

# BRIAN MASON

## Contact details

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## Profile

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Brian joined the Bar in 2013. His practice primarily encompasses commercial law, public law and building and construction law matters.

He has appeared in the High Court, the Federal Court and all Victorian courts, before administrative tribunals in various States, and before domestic and international arbitral tribunals.

Before joining the Bar, Brian worked for six years at Minter Ellison and Mallesons Stephen Jaques in Melbourne, and Herbert Smith LLP in London. He also spent 18 months as a senior legal adviser at the Department of Premier and Cabinet in Victoria.

Brian's work on a variety of legal issues has been published in numerous Australian and international journals, including the Building and Construction Law Journal, Lloyd's Maritime and Commercial Law Quarterly, the Journal of Equity and the International Construction Law Review.

He holds first class honours undergraduate degrees in Commerce and Law from Monash University (2005), and a Master of Laws from the University of Melbourne (2017).

## Selected matters

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Matters in which Brian has appeared include:

- *Adaz Nominees Pty Ltd v Castleway Pty Ltd*
  - [2021] HCATrans 1806 – application for special leave to appeal (led by Bret Walker SC)
  - [2020] VSCA 201 and [2020] VSCA 293 (and at first instance) – interpretation and application of a property development services

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agreement; whether the Court should adopt the findings of a special referee, and the extent to which it should do so; interest; and costs (led by George Golvan QC)

- *V601 Developments Pty Ltd v Probuild Constructions (Australia) Pty Ltd* [2021] VSC 849 – interpretation of a construction contract; disputes regarding the contractor’s entitlements to extensions of time and a variation arising from a mix commercial and residential development, including a challenge to the independence of the superintendent (led by Nick Hopkins QC)
- Acting for a project manager and contract administrator in an arbitration under the ICC Arbitration Rules regarding the allegedly deficient performance of its services (led by Hugh Foxcroft QC)
- Acting for a contractor in an arbitration under the ICC Arbitration Rules before Andrew Bartlett QC, Marcus Taverner QC and Peter Rees QC regarding a contractor’s claimed entitlements for the design, construction and procurement of onshore LNG processing facilities, with the amount claimed being approximately AUD 1 billion (led by Nick Pane QC)
- *Saafin Constructions Pty Ltd (in liq) v MAG Financial and Investment Ventures Pty Ltd* (led by Ian Upjohn CSC QC)
  - [2021] VSC 489 – enforceability of a loan agreement under the *Consumer Credit (Victoria) Act 1995* (Vic); interpretation of ‘all moneys’ clause in a secured credit facility; unconscionable conduct; tender of mortgaged debt; validity of the appointment of receivers
  - (*Costs and Orders*) [2021] VSC 702
- *Jolin Nominees Pty Ltd v Daniel Investments (Aust) Pty Ltd* [2021] VSC 705 – judicial review of the first instance decision in *Daniel Investments (Aust) Pty Ltd v Jolin Nominees Pty Ltd* [2020] VCAT 480 regarding the proper determination of variation and extension of time claims under sections 37 and 38 of the *Domestic Building Contracts Act 1995* (Vic) (led by Claire Harris QC in the judicial review proceeding, and unled at first instance in the Tribunal)
- *Owners Corporation – Strata Plan SP74698 v Jacinta Investments Pty Ltd* [2021] NSWCATAP 387 and [2022] NSWCATAP 11 (and at first instance) – claim for damages for a breach of section 106 of the *Strata Schemes Management Act 2015* (NSW) arising from a strata scheme’s failure to manage the common property, including the Tribunal’s jurisdiction to award damages and making quarantining orders, and regarding the existence and validity of a common property by-law or transfer of common property to a lot owner
- *Lacen Belder Pty Ltd v Leather Living (Vic) Pty Ltd* [2021] VCAT 1128 – dispute regarding a contractor’s entitlement to payment on account of the incorrect performance of the superintendent’s certification function; damages for an unjustified calling on a bank guarantee; counterclaim for restitution of amounts on account of alleged defects
- *ACN 112 594 902 Pty Ltd v Decmil Southern Pty Ltd* [2021] VCC 1074 – application for a stay of the proceeding under s 8 of the *Commercial Arbitration Act 2011* (Vic)

