

Philip Bambagiotti

Year of Call: 2018
Solicitor: 1992
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Overview

Philip Bambagiotti is an experienced barrister at the NSW Bar in Australia practising in commercial law with a focus on building & construction, infrastructure, property and international law. He takes a broad and pragmatic approach to dispute resolution beyond traditional litigation, having a strong focus on arbitration as well as mediation, negotiation and overall dispute management and solutions.

Philip is admitted as a barrister in England & Wales as well as in Australia. He is a registered foreign lawyer with the Singapore Commercial Courts (SICC). He is a fellow of a number of international commercial organisations, and is an arbitrator on the AIAC and THAC panels. He holds an APEC travel card, allowing him visa free entry for business in most of the countries in the APEC group: including China, Singapore, Hong Kong, Malaysia and Canada.

He conducts a busy international international dispute resolution practice with a focus in London, East Asia (principally Hong Kong and China), the Middle East (notably Dubai) and South East Asia (Singapore, Thailand).

Philip joined 3PB in September 2019 to further develop this international commercial and construction practice. His principal areas of practice include:

- Commercial
- Building & Construction
- Insurance
- Planning & Development
- Property and strata matters
- Professional negligence
- Tax disputes
- Transport
- Arbitration, International Arbitration, Security of Payments claims and judicial review

Philip appears as an advocate in courts, arbitrations, and inquiries as well as in mediations and negotiations - with a particular emphasis on acting as an independent party representative for international, multicultural and mulitlingualtransactional and dispute negotiations. Philip also accepts appointment as an arbitrator, a mediator, an adjudicator and a neutral evaluator.

Apart from traditional advocacy, in courts, tribunals, inquiries, and contested applications and disputes, Philip is experienced in strategic and tactical planning and dispute resolution. Clients often consult Philip early in the life of a potential dispute for long term planning and dispute management, as well as with respect to planning commercial transactions and developments.

Philip has long enjoyed a successful practice acting directly and via in-house solicitors and accountants for businesses, insurers (including property insurers, professional indemnity insurers and reinsurers), governments (including the Australian Commonwealth Government, the NSW Government and its instrumentalities and local government bodies, as well as specialist government entities such as NSW Self-Insurance Corporation and the Australian Tax Office), banks and financiers, industry groups, property developers, builders and subcontractors, building professionals, and landlords.

He takes a collegiate approach and distinctively pragmatic team approach to legal advice and assistance. He accepts retainer relationships as well as ad-hoc instructions. Some in-house as well as private practice solicitors retain Philip to provide point or issue specific advice or even representation within the framework of a wider dispute (as a specialised supplement to a transactional or dispute legal team).

Experience as a Solicitor

As is the practice in Australia, he was a solicitor for some years before going to the NSW Bar. He worked in Sydney with commercial law firms Dunhill Madden Butler and Gadens Ridgeway, where he was promoted to a Senior Associate in 1996 in their commercial and construction law teams. He was called to the bar shortly afterwards, but retains a close understanding of solicitors' commercial practice and maintains good and close relationships with his solicitors.

Recent speaking roles and publications

Philip is the author of Building Disputes & the Home Building Act 1989 (of which the highly awaited 2nd edition is under way). He is a popular presenter, and regularly speaks and presents seminars & workshops in Australia, Europe and in Asia (predominantly in Hong Kong & PRC).

He presents on a range of commercial & construction related topics, principally international arbitration issues and management, building /construction issues (including contract drafting, dispute management, professional liability, residential building issues (including aluminium cladding), commercial & residential property & equity, commercial contract issues, guarantees, security of payment laws /adjudication/ and judicial review (in Australia and Hong Kong), conflict of laws issues, international trade (including Belt & Road), as well as having a particular interest in the Vienna Convention for the International Sale of Goods (CISG).

