

Commercial jurisdiction of the District Court: surprising, inconvenient, unfortunate?

BY MICHELLE CASTLE

A number of recent cases have considered the District Court's jurisdiction in commercial matters. There is a difference in approach between the Court of Appeal and the Supreme and District Courts. It is hoped that either the Court of Appeal or legislation will clarify the issue soon.

Jurisdictional limits

Most practitioners are aware of the monetary limit to jurisdiction. It is \$750,000 (*District Court Act 1973 ('DCA') s 4(1)*), other than in certain claims (e.g. motor accidents, workers compensation, where there is consent to unlimited jurisdiction and in some circumstances where a defendant has not objected to an extension of the jurisdiction).

Less familiar to many practitioners are the subject matter limitations to jurisdiction. It is with these limitations that this article is concerned.

Source of jurisdiction

The District Court is a court of limited jurisdiction: it has only the jurisdiction given to it by statute and such power as may be implied from the express statutory grants of power (*Pelechowski v Registrar, Court of Appeal* [1999] HCA 19; 198 CLR 435). There are various specific grants of jurisdiction under the *DCA*, such as in relation to certain equitable claims, frustrated contract claims, *Contracts Review Act* claims, *Fair Trading Act* claims and grants of jurisdiction under other legislation. However, s 44 *DCA* is the primary general grant of power. It provides, relevantly, that the Court has jurisdiction to hear and dispose of 'any action of a kind... which, if brought in the Supreme Court, would be assigned to the Common Law Division of that Court'.

Forsyth v Deputy Commissioner of Taxation

In *Forsyth v Deputy Commissioner of Taxation* [2007] HCA 8; 231 CLR 531 (*'Forsyth'*) the High Court stated that, '[t]he construction of par (a)(i) of s 44(1) of the District Court Act turns on the statutory provisions governing from time to time the assignment of business within the Supreme Court of New South Wales' (at [24]). But that statement was qualified by the High Court's ultimate finding that the correct approach to construction was that s 44(1) 'must be construed as referring to



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Snapshot

- The District Court's commercial jurisdiction has been thrown into doubt by recent cases.
- The result has been called 'surprising', 'unwelcome', 'inconvenient' and 'unfortunate' by judges of the Supreme Court.
- It is understood that legislation may be introduced to clarify the issue but it is not known when.

actions which would have been assigned to the Common Law Division of the Supreme Court as at the time when the 1997 Amendment Act was enacted', i.e. on 2 February 1998. At that time, there were nine divisions of the Supreme Court and the rules of assignment took an approach of specifically assigning matters to divisions and then assigning to the common law division 'all proceedings not assigned to another Division' (*Supreme Court Act 1970, s 53(4) ('SCA')*). All proceedings 'of a commercial nature which are required...

by or in accordance with the rules, to be commenced, heard or determined...' in the Commercial Division were assigned there. Rule 14.2 of the *Supreme Court Rules ('SCR')* provided, inter alia, that subject to specific exceptions, 'there shall be assigned to the Commercial Division proceedings in the Court: (a) arising out of commercial transactions; or (b) in which there is an issue that has importance in trade or commerce'.

Court of Appeal - without reference to the rules of assignment

Following *Forsyth* the Court of Appeal relevantly considered the issue on three occasions.

May v Brahmabhatt

In *May v Brahmabhatt* [2013] NSWCA 309, the respondent obtained judgment against the appellant in the District Court in respect of rental payments the appellant guaranteed under a lease of a display home in a display village for the purpose of promoting a construction business. Such an arrangement could be characterised as arising out of a 'commercial transaction'. The Court of Appeal refused to grant leave, stating, 'A claim such as brought by the appellant would, in the normal course, be assigned to the Common Law Division: see the *Supreme Court Act 1970, s 53(1)*' (at [3]). Rule 14.2 was not referred to by the Court. Furthermore, the reference to s 53(1) is more apt to be a reference to s 53(1) when it was amended after 2 February 1998, i.e., when all proceedings were assigned to the common law division unless assigned to the Equity Division.

