

Bret Gustafson Barrister



Bret's specialty area is commercial litigation with an emphasis on insolvency, securities, professional negligence (in particular valuers), shareholder disputes and contractual disputes. He also specialises in obtaining urgent injunctions in all nature of proceedings.

AREAS OF PRACTICE

- Insolvency
- Commercial litigation
- Securities and PPS Act
- Professional Negligence
- Commercial Contracts
- Shareholder Agreements
- Injunctions

**FortyEight
Shortland**
Barristers

DDI: +64 9 972 2053
Mobile: +64 21 632 066
Email: bretgustafson@fortyeightshortland.co.nz
Web: fortyeightshortland.co.nz
Web: bretgustafsonbarrister.co.nz/

Level 34
Vero Centre
48 Shortland Street
Auckland 1010

BIOGRAPHY

Bret graduated from Auckland University with an LLB and BA in economics in 1990. Bret commenced practice as a barrister and solicitor in January 1991. From 1999 to April 2009 he was a partner at Kensington Swan Solicitors, and was the national head of the litigation department of that firm. In April 2009 Bret moved from practice as a barrister and solicitor to practice as a barrister sole.

Bret was counsel for one of the named parties in the Winebox Commission of Inquiry that ran for more than a year. He has appeared as counsel in numerous trials, appeared before the Court of Appeal on 14 appeals to the Court of Appeal, and appeared as senior counsel and succeeded in two high profile cases in the Supreme Court and one Privy Council case.

A large part of Bret's work involves being the principal legal adviser for creditors, administrators, liquidators and receivers of insolvent companies and other trading entities. This involves litigation but also opinion work relating to the conduct of the insolvency in question and creditors' rights.

In the last 25 years Bret has been senior counsel in the high profile insolvency cases list below. He has also acted for a number of financial institutions including ANZ Bank, Rural Bank, National Bank, Stockco Limited, Capital Equipment Finance Limited, SH Lock Limited, Easy Factors Limited, FAI Finance Limited and Banco Industrial de Venezuela, CA (BIV) in relation to insolvency and enforcement of their rights.

In 2004 Bret appeared as senior counsel in the Privy Council and obtained judgment against the third party funder of an insolvent party who had brought unsuccessful legal proceedings. This is currently the leading case on this topic in New Zealand and the United Kingdom. (See *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2005] 1 NZLR 145).

Many of the matters upon which Bret has advised, and cases he has argued have involved commercial contracts. Shareholder agreements, sale of businesses, franchise agreements and security agreements are just some of the types of contracts he works with regularly.

Bret also specialises in advising and representing parties in claims involving the Personal Property Securities Act. This legislation is based on the Canadian PPSA legislation and the Uniform Commercial Code of the United States. Bret subscribes to the lexis databases for these jurisdictions and is very experienced using it. This asset and experience allows him access to many cases and articles on the area that opposing lawyers often do not have. This gives Bret's clients a real advantage in assessing and advancing their cases.

Throughout his career Bret has acted for parties in cases involving breach of duty by accountants, lawyers and valuers. These have involved allegations of negligent misstatement, misleading conduct and breach of fiduciary duty. Often these instructions involve financial transactions causing loss to a lender and then an action against valuers or solicitors involved in those transactions.

EXPERIENCE

Bret has appeared as senior counsel in the following notable cases prior to 2013:

- *Capital Equipment Finance Ltd v Dominion Finance Group Ltd HC Auckland, CP349-SD/00*, 16 April 2002.
- *Agio Trustees Company Ltd v Harts Contributory Mortgages Nominee Company Ltd* [2001] 4 NZ ConvC 193,480.
- *Service Foods Manawatu Ltd (in receivership and liquidation) v NZ Associated Refrigerated Food Distributors Ltd* [2006] 9 NZCLC 263,979.
- *Stockco Ltd v Tawhiti-Ariki Ltd HC Auckland CIV-2010-404-3413*, 28/04/11.
- *Westpac New Zealand Ltd v Map & Associates Ltd* [2011] 3 NZLR 751.
- *David Browne Contractors Limited v Petterson* [2018] 1 NZLR 112. This is now the leading case on the interpretation of sections 292, 293, 295 and 296 of the Companies Act.
- *Petterson v Browne* [2016] NZCA 189. This is now the leading case on interpretation of section 299 of the Companies Act.
- *McCullum v McBeth* [2017] 23 PRNZ 467. The Court of Appeal considered the interpretation of ADLS standard terms for a GSA and its enforcement in a receivership.
- *FAI Money Limited v Johnston* [2016] NZCA 219. The Court of Appeal ruled on the interpretation of a trustee's limitation of liability clause in a guarantee.
- *Madsen-Ries v Rapid Construction Ltd* [2013] NZCA 489. The Court of Appeal upheld a finding that section 310 of the Companies Act should be taken into account in determining the quantum of a recovery the Court should award a liquidator pursuant to section 295 of the Companies Act.

In the last 25 years Bret has argued (representing both applicants and respondents) a large number of injunction applications. It is estimated he has argued over 50 injunctions. This extensive experience means he knows the necessary requirements the client, the solicitor and counsel must achieve to obtain or resist the making of enjoining orders. Bret is now viewed as a specialist in this area:

- *Bushetts Transport v Lowes & Ors HC Wellington, CIV-2011-485-131*, 25 February 2011;
- *StockCo v Tawhiti- Ariki Limited CIV2009-404-3413*, 9 June 2010;
- *Sovereign Yachts (NZ) Limited v Hanover Group Holdings Limited HC Auckland, CIV-2007-404-491*, 3 April 2007;
- *BDM Grange Ltd v Parker* [2005] 2 NZELR 523;
- *Argent Networks Ltd v Jones HC Auckland, CIV-2007-404-2944*, 17 July 2007;
- *Ernst & Young Nominees v Kiwi Property Holdings Ltd* [2003] 7 NZBLC 103,897;
- *Agio Trustees Ltd v Reeves Moses Hudig Mortgage Nominee Company Ltd HC Auckland, CP281-SW00*, 8 September 2000; and
- *PC Direct Ltd v Best Buy Ltd* [1997] 2 NZLR 723.
- *Choi v Hong* [2013] NZHC 2973;
- *Eger Properties Ltd v DK Kelsey Ltd* [2014] NZHC 1101;
- *FAI Money Ltd v Johnston* [2014] NZHC 2075. A successful application for a freezing order;
- *Fit Properties Ltd v Zantra Health & Wellbeing Ltd (in liq)* [2014] NZHC 2866;
- *Kenealy v Morton-Jones* [2015] NZHC 297;
- *Interclean Industrial Ltd v Camp* [2015] NZHC 3177;
- *Whitford Properties Ltd (in rec and liq) v Bruce* [2015] NZHC 1426;
- *Yellow Dog Trustee Ltd & Ors v Paul Biddle & Ors CIV/2017-404-00193*;
- *DJ 4 YOU (Waikato) Limited v Pro Fresh Events Limited & Anor CIV:2018-404-1683*.

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Bret has written a number of papers and presented the same at Insol conferences mainly about the law relating to Insolvency and the PPSA.

He has previously written the New Zealand section for a United Kingdom loose leaf publication entitled Tracing of Assets (2004). That publication has now been discontinued.

He has presented the following seminars:

- Developments in Insolvency Law organised by the ADLS, 18 March 2015
- Insolvency law in New Zealand organised by CCH, 17 March 2016
- Seminar outlining the law relating to liquidators' causes of actions focussing on recent case law organised by CCH, 26 May 2016.
- Legalwise seminar on shareholders' agreements and the application of section 174 of the Companies Act, November 2017
- Insolvency seminar paper to the New Zealand Credit and Finance Institute members, May 2018.

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