facto relationship – property - jurisdiction – declaration of de facto relationship – where judgment was entered between the parties by consent pursuant to the *Property (Relationships) Act 1984* (NSW) - where the primary judge declared the de facto relationship existed during a period covered by the Supreme Court judgment – estoppel – remittal

Cleese & Colburn [2022] FedCFamC1F 282

Family law – de facto relationship – property - jurisdiction – applicant seeks a declaration pursuant to s 90RD of the *Family Law Act 1975* (Cth)

Colburn & Cleese (No 2) [2022] FedCFamC1F 426

Family law – costs

Colburn & Cleese [2021] FamCAFC 12

Family law – de facto relationship – property - jurisdiction – costs

Colburn & Cleese [2020] FamCAFC 278

Family law – de facto relationship – property - jurisdiction – declaration was made which was not based on agreed or found facts – hypothetical or advisory opinion

Cleese & Colburn [2020] FamCA 516

Family law – de facto relationship – property - jurisdiction – whether the Family Court has the jurisdiction to determine whether an Agreement as to Judgment at the Supreme Court, made pursuant to *Property (Relationships) Act* (NSW) should be set aside

Jurisdiction - de facto relationships – declaration sought pursuant to s 90RD *Family Law Act 1975* (Cth) – jurisdiction to set aside or vary Agreement as to Judgment of a State Court

Cummins v Petterd [2021] FCA 646

Financial services – superannuation trustee exercise of powers –
Corporations Act 2001 (Cth) s 1055

Re Estate Bobar, Bockos v Bobar [2021] NSWSC 1177

Succession - family provision – claim by adult granddaughter - costs

Kabbara & Ors v Australian National Sports Club Incorporated
[2021] NSWSC 738

Associations and clubs – domestic and private tribunals – procedural
fairness

Roderick v Washington H Soul Pattinson & Company Limited [2020] NSWSC
1223

Roderick v Washington H Soul Pattinson & Company Limited (No 2) [2020]
NSWSC 1224

Employment and industrial law — contract — termination without
notice — whether original written contract applied or had been varied
or discharged in ongoing relationship of employment — objective
assessment of parties' mutual intention — necessity for implied term as
to reasonable notice in new contract — determination of reasonable
notice period

Dawson v Secretary, Minister of Health [2020] NSWCCPD 16

Deemed worker – volunteers – *Workplace Injury Management and Workers
Compensation Act 1998* (NSW) Sch 16, Cl 1

In the matter of A Twins Spare Parts Pty Ltd [2020] NSWSC 156

Corporations – external administration – whether appropriate to wind
up company on the just and equitable ground – *Corporations Act
2001* (Cth) s 461(1)(k)

In the matter of Norwest Legal Services Pty Limited [2019] NSWSC 1896

Corporations – application to set aside creditor's statutory demand –
where debt purported to be due and payable to beneficiary of trust –

where evidence of debt appears to be sourced from financial accounts that have not been prepared – whether debt is due and payable

HME Services Pty Ltd v Ortado [2019] NSWSC 1325

Freezing order – judgment for the plaintiff following grant of a freezing order

Cordina Chicken Farms Pty Ltd v Dharun Prasad [2019] FWCFB 8661

Employment – appeal from decision of the Fair Work Commission – Work Health & Safety

Alison Bleyerveen v Uniting Mission and Education [2019] FWC 4818

Employment – genuine redundancy – appeal lodged. Settled

Croft v Sanders [2019] NSWCA 303

Succession — contested probate — testamentary capacity — application of test in *Banks v Goodfellow* — where will apparent and rational on its face — where evidence of hallucinations or delusions

Re Estates Croft, deceased [2018] NSWSC 1303

Succession – Contested probate – Testamentary capacity – Joint hearing of challenges to respective wills of a married couple – Where each will-maker suffered some form of mental illness

Secretary, Ministry of Health v Dawson [2019] NSWWCPCPD 30

Workers compensation – appeal – deemed worker – ambulance volunteer

State of NSW Wales v Abdul [2018] NSWWCPCPD 41

Workers compensation – appeal – CPI indexation of benefits

UP Australia Pty Ltd v McDonald & Anor [2018] NSWSC 218

Equity - interlocutory injunctions - serious question to be tried - balance of convenience - interests associated with the first defendant to sell a gym business to the plaintiff - second defendant is employed as a mentor within the gym business from the time of the sale