For example, Philip recently spoke on topics such as:

- the Implications, Issues and responses to the Aluminium Cladding fires and the consequent changes to the statutory regulation of bulding work (Resolution Institute and Legalwise)
- Opportunities & Challenges when Belt & Road meets Arbitration under the Model Law? (MLAANZ) Practical Case Management of Complex Real Property Disputes (Bench TV)
- the 'ipso facto' amendments to Australian Corporations law - relating to insolvency issues (Law wise)
- Practical case management of real property disputes (UNSW Law)
- Indemnities & Guarantees: the Tricky Bits Explained (NSW Property Law Conference)
- Comparative Insights into International Case Management, with Prof Michael Hwang SC (ABA Convergence Conference, Singapore)

From 2016 to 2018 in Asia, Philip has delivered papers in Hong Kong, PRC and Thailand on:

- the NEC3 contract and its use in Hong Kong
- Adjudication under the proposed Hong Kong seurity of payments regime (for the Hong Kong DoJ)
- the use and presentation of evidence in arbitrations and other commercial disputes including BIM Improved service delivery in international arbitration
- Delay & Disruption Protocol (Society of Construction Law)
- Convergence of substantive law systems (common law and civil law and hybrids) in international arbitration Ethics of counsel in international arbitration (in Beijing)

Philip is a speaker at the Asia Pacific Mediation Forum in South Korea in November 2019 and will be at the CIETAC arbitration competition in Beijing that month as well.

Philip is a Fellow of the International Dispute Resolution Academy IDRA) and has been a delegate for the IDRA course in international arbitration in Shaghai PRC in 2016 and Beijing PRC in 2017, and represents and presents for the IDRA. The IDRA focuses upon teaching arbitration, mediation, and advocacy skills in the PRC.

As well as authoring the leading text on residential building dispute in NSW: "Building Disputes and the Home Building Act 1989" (NSW) published by Thomson Reuters (2012) (with a 2nd edition in preparation), he is the general editor of the Australian Building Service and the author of the residential building chapters in the NSW Building Service (both published by Thompson Reuters). He is also a contributing author (Ch 3) to Construction Law in Australia (4th ed, Bailey, Lawbook Co, Sydney 2018).

Recommendations

Philip Bambagiotti – Tenth Floor St James Hall Chambers Philip Bambagiotti – 'Philip runs cases hard for his clients'.
Legal 500 2025 - Australia Bar - Construction, Infrastructure And Property

Philip Bambagiotti – Tenth Floor St James Hall Chambers `Philip has an encyclopedic knowledge of the law and practice, and his recollection of facts and issues is exceptional.'
Legal 500 2024 - Australia Bar - Construction, Infrastructure And Property

`Attention to detail, well informed about up to date case law and developments, very experienced advocate, commercially and practically minded.`
Legal 500 2023 - Australia Bar - Construction, Infrastructure And Property

Academic qualifications

B Ec (Macq), LLB (UNSW), G Dip Leg Prac (UTS)

Adjunct Professor of Law, University of Notre Dame, Sydney

Professional qualifications & appointments

- Registered Foreign Lawyer
- Barrister at the Bar of England & Wales
- Barrister at the NSW Bar, Australia
- Arbitrator & Fellow, Asian International Arbitration Centre (AIAC)
- Arbitrator & Fellow, Thailand Arbitration Commission (THAC)
- Counsel appointed to the Civil list, Hong Kong Department of Justice
- Regional Secretary (Region XVI Oceania), Union Internationale des Avocats (UIA)
- Fellow, Chartered Institute of Arbitrators (CIArb)
- Fellow, International Dispute Resolution Academy (IDRA)
- Fellow, Tax Institute (Australia)
- Accredited Mediator (Australian Disputes Centre)

