Amending a 'surprising and unwelcome result'

Natasha Laing reports on how the *Justice Legislation Amendment Act (no. 3) 2018* restored the long assumed commercial jurisdiction of the District Court

District Court jurisdiction prior to 28 November 2018

Prior to the entry into force, on 28 November 2018, of the *Justice Legislation Amendment Act (no. 3) 2018 (NSW)*, s 44 of the *District Court Act 1973 (NSW)* provided, relevantly, as follows:

(1) Subject to this Act, the Court has jurisdiction to hear and dispose of the following actions:

(a) any action of a kind:

(i) which, if brought in the Supreme Court, would be assigned to the Common Law Division of that Court, and

(ii) in which the amount (if any) claimed does not exceed the Court's jurisdictional limit, whether on a balance of account or after an admitted set-off or otherwise,

In *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531, the High Court held that, for the purposes of s 44(1)(a)(i), jurisdiction of the District Court depended upon whether the action would have been assigned to the Common Law Division of the Supreme Court according to the assignment rules as at 2 February 1998.

At that time, in addition to the Court of Appeal, the Supreme Court had seven divisions comprising, the Admiralty Division, the Family Law Division, the Administrative Law Division, the Criminal Division, the Commercial Division, the Equity Division and the Common Law Division. As at 1998, s 53 (Assignment of business) of the *Supreme Court Act 1970 (NSW)* relevantly provided that:

(3E) Subject to the rules, there shall be assigned to the Commercial Division all proceedings of a commercial nature which are required by or under any Act, or by or in accordance with the rules … to be commenced, heard or determined in that Division …

(4) Subject to the rules, there shall be assigned to the Common Law Division all proceedings not assigned to another Division by the foregoing provisions of this section.

Further in relation to s 53(3E), Part 14 of the then *Supreme Court Rules 1970 (NSW)* relevantly provided that:

2.(1) …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.

Thus, as at 1998, the legislation and rules provided for the residual allocation of matters to the Common Law Division which were not assigned elsewhere. Relevantly, the Commercial Division was allocated matters which arose 'out of commercial transactions' or where there was an issue with 'importance in trade or commerce'.

For decades, it was widely assumed that commercial matters may fall within the District Court's jurisdiction if quantum was within relevant limits. This was supported by decisions such as *Mega-top Cargo Pty Ltd v Moneytech Services Pty Ltd* [2015] NSWCA 402 (*Mega-top*) and *New South Wales Land and Housing Corporation v Quinn* [2016] NSWCA 338 (*Quinn*), which had taken a broad view of the Court's jurisdiction. Thus, in the latter case, Ward JA (Beazley P and Davies J agreeing) said as follows (at [71]):

> 'Mr Quinn's focus is on the source of the debt claimed – whether one arising under statute as a consequence of a decision of a public body (the s 57(5) *Housing Act* claim) or one imposed by the Tribunal'

(which he described, incorrectly, as a 'statutory fee' under the *Residential Tenancies Act* – T 14.9). That is not warranted by the terms of the *Supreme Court Act* or rules. Housing NSW's 'action', for the purposes of s 44, is an action to recover monetary sums. That is the kind of action i.e., typically, and was at the relevant time, assigned to the Common Law Division. There is no reason to think that the underlying source of the debt should make any difference to that result.

District Court's commercial jurisdiction questioned

In late 2017 the District Court's commercial jurisdiction was called into question. In *The NTF Group Pty Ltd v PA Putney Finance Australia Pty Ltd* [2017] NSWSC 1194 (*NTF Group*), Parker J observed (at [42]), as noted above, by reference to *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531, that for the purposes of s 44(1)(a)(i) of the *District Court Act 1973* (NSW), jurisdiction depended upon whether the action would have been assigned to the Common Law Division according to the assignment rules as at 2 February 1998. Although his Honour accepted (at [45]) that the claim in *NTF Group* was a 'simple contractual claim in debt', Parker J found that it would not have been assigned to the Common Law Division in 1998. This was because the principal claim in the proceeding 'was between two corporate entities' and the goods in question 'were leased for business purposes'. Accordingly, 'the proceedings fall within the description of proceedings 'arising out of commercial transactions' ... and would have been assigned to the Commercial Division' and the District Court would not have had jurisdiction (at [45]-[46]). Justice Parker termed this a 'surprising and unwelcome result' (at [46]).