Marathon Group Pty Ltd v Latrobe Valley Building Services Pty Ltd [2018] NSWSC 194

Appeal – appeal of decision of the Local Court of NSW

Giles & Giles & Anor [2018] FCCA 294

Family law – express trust – resulting trust – presumption of advancement

Young v Cooke [2018] NSWSC 588

Costs – application for security for costs – principles – r 50.8 of the *Uniform Civil Procedure Rules 2005* – whether or not special circumstances demonstrated – discretionary factors – prospects of success – impecuniosity – question of bona fides – conduct in litigation – risk of stultification – special circumstances established

Young v Cooke [2017] FCA 26

Young v Cooke [2016] FCA 1215

Bankruptcy and insolvency – application for extension of time to appeal from a decision of a single judge of this Court – whether proposed appeal has merit – application refused

Kallin Pty Ltd v ACN 107 851 847 Pty Ltd [2018] NSWSC 124

Consumer law — Misleading or deceptive conduct — Whether statement misleading — Reliance upon misleading statements — Causation — Damage

Kohari v NSW Trustee & Guardian (No 3) [2017] NSWSC 1431

Costs – party/party – offer of compromise – judgment for plaintiff no more favourable than offer – effect of notice disputing a fact where fact subsequently admitted – *Uniform Civil Procedure Rules 2005* (NSW), rr 42.8, 42.15

Kohari v NSW Trustee & Guardian (No 2) [2017] NSWSC 1080

Succession – family provision

Kohari v NSW Trustee & Guardian [2016] NSWSC 1372

Succession – parentage testing – *Status of Children Act 1996* (NSW) - DNA test ordered

Watson v Uniting Care [2017] FCCA 126

Employment – adverse action

Two Italian Boys Holdings Pty Ltd v The Winery Pty Ltd [2017] NSWSC 67

Two Italian Boys Holdings Pty Ltd v The Winery Pty Ltd [2016] NSWSC 1163

Costs – security for costs – where plaintiffs are arguably impecunious – whether plaintiffs’ financial position caused by the defendant – where defendant has filed no defence to the statement of claim – where strength of the plaintiffs’ case cannot be judged before a defence has been filed

PND Civil Group Pty Ltd v Bastow Civil Constructions Pty Ltd [2017] NSWCA 159

Appeal – new issues raised for first time on appeal – whether entitled to recover management time as a result of defective works - whether primary judge’s discretion miscarried with respect to costs

Sadiq v NSW Trustee & Guardian [2016] NSWCA 62

Succession – de facto partner of the deceased

The Estate of Roger Christopher Currie, late of Balmain [2015] NSWSC 1098

Succession - informal computer Will

Bibby Financial Services Australia Pty Ltd v Sharma [2014] NSWCA 37

Contract – employment - construction of a written contractual clause of good faith - sexual harassment and serious misconduct

Sharma v Bibby Financial Services Australia Pty Ltd [2012] NSWSC 1157

Contract – employment - construction of a written contractual clause of good faith - sexual harassment and serious misconduct

Toth v Graham [2014] NSWSC 393

Succession – family provision

Michael Zannetides v Tracey Spence [2013] NSWSC 2032

Succession – family provision – extension of time

Gana Holdings v Renshaw [2013] NSWSC 381

Application for injunction to restrain alleged breach of partnership deed

Bindaree Beef Pty Ltd v Riley [2013] NSWCA 305

Employment - injured employee provisions under the *Workers Compensation Act 1987* (NSW) and their interaction with workplace health and safety legislation - special Leave Application refused

Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd [2013] NSWCA 344

Corporations - construction and application of s.459G of the *Corporations Act 2001* (Cth)

Grace v Grace - [2010] NSWSC 1513; [2010] NSWSC 1514; [2010] NSWSC 1526; [2010] NSWSC 1527; [2012] NSWSC 976; (No 2) [2012] NSWSC 1321; (No 3) [2012] NSWSC 1623; (No 4) [2013] NSWSC 385; (No 5) [2013] NSWSC 601; (No 6) [2013] NSWSC 897; (No 7) [2013] NSWSC 1745; (No 8) [2014] NSWSC 419; [2014] NSWCA 86