Professional bodies

- Society of Construction Law (Australia) and (Hong Kong)
- Union Internationale des Avocats/International association of Lawyers (UIA)
- Australian Bar Association, Member: Futures Committee
- Australian Construction Law Discussion Group - Member
- Australia Insurance Law Association (ALA) - Member
- Maritime Law association of Australia and New Zealand (MLAANZ) - Member
- Australian Centre for International Commercial Arbitration (ACICA) - Member
- International Bar Association (IBA) - Member
- International Chamber of Commerce (Australia) (ICC)
- NSW Bar Association (Australia)
- French Australian Lawyers Society - Member
- Lighthouse Club, Australia - Member
- Resolution Institute, Australia (formerly Institute of Arbitrators & Mediators, Australia
- Union Internationale des Avocats (UIA) - Regional Secretary - Oceania
- Union Internationale des Avocats (UIA), Member of the Governing Board
- Chartered Instutute of Arbitrators (ClArb), Hong Kong and AustraliaNSW Construction & Infrastructure Committee, Law Council of Australia, Business Law Section (and as such, deputy Chairman of the Committee)
- Member, Commercial Litigation Advisory Committee, NSW College of Law (Masters of Applied Law)
- Past Member of the NSW Bar Association ADR Committee
- Past Chairman of the Fair Trading Advisory Council

Direct Access

Philip Bambagiotti is qualified to accept instructions directly from members of the public and professional clients under the Direct Public Access scheme.

Expertise

Construction and engineering

Philip Bambagiotti practice focuses on all aspects of building, engineering and construction law – domestic and international. He acts in "traditional" building disputes such as those about building contracts, consultants contracts, defects, variations, delays and technical issues.

However, as is the Australian approach, his busy practice though extends to commercial litigation dealing with issues affecting the building and construction industry, such as certifier & building consultant negligence, latent defects in buildings and losses suffered, development contracts, property rights disputes, insurance & insurance disputes, contract /tort/ and restitutionary claims, associated planning issues – as well as disputes arising from joint ventures, shareholder agreements, partnering projects, directors & officers liability, related insolvency & corporate restructuring, financing disputes, and the like.

He appears as a barrister in courts and tribunals, as well as in arbitrations, mediations, adjudications and as a neutral evaluator.

Philip is long-regarded as one of the foremost practitioners in the specialist area of Building & Construction Law. Apart from his extensive experience in acting for different interests in construction disputes, he has also authored the leading text on residential building disputes in New South Wales, Building Disputes and the Home Building Act 1989 (NSW), of which a 2nd Edition is underway. He is the general editor of the National Building Service.

He has a particular interest in international arbitration. He is a Fellow of the Chartered Institute of Arbitrators (FCIArb) and is a panel arbitrator with the Thailand Arbitration Center (THAC) and the Asian Internaitonal Arbitration Center, based in Malaysia (FAiAC).

Being Australian, French, & Italian, Philip has always had an international element to his practice. He has been a member of the Union Internationale des Avocats / International Association of Lawyers (UIA) since his first year at the bar (for more than 20 years), and has recently been appointed the UIA's Regional Secretary for Oceania (which puts him on the UIA Governing Board).

He is very active in arbitration and mediation practice, particularly in East Asia, and is a member of a range of Construction and Arbitration law organisations operating in the region. Apart from the SICC (where he is a registered foreign practitioner) and CIArb (where he undertook all the qualifying elements in Hong Kong), he is a Fellow of the International Dispute Resolution Academy (Hong Kong), a member of the Society of Construction Law (Hong Kong), a Fellow with the THAC, and a Fellow with the AiAC. He is also a member of a range of international law organisations, such as the ICC, and the IBA.

Notable cases include :

Mick Fabar Constructions P/L v Lingrp P/L[2019] NSWSC 158 (26 February 2019) where he defended an appeal from a lower court decision on a building case –involving issues of formation of contract and repudiation.