- *MAG Financial and Investment Ventures Pty Ltd v El-Saafin* [2020] VSCA 322 – appeal against the grant of derivative leave in the exercise of the Court’s inherent jurisdiction (led by Ian Upjohn CSC QC, but unled at the hearing)
- *Lal Lal Wind Farm Nom Co. Pty Ltd v Vestas – Australian Wind Technology Pty Ltd* (led by David Batt QC):
  - [2021] VSC 733 – application by defendants to restrain the plaintiff’s solicitors from continuing to act
  - [2020] VSC 875 – application for preliminary discovery and an interlocutory injunction
- *Pavlovic v Punt Road Hostel Pty Ltd*
  - [2021] VCC 750 – application to set aside a default judgment
  - (No. 2) [2021] VCC 1116 – application to strike out part of a pleading amended during the trial, which was shortly followed by the dispute settling
- *El-Saafin v Franek* (led by Ian Upjohn CSC QC)
  - [2018] VSC 450 – application for an interlocutory injunction
  - (No. 2) [2018] VSC 683 – application for an interlocutory injunction; application by administrators for directions under section 90-15 of the *Insolvency Practice Schedule (Corporations)*
  - (No. 3) [2019] VSC 155 – appeal against the administrator’s decision to accept or reject proofs of debt under section 75-100 of the *Insolvency Practice Rules (Corporations) 2016*
  - (No. 4) [2020] VSC 389 – application for derivative leave in the exercise of the Court’s inherent jurisdiction
  - (No. 5) [2020] VSC 773 – costs on interlocutory applications
- *Elibanc Pty Ltd v Foursquare Construction Management Pty Ltd* (Supreme Court of Victoria, Efthim AsJ, 17 August 2020) – application for preliminary discovery
- Various proceedings regarding the interpretation and application of the *Building and Construction Industry Security of Payment Act 2002* (Vic) including:
  - *Façade Treatment Engineering Pty Ltd (in liquidation) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 – recovery of amounts by companies in liquidation (led by Ian Upjohn CSC QC)
  - *John Beever Pty Ltd v VicRoads* [2018] VSC 635 and [2018] VSC 799 (led by Martin Scott QC)
  - *SJ Higgins Pty Ltd v Mike & Shan Pty Ltd* [2020] VCC 1443

- *MPA Construction Pty Ltd v Profine Construction Pty Ltd* [2020] VCC 1254 and [2020] VCC 1035
- *Herbert & Mason Pty Ltd v O'Brien Group Australia Pty Ltd* [2021] VCC 620
- *Lal Lal Wind Farms Nom Co Pty Ltd v Vestas – Australian Wind Technology Pty Ltd* [2021] VSC 807 (led by David Batt QC)
- *Myer Pty Ltd v J Hutchinson Pty Ltd* (ongoing) – claims in negligence and nuisance for the property damage and economic losses resulting from the collapse of the Hobart Rivulet as part of the Icon Complex Redevelopment in Hobart
- *Mitchell Water Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2018] VSC 753 – application regarding the enforcement of an arbitrator's award; acting for a contractor in a 'chess clock' arbitration before Paul Santamaria QC in an arbitration regarding delay claims, variations and the restitution of amounts paid under the *Building and Construction Industry Payments Act 2004* in connection with a gas pipeline project in Queensland (Qld) (led by Nick Hopkins QC)
- Acting for a principal in an arbitration under the ICC Arbitration Rules before John Marrin QC regarding defective goods and allegations of misleading and deceptive conduct in connection with the supply of a water treatment plant for a mine in the Northern Territory (led by Nick Pane QC)
- *Re Ozlift Pty Ltd* (Supreme Court of Victoria, Gardiner AsJ, 1 November 2018) – application to set aside a statutory demand in connection with services provided in support of a windfarm development
- *Kamasae v Commonwealth* – acting for the Commonwealth in a negligence and false imprisonment class action brought by a former detainee at the Manus Island Regional Detention Centre (led by Christopher Blanden QC)
- *Stirling v Minister for Finance* [2017] FCA 874 – judicial review of a delegate's decision refusing to waive a debt under section 63 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (led by Timothy McEvoy QC)
- *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No. 2)* [2017] VSC 640 – adoption of a special referee's report regarding the use of Technology Assisted Review when making large discovery in a proceeding regarding an insurer's indemnity obligations and the application of the *Insurance Contracts Act 1984* (Cth) (led by Penelope Neskovic QC)
- *Façade Treatment Engineering Pty Ltd (in liquidation) v Brookfield Multiplex Constructions Pty Ltd* [2015] VSC 41 and [2016] VSCA 247 – set-off claims under the *Corporations Act 2001* (Cth) to preclude the enforcement of amounts otherwise payable under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (led by Ian Upjohn CSC QC)
- *Chief Executive Officer of the Australian Sports Anti-Doping Authority v 34 players and one support person* [2014] VSC 635 – application to set aside a