Corporations - undue influence and unconscionable conduct - administration of estates - *Family Law Act 1975* (Cth) - oppression - *Corporations Act 2001* (Cth) – valuation experts property and shares

Australian Meat Industries Employees' Union v Wingham Beef Exports Pty Ltd [2013] FWCFB 909

Employment - construction of an Enterprise Agreement

The Owners-Strata Plan 62658 v Mestrez Pty Ltd & Ors [2012] NSWSC 1259; *The Owners-Strata Plan 62658 v Black No Sugar Pty Ltd* [2010] NSWSC 408

Corporations - professional indemnity insurance - flood

Malaarachchi v UnitingCare NSW.ACT [2014] FWC 7944

Employment - allegations of misconduct

Hanson v Johnston & Ors [2011] NSWSC 621

Court of Disputed Returns - email

Jones v Pearson & Anor [2015] NSWSC 1324

Court of Disputed returns – NSW elections

Do Rozario v French Accent [2011] FWA 3003

Jiang Shen Cai trading as French Accent v Do Rozario [2011] FWAFB 8307

Employment – contractor or employee

Atlas Copco Australia Pty Ltd v Max Smith Enterprises Pty Ltd [2009] FCA 1054

Corporations – application for leave to proceed against a corporation in liquidation – no prospect of recovering a money judgment – public interest in pursuing errant entities – prospect of making declarations sufficient to justify leave being granted – leave to proceed granted

Also, appearing for examinees pursuant to Chapter 5, Part 5.9 of the *Corporations Act 2001* (Cth)

Advising on Church trust property and applicable legislation

Advising, drafting and appearing in matters involving partnership disputes; restraint of trade; confidential information; distributorships; directors' duties; lent workers; shareholder agreements; employment contracts; dismissal; termination; total and permanent disablement; discrimination and harassment; workplace health and safety; importation of heavy equipment; and prosecutions under Chapter 4 of the *Fair Work Act 2009* (Cth)

Confidential matters – complaints to medical tribunals and with respect to training programmes – complaints with respect to legal practitioners

January 2001 to
21 December
2007

Harmers Workplace Lawyers

Team Leader and Partner

Experience:

- Advising and acting in corporate and commercial matters, constitutional law, contract, trade practices, administrative law, directors' duties, corporate governance, restraints, confidential information, share schemes, employment and industrial law, discrimination and human rights, and occupational health & safety.
- For clients including Australian Bankers' Association, Choice, CMC Markets, Coca-Cola, Egis, Elizabeth Arden, EnergyAustralia, Gough & Gilmour, Hawker Pacific, Mayne Group, McDonalds, RailCorp, Ricoh, Roche Pharmaceuticals, State Transit Authority, State Water, Spruson & Ferguson, Talent2, Tennis NSW, and a number of law firms as well as individuals.

Examples:

- advising Mayne Group Limited on demerger
- advising on impact of new IFRS/AASB standards on share options and bonus schemes
- Federal and Supreme Court proceedings involving *Corporations Act* and directors' and fiduciary duties and winding up
- submissions to the Federal Remuneration Tribunal for the Judges and Judicial Registrars of the Family Court of Australia
- acting in the first case testing the meaning of "constitutional corporation" in relation to the *Workplace Relations Act* and the State unfair contracts jurisdiction
- acting for a developmentally disabled man in employment proceedings against Australia Post
- acting for Gough & Gilmour in unfair contract proceedings against Caterpillar
- acting for an individual in unfair contract proceedings involving share options
- advised on industrial strategy for RailCorp
- acted in federal and state industrial actions including strikes, boycotts and award and agreement negotiations
- acted for labour hire provider in Mobil dispute in South Australia
- acted for CSR in truck contractor matter
- involved in industrial strategy for brick and tile manufacturer in New South Wales
- advised on strategy and entitlements for redundancy programme for computer manufacturer
- advice on a range of outsourcing matters
- advising on implementation of redundancy programmes for clients, including dotcom companies, a consultancy company and an advertising company
- advising a number of senior executives in the banking & finance and the media & music industries
- occupational health and safety and injured employee compliance advice for Amalgamated Holdings
- defending McDonalds against occupational health and safety prosecution for a fatality
- defending Kosciusko Thredbo against occupational health and safety prosecution

- acted for individual and corporate clients in state and federal discrimination and human rights matters including sexual harassment
- development and implementation of compliance programmes

December
1999 to July
2000

Freshfields

Manager and Solicitor, London office.