Mega-top Cargo Pty Ltd v Moneytech Services Pty Ltd

Mega-top Cargo Pty Ltd v Moneytech Services Pty Ltd [2015] NSWCA 402 concerned an appeal from the District Court,

inter alia on the ground that the District Court lacked jurisdiction. Mega-Top was a freight forwarder and customs agent, who took delivery, as agent, of imported goods and paid a total of \$233,989.62 in customs duty and other charges. It took delivery subject to a written agreement with Moneytech, who provided finance for the owner of the goods, Mentmore. Mentmore went into liquidation and Mega-Top sued Moneytech. Leeming JA, with whom Gleeson JA and Emmett AJA agreed, found that Mega-Top's claim was a common law claim, either in contract or quasi-contract, and that '[h]ad the claim been brought in the Supreme Court in 1998, it would have been assigned to the Common Law Division, because claims for contract or quasi-contract were not specifically assigned to any other Division' (at [49]). His Honour did not specifically consider SCR 14.2 and whether the matter would have engaged those provisions. It is possible it would have done so.

NSW Land and Housing Corporation v Quinn

In *New South Wales Land and Housing Corporation v Quinn* [2016] NSWCA 338 (*'Quinn'*), the Court of Appeal heard an appeal from a decision of Taylor DCJ in the District Court in which his Honour dismissed proceedings for want of jurisdiction. The proceedings were commenced by the plaintiff against a tenant who had been provided with housing subsidies. Following an investigation by Housing NSW in relation to his disclosure of his household income, a debt of \$221,062.10 was added to his rental account and was claimed in the District Court. Ward AJ, with whom Beazley P and Davies J agreed, found that 'Housing NSW's "action", for the purposes of s 44, is an action to recover monetary sums. That is the kind of action that is typically, and was at the relevant time, assigned to the Common Law Division' (at [71]). Her Honour did not give express consideration to whether the matter would have been caught by the assignment rules of the Commercial Division, though it is unlikely that it would have been.

Supreme and District Courts - a different approach

Since those decisions were delivered a number of other decisions have been delivered by the Supreme Court and District Court. Each takes the same approach but one which is different to that taken by the Court of Appeal. The approach taken by these cases is to consider whether SCR 14.2 is engaged and, if it is, to find that the matter would have been assigned to the Commercial Division and not the Common Law Division and that, therefore, the District Court lacks jurisdiction. This approach sits comfortably with an orthodox approach to statutory interpretation but in some cases does not accord with the reality of where cases were run in 1998.

NTF Group P/L v PA Putney Finance Australia P/L

In *The NTF Group Pty Ltd v PA Putney Finance Australia Pty Ltd* [2017] NSWSC 1194 (*'NTF'*) the plaintiff - who had commenced proceedings in the Local Court - was a company which hired equipment to the first defendant company, whose directors, the second and third defendants, had provided guarantees. The

defendants cross-claimed, seeking to set aside the agreements. This relief was sought under s 237 of the *Australian Consumer Law*. Parker J, after deciding that the Local Court did not have jurisdiction, considered whether the District Court had jurisdiction. His Honour determined that it did not, saying, 'The principal claim in the proceedings is between two corporate entities and, on the face of it, the goods in question were leased for business purposes. Accordingly, the proceedings fall within the description of proceedings "arising out of commercial transactions" in SCR Pt 14 r 2(1)(a) and would have been assigned to the Commercial Division' (at [45]). His Honour called this 'a surprising and unwelcome result' (at [46]).

