

CURRICULUM VITAE
OF
STEPHEN (BENJAMIN) WHITTEN
BARRISTER-AT-LAW

Name	(Stephen) Benjamin Whitten LLB (QUT), LLM (Com)
Preferred Name	Ben Whitten
Chambers	35 West Chambers, Level 35, 32 Turbot Street, Brisbane QLD 4000 Telephone: +61 7 3211 0110 Facsimile: +61 7 3211 5410 E-mail: whitten@qldbar.asn.au Website: www.35westchambers.com/benjamin-whitten/
List Clerk	Michael Drummond Barrister's Clerk, Hemmant's List Phone: +61 7 3505 3969 Email: hemmantslist@qldbar.asn.au Website: www.hemmantslist.com.au
Interstate (visited) Chambers	Chancery Chambers, Level 26, 200 Queen Street, Melbourne VIC 3000 Telephone: +61 3 8600 1700 Website: www.chancery.com MTECC – www.mtecc.com.au/senior/s-benjamin-whitten/
LinkedIn	LinkedIn – www.linkedin.com/in/benjamin-whitten-25779865/
Education	St Patrick's Christian Brothers College, Mackay, Queensland Queensland University of Technology – LLB, LLM (Com)
Qualifications	Electrical Fitter Mechanic, 1987 Bachelor of Laws, 1993 Master of Laws (Commercial Law), 2009 Mediator – NMAS Accreditation, 2020
Admissions	Queensland Australian Capital Territory
Affiliations/Memberships	Bar Association of Queensland - Sub-committee member Bar Association of Victoria Australian Bar Association Commercial Law Association of Australia – Director and Chairman of Queensland Division. Australian Insurance Law Association (AILA) Energy and Resources Law (ER Law) Building Dispute Practitioners Society (BDPS)

Chartered Institute of Arbitrators (CI Arb)
 Melbourne Technology Engineering and Construction Chambers (MTECC)
 Society of Construction Law of Australia (SoCLA)

Qualifications Chronology	<p>1983-1987 Electrical Fitter Mechanic, BHP, Queensland</p> <p>1989 – 1994 Articled Clerk, Mackay</p> <p>1994 Admitted as Solicitor</p> <p>1994 – 1999 Solicitor, SR Wallace & Wallace, Mackay</p> <p>1999 Admitted as Barrister to Queensland Bar – first call</p> <p>2002 Admitted as Barrister to Queensland Bar – last call</p> <p>2015 Admitted as Barrister to Victorian Bar (interstate)</p> <p>2020 Mediator – NMAS accreditation</p>
Primary Practice Areas	<p>Commercial and insurance litigation and alternate dispute resolution (including mediation and arbitration), with special interests in legal issues involving the following sectors:</p> <ul style="list-style-type: none"> • Construction and engineering • Energy, mining and resources, • Infrastructure and property developments • Insurance and professional negligence • insolvency
Professional Activities	<ul style="list-style-type: none"> • Presentations for the Queensland Bar Practice course, QUT students (mediations), Queensland Law Society seminar, LexisNexis and Legalwise seminars • Judged Griffith University moots on Evidence • Judged moots at the Bar Practice Course. • Mentoring young lawyers and law students. • Doyles guide recommended leading barrister in Construction Law 2019, 2020, 2021, 2022, 2023, 2024. • Director and Queensland Chair of Commercial Law Association of Australia, from 2020 to present.
Presentations/Papers	<p>March 2021 - Legalwise – Latest Cases and Trends in the Building and Construction Industry in Queensland</p> <p>August 2022 – ER Law – Review recent issues and trends in the Resources and Construction sectors on expert determination, arbitration and penalties.</p>
Sample Cases	<p><i>NB: Whilst many cases settle through mediation or other ADR, below is an extract of some which have resulted in court proceedings.</i></p> <p>Insolvency - Cooloola Dairies Pty Ltd v National Foods Milk Pty Ltd [2005] 1 Qd R 12 – corporations – application to set aside multiple statutory demands - <i>Graywinter</i> principle</p> <p>Insolvency - Van Der Velde v Ng (No 3) [2009] FCA 1563 – insolvency – voidable transactions – whether arrangements for the transfer of a property</p>

constitute transactions rendered voidable and by operation of s 588FE of the *Corporations Act 2001* (Cth) and whether the transfer of the property is rendered void by operation of s 468 of the Act

Insolvency - [Mayaman Developments Pty Ltd v TQ Constructions Pty Ltd](#) [2009] QSC 144 – corporations – application to set aside statutory demand and the application of the “Graywinter” principle