Corporate and commercial work on large scale multi-jurisdictional transactions.

The main types of work involved:

- corporate transaction work primarily on behalf of the bidder in acquisitions
- corporate work on mergers, joint ventures and IPOs
- specialist due diligence and reporting on liabilities arising from transactions, including executive service contracts and share option schemes
- drafting sections on employment and share schemes for offer documents and listing particulars
- the establishment of employee share option schemes for companies
- undertaking negotiations and drafting the termination of executive contracts and drafting letters to option holders under share schemes

Experience:

- proposed joint venture between EMI and Time Warner
- subscription by Soros in a listed company
- purchase by Pearson of Dorling Kindersley
- proposed purchase of a soup business by Campbells
- purchase of a number of newspapers by Gannett
- purchase of a steel making business by Henkel
- setting up schemes for Caradon, Anglian Water, Hewlett Packard, First Leisure and RJB Mining
- potential purchase of Welsh Water by Nomura
- purchase of a manufacturing business by Jefferson Smurfit

Negotiated approval of schemes with the Inland Revenue, where required. Involved in drafting documentation to establish trusts for the

satisfaction of shares under schemes. Involved in the provision of related general advice at Board level, particularly on financial assistance for employees to buy company shares.

July 1998 to
October 1999

Michael Harmer & Associates

Team Leader

Experience:

- advised Coca Cola on their employment and industrial arrangements for the Sydney 2000 Olympics
- advised the State Transit Authority in relation to an enterprise agreement with their ferry staff
- acted for senior executives including the editor of a major daily newspaper, editor of a fashion magazine, the CEO of a publicly listed internet company, senior executives of a leading music company and executives in the financial and mining industries
- advising a food manufacturing company on injured employee issues
- defending occupational health and safety prosecutions for Coca Cola, Smiths Snack Vending and McDonalds
- involved in occupational health and safety compliance programme for aluminium manufacturing company
- assisted Kosciusko Thredbo in the inquest arising from the landslip
- advising and providing training seminars for clients on sexual harassment
- acted for a sixteen year old boy on a pro bono basis who was physically abused on a work site
- acted for a woman who was held against her will by her manager
- advising a large financial institution on employee entitlements on a takeover
- advising a manufacturing company on the restructuring of their plant
- conducting a due diligence programme for a prospective purchaser in the shipping industry

August 1993 to
June 1998

Moray & Agnew

Solicitor

Experience:

- commercial and corporate advice
- commercial litigation including in relation to an aeroplane crash
- advising and drafting of awards, enterprise agreements, Australian Workplace Agreements, and the establishment of an Industrial Committee
- drafting and negotiating specific executive employment contracts, as well as drafting standard letters of appointment
- providing advice on the legitimate grounds for termination and the proper handling of dismissals
- conducting litigation with an emphasis on unlawful terminations, unfair dismissals, unfair contracts and workers' compensation.
- assisting clients with apprenticeship matters before the Vocational Training Board
- experience in defence of prosecutions under occupational health & safety legislation
- experience in anti-discrimination law, including defending harassment and equal opportunity claims
- defending a variety of personal injury claims

Other related work experience

Sydney University Law Library, Assistant, March 1992 - July 1993

Norton Smith & Co, Summer Clerk, December 1991 - January 1992 - included arresting a ship, dealing with a stowaway and preparing the document list in *Baltic Shipping v Dillon*

Publications and papers

Presented papers and seminars and published articles on issues ranging from change management to effective performance appraisal systems and interviewing.

Other positions and memberships

Member, NSW Bar Association

Member, Costs and Fees Committee, NSW Bar Association
Former Member of the New South Wales Netball Appeals Panel

Qualifications

Masters University of Sydney, Master of Labour Law and Relations

Tertiary University of Sydney, Bachelor of Arts, conferred 1991
University of Sydney, Bachelor of Laws, conferred 1993
University of Technology, College of Law, Graduate Diploma in Legal Practice, completed June 1993

Secondary James Ruse Agricultural High School
Higher School Certificate, conferred 1986