*Vella v Mir[2019] NSWCATAP 28 (31 January 2019)*in which he appeared for the builder in a successful appeal in a building case. This decision is notable for the adoption of the submission that the terms of sec 18F Home Building Act 1989 are a jurisdictional issue, rather than being properly characterized as a limitation provision.It effectively reverses the way that those issues are to be dealt with in Statutory Warranty claims (and will apply to proceedings in courts as well as in the tribunal).

Indorato v Ottaviano t/a Transbuild Constructions[2019] NSWCATAP 115 (20 January 2019) in which appeared for the builder in successfully defending an appeal, on questions of formation of building contracts, and the proper inference to be drawn from payments.

O'Neill v Community Association DP 270158[2018] NSWCATAP 272 (20 November 2018): he represented the community association in an appeal from a community management association dispute and succeeded, including in an application for

indemnity costs (the first indemnity costs award for the costs of an appeal made by the NCAT appeal panel).

The Owners –Strata Plan No 81837 v Multiplex Hurstville & Anor[2018] NSWSC 1488 (4 October 2018) : a separate question involving the question of equitable title to land and whetherit accrues by the aggregation of contract rights of use & enjoyment, the meaning of 'successor in title', and whether application for an occupation certificate can be made in trade or commerce for the purposes of trade practices legislation(NSWSC).

The Owners –Strata Plan No 66375 v King[2018] NSWCA 17 3 Auguust 2018) : dealing with 'developers' for the purposes of sec 3A of the Home Building Act 1989, the process of drawing inferences, and 'design defects' for the purposes of the Act (NSWCA).

Ku-ring Gai Council v Chan (No 2)[2018] NSWCA 73 (11 April 2018) : that involving the appropriate approach to consideration of offers to settle (Calderbankclaims and offers of compromise) in the circumstance of contested economic loss claims in negligence involving novel duties of care.(NSWCA)This case has since been cited in costs arguments for resisting applications for indemnity costs.

Dinov v Allianz Australia Insurance Ltd[2017] NSWCA 270 (20 October 2017) involvingthe extent and applicability of the long stop limitation provisions for building claims in sec 109ZK of the Environmental Planning & Assessment Act 1979.(NSWCA)

Ku-ring-gai Council v Chan[2017] NSWCA 226 (7 September 2017), being the local council's appeal from Chan v Acres, involving a case for a claim in negligence for economic loss arising from allegedly faulty certification of building work.(NSWCA). This case deals withthe question of the extension of duty of care to statutory building certifiers, and is an important case on the application of the principles identifying economic loss in the building/construction context. He acted for the Council in defending the application for special leave to the High Court, where that application was dismissed.

Chan v Ku ring Gai Council[2018] HCASL 21.(HCA) 2017 : commercial arbitration between an architect and developer regarding a dispute as to the extent of the architect's retainer, allegations of breach of retainer, and reconciliation of claim (conducted by grade 1 arbitrator)

The Owners –Strata Plan No 76841 v Ceerose Pty Ltd [2017] NSWCA 140 (23 June 2017) which involved the question of the jurisdiction of the Court in limiting the scope for plaintiff recovery on a later amended claim.(NSWCA)

The Owners Strata Plan No 66375 v Suncorp Metway Insurance Ltd (No 2) [2017] NSWSC 739 which involved the question of agency in the execution of building contracts for the purposes of the Home Building Act 1989.(NSWSC). He appeared in the appeal, see The Owners –Strata Plan No 66375 v Kingabove.

Foyv Calliden Insurance[2017] NSWDC 33 (3 March 2017) per Hatzistergos DCJ involving questions of the true construction of statutory periods of grace in insurance provisions of the Home Building Act 1989 as well as the constitutional validity ofstatutory amendments to that Act by reference to the Insurance Contracts Act 1984 cvCommonwealth Constitution Act 1900(NSWDC).