Commercial - [Brinsmead and Ors v Property Solutions \(Australia\) Pty Ltd](#) [2009] QSC 223 – practice and procedure - disclosure and particulars in breach of contract case

Property - [Zen Ridgeway v Adams](#) [2009] 2 Qd R 298 – removal of caveat - where applicant is registered owner as trustee of land – where judgment awarded against applicant for liability incurred as trustee – nature of applicant’s right of indemnity out of trust assets – whether respondent creditor may be subrogated to the applicant trustee’s right of exoneration or lien

Succession – property – wills, probate and administration – jurisdiction and discretion of the court – handwritten document sought to be admitted to probate despite non-compliance with s 10 Succession Act – whether discretion under s 18 should be applied - [In the Will and one Codicil of Julia Lesley Cleland, deceased](#) [2009] QSC 189

Construction – adjudication – wh jurisdictional error as no construction contract existed – wh merely loose form of understanding that applicant was to pay respondent - wh adjudication decision is void: [Surfabear Pty Ltd v GJ Drainage & Concrete Construction Pty Ltd](#) [2009] QSC 308

Construction – adjudication – whether decision void for jurisdictional error – whether valid payment schedule given by email: [Gisley Investments Pty Ltd v Williams & Anor](#) [2010] QSC 178

Construction - [57 Moss Rd Pty Ltd v T&M Buckley Pty Ltd t/a Shailer Constructions & Anor](#) [2010] QSC 278 – construction – practice and procedure – application for security for costs in BCIPA judicial review application

Construction – pleadings – joinder – discretionary factors – delay - [MDC Developments Pty Ltd v G & M Van Der Vegt Nominees Pty Ltd](#) [2010] QCAT 489

Construction - [Neumann Contractors Pty Ltd v Traspunt \(No 5\) Pty Ltd](#) [2011] 2 Qd R 119 – construction – administrative – judicial review application on appeal re BCIPA claim affected by misleading or deceptive conduct

Construction - [*James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd and Ors*](#) [2011] QSC 145 – construction – administrative – judicial review of BCIPA adjudication and whether principle of severance applies

Construction - [*Sweeney v Magnay*](#) [2011] QCAT 648 – construction – 3 week trial in QCAT involving building dispute

Construction - [*VK Property Group Pty Ltd and Ors v Conias Properties Pty Ltd and Anor*](#) [2011] QSC 54 – construction – administrative – judicial review application to set aside adjudication under BCIPA

Construction - [*Australian Timber & Trusses Pty Ltd v T & M Buckley Pty Ltd*](#) [2012] QSC 110 – contracts – construction – trial of whether s.42 QBSA Act (unlicensed work) applied to a particular manufacture and supply contract

Property - [*Thornton Avenue Pty Ltd v Body Corporate for the Avenue*](#) [2013] QCAT 39 – body corporate – contracts – trial of application for remuneration review of caretaker and manager involving statutory interpretation

Insurance - [*Nucifora v AAI Ltd*](#) [2013] QSC 338 – damages – measure and remoteness of damages – where plaintiff injured in motor vehicle accident – where plaintiff employed as general manager of coal mine – whether plaintiff suffered loss of earning capacity in the future despite no current loss – where loss of chance awarded - where claim for paid services in the future.

Appeal – Evidence – Without Prejudice negotiations – admissibility – ambit of mediated agreement – whether included a third party claim between the parties: [*Coomber v Meiklejohn*](#) [2014] QDC 95

Construction - [*Wright v QBSA \(now QBCC\)*](#) [2015] QCAT 16 – construction – licensing – review of QBSA decision relating to “excluded person” status, and “permitted individual” status and applying “Dinsey” test

Construction - [*John Urquhart t/as Hart Renovations v Partington & Anor*](#) [2016] QCA 87 – contracts – building, engineering and related contracts – regulation for payment for “enclosed stage” – whether enclosed stage reached – where the applicant performed domestic building work on the residence of the respondents – where a dispute arose in connection with the respondents’ failure to pay the applicant’s progress claim – where the respondents assert the works had not reached the enclosed stage and there were defects – where in first instance the Queensland Civil and Administrative Tribunal Member concluded the enclosed stage had been reached and the respondents’ failure to pay the progress claim put them in substantial breach of the contract – where the Appeal Tribunal of the Queensland Civil and Administrative Tribunal concluded the Member had erred in finding the enclosed stage had been reached – whether the Appeal Tribunal erred in its interpretation of “structural flooring” and its conclusion

on the topic of whether the enclosed stage of the building works had been reached – Held: appeal successful.