subpoena under the *Commercial Arbitration Act 2011* (Vic) (led by Anthony Rodbard-Bean)

- *Small Business Commissioner reference for advisory opinion* [2015] VCAT 478 – application for an advisory opinion regarding landlords and tenants’ liabilities in relation to essential safety measures (led by George Golvan QC)
- Acting for the contractor in a ‘chess clock’ arbitration before Sir Vivian Ramsey (formerly a judge of the High Court of Justice of England and Wales and editor of *Keating on Construction Contracts*) in an arbitration against a statutory corporation regarding variations, provisional quantity items, latent conditions and delay claims in connection with a highway duplication project (led by Jeff Gleeson QC)

## Publications

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### Articles

- Australia is different: Restitution and the Australian Constitution (2016) 90 *Australian Law Journal* 120
- Falling asleep at its master’s feet?: The *Kable* principle and Royal Commissions (2015) 22 *Australian Journal of Administrative Law* 177
- Why the sound and fury? Enforcing security of payment judgment debts (2013) 29 *Building and Construction Law Journal* 372  
(A version of this article was presented at the Society of Construction Law, Australia’s conference in August, 2013.)
- Revitalising a withered vine: Equity’s penalty doctrine [2013] *Lloyd’s Maritime and Commercial Law Quarterly* 233
- Jurisdictional facts after *Plaintiff M70* (2013) 24 *Public Law Review* 37
- Unravelling the hypothetical bargain (2012) 20 *Restitution Law Review* 74
- ‘I’ll have my bond; speak not against my bond’: Constructive trusts and surplus proceeds from performance bonds (2012) 6 *Journal of Equity* 74  
(Cited by the High Court in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205.)
- On proprietary trespass: The availability and application of hypothetical bargain damages (2012) 1 *Journal of Civil Litigation and Practice* 141  
(A version of this article was presented at the Fourth International Construction Law Conference in May, 2012 and was published in an ebook comprising that conference’s papers titled *Global Challenges, Shared Solutions*.)
- Good faith clauses in construction contracts: Fine sentiments in search of substance [2011] *International Construction Law Review* 5

### Case notes and legislation updates

- The principles of propriety (2014) 88.09 *Law Institute Journal* 45
- Training the constitutional guard-dog: *Condon v Pompano Pty Ltd* (2013) 24 *Public Law Review* 239

- Coordinating statute, contract and restitution (*Equuscorp v Haxton*) (2012) 20 *Restitution Law Review* 130
- When 'trust and confidence' and a 'special disadvantage' overlap: *Bank of Western Australia Ltd v Abdul* (2012) 6 *Journal of Equity* 238
- Unjust enrichment in Australia: High dives into shallow pools (*Mayne v Freeform Pools*) [2012] *Lloyd's Maritime and Commercial Law Quarterly* 16
- The Local Democracy, Economic Development and Construction Bill 2008 [2009] *International Construction Law Review* 378 (with Martin Bridgewater)
- The Construction Contracts Bill [2009] *International Construction Law Review* 129 (with Martin Bridgewater)

## **Education**

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### **Qualifications**

- Master of Laws, University of Melbourne (2017)
- Bachelor of Laws (First Class Honours), Monash University (2005)
- Bachelor of Commerce (First Class Honours), Monash University (2005)
- Postgraduate Diploma in Legal Practice, Skills and Ethics, Monash University (2006)

### **Awards**

- Brooking Prize, presented by the Society of Construction Law, Australia
  - Joint winner of the General Division (2013)
  - Winner of the Student Division (2012)