Re Ply (ACT) P/L (in admin) Acton Developments (ACT) P/L v Ply (ACT) P/L (in admin)in the Supreme Court of the Australian Capital Territory, No: SC522/2016, 3 March 2017 per Walmsley AJ, an application for leave to proceed against a company subject to administration.(ACTSC)

Wesiak v D&R Constructions (Aust) P/L[2016] NSWCA 353 was an appeal from the NCAT Appeal Panel dealing with the nature and operations of the principles of repudiation of contract, as well as the powers of the tribunal on appeal.(NSWCA)

Chan v Acres (No 3)[2016] NSWSC 1389 was a consequent costs argument tothe Chan v Acres' case, the issue involved successful opposition to claims for indemnity costs, as well as issues involving Sanderson and Bullock type costs orders.(NSWSC).

Hogan v Trustees of Catholic Aged Care Sydney[2016] NSWCATAP 188 which was an appeal involving issues of the financial management of a retirement villageper Retirement Villages Act 1999 (NSWCATAP).

International commercial arbitration between an international professional services firm and a national government regarding the provisions of services for substantial infrastructure projectin Asia-Pacific (2016).

Gardez Nominees Pty Ltd v NSW Self Insurance Corp'n [2016] NSWSC 532 (28 April 2016) in which he appeared for a mortgagee in possession seeking the benefit of the Statutory Warranties under the Home Building Act and indemnity under Home Warranty Insurance. (NSWSC).The case, however, turned upon the proprietary nature of unregistered interests in Torrens Title land and the nature of 'title'. It is the first such consideration of these issues.

Chan v Acres[2015] NSWSC 1885 (11 December 2015) in which he appeared for a local council defending a case for a claim in negligence for economic loss arising from allegedly faulty certification of building work. (NSWSC)This is now one of the significant case on this point in NSW, following as it does the question of the extension of duty of care to statutory building certifiers.

Wang v Kaymet Corporation Pty Ltd [2015] NSWSC 1459 (6 October 2015) in which he successfully defended a group of developers who rescinded off-the-plan sales contracts.(NSWSC)The case is of great significance and has aroused a wide range of media response and our success led to an urgent statutory amendment. This is the first modern case dealing with the topical sunset clause issue in off-the-plan contracts.

In late 2015, he appeared for the owners' corporation in the Inquest into the fire and death of Connie Zhang, which occurred following a prominent and tragic apartment block fire in Sydney. The issue involved the proper construction and application of the building code tothe building. This led to recommendations that are likely to lead to statutory reform.Further, the Zhanginquest has led to now current Supreme Court proceedings, in which he is briefed.(NSWSC)

De Armas v Peters [2015] NSWSC 1050, in which he appeared for the plaintiff insurer on an appeal involving the application of extended res judicata principles and the nature of subrogated interests in choses in action. This was the first consideration of that particular aspect of those principles at superior court level.(NSWSC)

In 2014 and 2015, he appeared in the latter of a series of cases involving the capacity of the statutory owners' corporation to bring proceedings for building defects. These included: *The Owners -Strata Plan No 70798 v Bakkante Constructions Pty Ltd(2014) 88 NSWLR 513, [2014] NSWCA 410* as well as a number of others.(NSWCA)

He appeared for the respondents in the leading Australian case on tort claims for economic loss in relation to latent defects in buildings: *Brookfield Multiplex v The Owners –Strata Plan No 61288 (2014) 254 CLR 185, [2014] HCA 36 (8 October 2014).* This case has re-defined the way that such negligence cases are decided.(HCA)

He appeared for the Building Insurers Guarantee Corporation in The Owners -Strata Plan No 61162 v Lipman; The Owners - Strata Plan No 61162 v Building Insurers' Guarantee Corporation,a claim against a statutory insurer for defects in an apartment building. (NSWSC). This decision then led to the significant decision on costs: The Owners -Strata Plan No. 61162 v Lipman The Owners Strata Plan No 61162 v Building Insurer's Guarantee Corporation[2014] NSWSC 622 (23 May 2014) providing an overwhelming success for the client.(NSWSC)

In 2012, he appeared in a substantial commercial arbitration, between a major institutional property owner and a building company. The matter involved the construction of a defective façade and awning to a feature building in Sydney. The case involved complex technical evidence as to the construction of a structural glass awning including the properties of the glass.