Commercial - [*Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous Engineering Pty Ltd & Anor trading as Monadelphous Muhibbah Marine*](#) (2016) QSC 096 estoppel – issue estoppel – Anshun estoppel – BCIPA – commercial list hearing involving multiple issues in a BCIPA payment claim and adjudication application with over AUD \$35M in dispute, including novel claims of issue estoppel, abuse of process and Anshun estoppel in the BCIPA adjudication process

Corporations – winding up in insolvency – statutory demand – application to set aside demand - offsetting claim – wh genuine dispute exists: [*Building Solutions and Waterproofing Pty Ltd v Robin H Wright Pty Ltd*](#) [2017] QSC 110

Contract – property – breach of contract - specific performance and damages - [*Long & Anor v Hijazi*](#) [2017] QDC 187

Commercial - [*Global Scrap Trading Pty Ltd v Graveson*](#) [2017] QCA 080 Gotterson JA 2 May 2017 – refusal of stay of consent orders pending appeal

Insurance - [*McGrory v Medina Property Services Pty Limited*](#) [2017] QCA 234 – workplace health and safety – damages – loss of earning capacity – appeal from District Court

Mortgages – Equity – Undue influence and economic duress - [*Suncorp-Metway Ltd v Nagatsuma & Anor*](#) [2019] QSC 16

Construction – adjudication decisions – jurisdictional error - where two different projects involve identical parties, whether claim for payment under multiple contracts – whether terms of contract incorporated, varied or waived: [*S.H.A. Premier Constructions Pty Ltd v Lanskey Constructions & Ors*](#) [2019] QSC 81

Contracts – formation of contract – contract implied from conduct – where identity of loan recipient is contested – where terms of repayment of the principal loan and interest are contested – where no direct evidence of any oral contract – wh summary judgment available: [*Walsh & Anor v Iker & Ors*](#) [2019] QDC 225

Commercial - Construction - [*Lanskey v SHA Premier Constructions Pty Ltd*](#) [2019] QSC (unreported, Dalton J, 28 June 2019) – successfully defended interlocutory injunction and stay application seeking to restrain enforcement of adjudication decision judgment for \$1.4 million on basis of alleged jurisdictional error.

Equity – Joint venture Agreement for property development – Fiduciary Duty and Obligations – Scope Generally – interpretation – express exclusion

of Fiduciary Relationship – wh no fiduciary duty proscribing conduct arose in the circumstances: [Eaton v Rare Nominees Pty Limited \[2019\] QCA 190](#)

Construction – adjudication – where appellant served multiple volumes of adjudication application, with a document containing all substantive information required by QBCC “approved form”, but failed to serve actual “approved form” until 12 business days, when respondent notified appellant of the form being missing – where respondent alleged service had not been effected under the Building and Construction Industry Payments Act 2004, as had not been served “as soon as possible”, even though no date for service expressed in Act – wh “as soon as possible” should be implied in Act by s 38(4) Acts Interpretation Act 1954 (Qld) – wh adjudicator’s jurisdiction not enlivened until proper service of application – wh jurisdiction denied where service late and not “as soon as possible”: [Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor \[2019\] QCA 177](#)

Real Property – indefeasibility – presumed lane in Brisbane CBD – for this proceeding the lane was presumed to be a public road arising from subdivision in 1876 by Grammar School Trustees – Torrens Title – indefeasibility of title to lot owner registered under Land Title Act 1994 (Qld) – whether title of registered owner subject to historical public rights over (presumed) road: [Orb Holdings Pty Ltd v WCL \(Qld\) Albert Steet Pty Ltd \[2019\] QSC 265](#); overturned on appeal: [\[2020\] QCA 198](#); Special leave application to the High Court refused.