This 'surprising and unwelcome result'

was followed in a number of subsequent cases in which the District Court's jurisdiction was found to be absent or sufficiently doubtful that transfer to the Supreme Court was warranted. Such cases included *Sapphire Suite Pty Ltd v Bellini Lounge Pty Ltd* [2018] NSWDC 160; *Parramatta Operations TC Pty Ltd trading as APX Parramatta v Consulting Professional Engineers Pty Ltd trading as Consulting Professional Engineers Pty Ltd* [2018] NSWDC 202 (*Parramatta Operations*); *Nova 96.9 Pty Ltd v Natvia Pty Ltd* [2018] NSWSC 1288; *Sapphire Suite Pty Ltd v Bellini Lounge Pty Ltd* [2018] NSWSC 1366 (*Sapphire Suite*); *Commonwealth Bank of Australia v QBE Insurance (Australia) Ltd* [2018] NSWSC 1440; *Tzovaras v Williams* [2018] NSWDC 275; *Australian Wholesale Meats (Sydney) v S&R Cool Logistics Pty Ltd* [2018] NSWSC 1541; *Bendigo and Adelaide Bank v Gannon* [2018] NSWSC 1520. Presumably, a number of other cases were dealt with in a similar fashion by consent orders, or in the absence of written reasons for judgment.

The issue was often identified late in proceedings. In *Parramatta Operations*, e.g., the parties agreed that the Court lacked jurisdiction after becoming aware of the issue on the first day of hearing. In many cases, it took the Court by surprise. In *Sapphire Suite*, Harrison J commented at [13]: 'As Parker J said in [*NTF Group*], so in this case, a conclusion that the District Court does not have jurisdiction is both 'a surprising and unwelcome result'. Regrettably, however, it seems to me to follow as a simple matter of statutory construction, uninfluenced by what the primary judge perhaps somewhat wistfully described as 'judicial memory.' 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.'

One case in which a different conclusion was reached was *Jefferis v Gells Pty Ltd trading as Gells Lawyers* [2018] NSWDC 288. In that case, Dicker SC DCJ declined to follow the various decisions following *NTF Group* after the issue was raised on the third day of a final hearing. Instead, his Honour considered that the judgments in *Quinn and Mega-top* were determinative. Those decisions, his Honour reasoned, were to the effect that the District Court had jurisdiction to deal with claims in contract, quasi-contract and other actions to recover monetary sums in debt: [76]-[83].

'any action determined by the Court on or after 2 February 1998 that would have been within the Court's jurisdiction to determine had s 44(1)(c1) been in force at the time is taken to have been within the jurisdiction of the Court'.

Another case of interest is *Bendigo and Adelaide Bank v Jaeger* [2018] NSWDC 244. In that case, Mr Jaeger sought that judgment be set aside on the basis that it was 'irregularly entered' by reason of the jurisdictional issue. Mr Jaeger's application was dismissed. The Court (Taylor SC DCJ) considered that jurisdiction was 'a question that must be found at the outset'. As the Court of Appeal had already dismissed an appeal by Mr Jaeger, Taylor SC DCJ considered that the Court of Appeal had 'implicitly found jurisdiction'. His Honour also considered (a) the principle of *stare decisis* meant that the application ought to be dismissed; and (b) the Court would have dismissed the application as a matter of discretion: [12]-[29].

Restoration of commercial jurisdiction

In any event, at the prospect of the decimation of the District Court's civil jurisdiction, re-litigation of earlier matters and much longer lines at the Supreme Court, calls were swiftly made for legislative amendment. Those calls were heard by parliament, resulting in the *Justice Legislation Amendment Act (no. 3) 2018*. The effect of that Act was to introduce into s 44(1) of the *District Court Act 1973 (NSW)* subs (c1). That section provides, relevantly, that the District Court has jurisdiction in respect of:

> …any action arising out of a commercial transaction in which the amount (if any) claimed does not exceed the Court's jurisdictional limit, whether on a balance of account or after an admitted set-off or otherwise,

The legislation is retrospective. Part 10 of Schedule 3 of the *District Court Act 1973 (NSW)*, which also was introduced by the *Justice Legislation Amendment Act (no. 3) 2018 (NSW)*, provides that it 'is taken to have applied on and after 2 February 1998 in respect of the jurisdiction of the Court' and that, accordingly, 'any action determined by the Court on or after 2 February 1998 that would have been within the Court's jurisdiction to determine had s 44(1)(c1) been in force at the time is taken to have been within the jurisdiction of the Court'.

Thus, the long assumed commercial jurisdiction of the District Court has been restored.