In 2011, he was briefed by a government to advise and to develop strategy in respect of a large scale re-insurancedispute it was having with the liquidators of a major now insolvent insurer. The sums involved were substantial, and the issues of a complex technical nature (for reinsurance). This matter settled.

*In Associated Translators and Linguists Pty Limited and Commissioner of Taxation(2010) 78 ATR 937, [2010] AATA 260 (14 April 2010),*he appeared, for the Commissioner, in a substantial hearing involving a contest a to the Superannuation Guarantee charge.(AAT)

In 2010, in *The Owners –Strata Plan No 61759 v Vero Insurance Ltd(In the Supreme Court of NSW (Technology & Construction List –No: 55033/07).* The case was a substantial strata building defects insurance claim, which settled at the mediation.(NSWSC)

Allianz v Waterbrook [2009] NSWCA 224 (10 August 2009) which is important authority on causation and the structuring of the operation of the Statutory Warranties and the Home Warranty Insurance in the Home Building Act 1989. This case largely re-directed the development of the Court's approach to subsequent purchaser liability as to this Act.(NSWCA)

In The Owners SP 69352 v Vero Insurance Ltd (Home Building)[2009] NSWCTTT 396 (22 July 2009), he appeared in a leading case as to the true construction of Home Warranty Insurance policies in relation to owners corporations. That case ultimately went on appeal to the Court of Appeal, and represents one of the major authorities on the question.(NSWCTTT)

Property

Planning & environmental law are an integral part of a construction/property practice, and has always been a feature of his practice. Apart from commercial and similar kinds of matters for and against local government and planning bodies, he has also been involved in matters such as:

- Advised a local government authority as to development obligations and options in respect of the future and remediation of a large regional tipping facility.
- Advised upon the options for re-development on a complicated strata site (that involved a town-house development with a substantial undeveloped stage). The developer wanted to expand the, as then, incomplete part of a staged development. The issue being the opposition of the owners of the rest of the development and the validity or the consent.
- Acted in an application for the change of use of a workshop to a specialised medical facility. This involved contested appeal tothe planning panel and thereafter, strategy for merit appeal to the relevant Court.
- Advises in matters involving encroachment and compulsory easements for access, including a case involving claims for rectification of a common driveway and large retaining wall arising from disputes as to the construction of a deposited plan (and the consequence of the construction of that plan).
- various disputes about relative property rights and obligations arising from strata plans and the development/redevelopment of strata sites.

He has acted for, and provided advice to, local councils in enforcement of environmental and planning laws, as well as in respect of challenges to consents and assessments. In particular, he has acted for the Penrith City Council in a range of matters over the years, and continue to be retained by them for specialist matters.

Articles

3PB's specialist construction barrister Philip Bambagiotti issues a new guide for insurers about how a well-managed subrogation strategy helps to realise the real value of insurance outlay by vigorously advancing offsetting insurance claims.

View Article

3PB's dual UK-Australia qualified barrister Philip Bambagiotti,a construction and building defects expert, tackles the serious issue of mould growth in council and privately-owned buildings, substandard ventilation and poor design.

View Article

Philip Bambagiotti's analysis of the notices & orders provisions of the Building Safety Act 2022 (UK).

View Article

The UK's New Building Product Safety Regulator - Some Reflections from Abroad

Specialist construction law barrister Philip Bambagiotti comments on the UK's new Building Product Safety Regulator.

View Article

COVID-19 and "Force Majeure" of contracts – Not so fast! Philip Bambagiotti takes a contrary view to the new group-think which seems to reach for 'force majeure' as the first answer to the challenge to performance of existing contracts posed by the Covid-19 crisis.

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