Administrative Law – construction - review of QBCC decision under Home Warranty Insurance Scheme – wh works defective – wh QBCC should indemnify applicant – wh extension of time to make insurance claim should be granted: [Mark Richard Formosa v Queensland Building and Construction Commission \[2020\] QCAT 93](#)

Contracts – Building, Engineering and Related Contracts – Remuneration – wh works in the form of installation of waste tank in proposed residential lot as part of sewage system was “building work” – wh license required – wh adjudication decision under *Building and Construction Industry Payments Act 2004* was void - [Waterford PPG Pty Ltd v Civil Constructors \(Aust\) Pty Ltd \[2020\] QSC 8](#)

Construction – adjudication – whether adjudication decision is void for jurisdictional error by reason that the applicant took an inconsistent position to a case pleaded in the Supreme Court – whether application vexatious – whether adjudicator misconceived his functions for determining an entitlement to retention moneys as a component of a final payment claim – where adjudicator failed to value certain defect rectification offsetting claims, despite recognizing he was required to value them – whether such an error was jurisdictional error or accidental or erroneous omission: [SHA Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd \[2020\] QSC 307](#)

Commercial – contracts – expert determination - interpretation and other matters - sale and purchase of coal mine in Queensland – completion accounts requiring expert determination – whether determination void for manifest error or failing to undertake task instructed to perform - [Middlemount South Pty Ltd v Anglo American Metallurgical Coal Assets Pty Ltd & Anor \[2019\] QSC 211](#); overturned in part on appeal: [\[2020\] QCA 132](#)

Contracts – misleading or deceptive conduct – interpretation of contracts: [Beachmount Pty Ltd v Iker Partnership & Anor \[2020\] QSC 379](#)

Commercial – guarantee and indemnity – rights of surety – rights of subrogation – whether debt written off is payment in full enlivening right of subrogation – specialty debts – previous Deed of Release and Discharge – limitation of actions on contracts, quasi-contracts and torts – principles of construction of Deed – Six summary judgment applications in trial list – Removal of Caveat - [Smits v Cugola & Ors \[2021\] QSC 164](#)

Costs – Indemnity costs – Calderbank offer - [Smits v Cugola & Ors \[2021\] QSC 161](#)

Guarantee and indemnity – rights of surety – rights of subrogation – whether subject to payment of whole debt – equitable defences – limitation of actions – deed of release – [Smits v Cugola](#) (2021) 8 QR 175, 10 Jun 2021 Procedure – Civil Proceedings in State and Territory Courts

Contracts – Construction of Commercial Contract Terms – Where the plaintiff claims for sum due under an informal contract to drill a water bore – Where the plaintiffs gave no warranty that an aquifer would be intersected – Where no aquifer was tapped – Where the defendants contend that the plaintiff failed to perform the contract by not drilling to a true vertical depth of approximately 1,200 metres – Whether the plaintiff undertook the drilling work with reasonable care and skill – Whether the contract was an entire contract – Whether the parties agreed to end the drilling works or the plaintiff abandoned the works. [Drill Engineering & Pastoral Company Pty Ltd v Seymour & another \[2022\] QDC 165 \(sclqld.org.au\)](#)

Federal Court Practice and Procedure – corporate insolvency - application for leave to amend Originating Process - where application made before Points of Defence filed - where no prejudice to the defendants: [LFI Ventures Pty Ltd v Carter, in the matter of Australian Vocational Learning Institute Pty Ltd \(in liq\) \[2021\] FCA 1555 \(fedcourt.gov.au\)](#) per Goodman J

Construction pleadings – strike out applications – where further particulars to be provided on receipt of expert evidence – wh case pleaded for plaintiff should have been based on expert evidence first –

where defendant's counterclaim missing critical elements of fact to establish a reasonable cause of action – plaintiff's application to strike out counterclaim successful, defendant's application to strike out statement of claim unsuccessful – ***Hestbay Pty Ltd atf the J & F Property Trust v One Sector Pty Ltd*** [2022] QSC 25

Evidence– Admissibility– Expert Opinion Evidence– Whether the witness is an expert in a field of specialised knowledge – Where the witness lacked expertise to give expert opinion evidence on the subject matter of the issues at trial. [Drill Engineering & Pastoral Company Pty Ltd v Seymour \[2022\] QDC 136 | District Court of Queensland Caselaw \(queenslandjudgments.com.au\)](#) –

Contracts – Construction of Commercial Contract Terms – Seymour v Drill Engineering & Pastoral Company [2023] QCA (reserved pending decision) – whether miscarriage of justice from conduct of appellant's case at trial – whether reasons of trial judge adequate

Commercial – guarantee and indemnity – whether trial judge erred in dismissing claim, whether Deed of Release binding as agreement, whether right of subrogation existed – whether appellant's claims for equitable contribution were statute barred by the Limitations of Actions Act 1974 (Qld) – where appellant sought leave to reopen proceedings – where appellant sought leave to introduce further evidence – appeal dismissed [Smits v Cugola & Ors \[2022\] QCA 262](#)