Sapphire Suite P/L v Bellini Lounge P/L [2018] NSWDC 160

The next case which considered the issue was *Sapphire Suite Pty Ltd v Bellini Lounge Pty Ltd* [2018] NSWDC 160. The plaintiff commenced proceedings in the District Court seeking damages for breach of a commercial lease. The plaintiff made application to the Supreme Court to transfer the proceedings there and then sought an adjournment in the District Court. In granting the adjournment Taylor DCJ stated that the jurisdiction of the District Court to deal with the matter 'must be doubted' (at [14]). His Honour found that 'a claim for damages under a commercial lease arises out of a commercial transaction' (at [6]), that the use of the word 'or' in rule 14.2 SCR meant that the matter did not also need to involve 'an issue that has importance in trade or commerce...' (at [6]). In response to the Court of Appeal statement in *Quinn*, above, his Honour stated that assignment to a division is determined by where the statutory rules 'assign' the matter and that both evidence about where matters are heard and 'judicial memory' are unhelpful in determining the jurisdiction of the Court (at [9]).

Nova 96.9 Pty Ltd v Natvia Pty Ltd

In *Nova 96.9 Pty Ltd v Natvia Pty Ltd* [2018] NSWSC 1288 proceedings were originally commenced in the District Court by the plaintiffs, who had provided radio advertising to the defendants pursuant to written agreements. The plaintiffs approached the Supreme Court seeking, inter alia, an order that the proceedings be transferred to it. Rein J adopted the approach taken in *NTF*: his Honour considered whether the proceedings arose out of a commercial transaction and, finding that they did, concluded that the proceedings would have been assigned to the Commercial Division and therefore would not have been assigned to the Common Law Division. His Honour considered the result to be 'a most inconvenient and unfortunate outcome for litigants in this State' (at [35]).

Sapphire Suite P/L v Bellini Lounge P/L [2018] NSWSC 1366

In *Sapphire Suite Pty Ltd v Bellini Lounge Pty Ltd* [2018] NSWSC 1366, Harrison J heard the plaintiff's application to transfer the District Court proceedings (referred to above) to the Supreme Court. His Honour agreed with Taylor DCJ that the Court of

Appeal decisions in *Mega-Top* and *Quinn* were distinguishable and that the correct approach was identified by Taylor DCJ. His Honour agreed that the District Court lacked jurisdiction, noting that ‘I would have come to a different view if my experience of appearing in claims against guarantors were thought to be a permissible indicator of the outcome’ (at [13]).

The result of the authorities, and in particular the differences between the Court of Appeal and the approach of single judges, is that ‘the applicability of Pt 14 r 2 to the jurisdiction of the District Court is not well established’ (*Bendigo and Adelaide Bank Limited v Jaeger* [2018] NSWDC 244 pe Taylor DCJ at [14]). The District Court is, of course, bound by the Court of Appeal’s applicable decisions but not by judgments of the Supreme Court at first instance. There is scope for argument about whether the Court of Appeal decisions can be distinguished but that is undesirable, particularly when the approaches are clearly distinct. This situation creates confusion and uncertainty for litigants.

Conclusion

Practitioners in New South Wales may be accustomed to think of Supreme Court jurisdiction as binary: common law or equi-

table. But recent cases demonstrate that at a fixed date in 1998 the rules of assignment of the Supreme Court assigned to the Commercial Division numerous cases which were fundamentally of common law origin. Commerciality is often at the heart of a common law cause of action. The rules of assignment which then existed - and which continue to govern the District Court’s jurisdiction – effected the assignment to the Commercial Division, inter alia, of all common law matters which had a particular commercial nature (described by *SCR 14.2*): it was a Commercial (Common Law) Division and a Commercial (Equity) Division in one. To further complicate matters, it seems to have been the case that many matters which fit the description of being matters which were to be assigned to the Commercial Division were in fact commenced, heard and determined in the Common Law Division. **LSJ**

Editor’s note: The Law Society raised the issue of District Court’s jurisdiction with the Attorney General some time ago, and is currently in discussions with the Government regarding possible reforms in order to bring some clarity to the issue. We look forward to bringing you further updates soon.