

UNCERTAIN TIMES FOR THE COMMERCIAL JURISDICTION OF THE DISTRICT COURT

Introduction

1. Section 44(1)(a) of the *District Court Act 1973* (NSW) confers jurisdiction upon the District Court to determine matters which, if brought in the Supreme Court, would be assigned to the Common Law Division of the Supreme Court.
2. In 2007, the High Court of Australia determined that consideration of whether a proceeding would have been assigned to the Common Law Division requires analysis of the *Supreme Court Act 1970* (NSW) and the Supreme Court Rules as they stood at 2 February 1998.
3. A particular issue has recently surfaced with respect to the operation of Part 14 Rule 2(1)(a), which as at 2 February 1998 assigned to the Commercial Division proceedings “arising out of commercial transactions”. This rule has been interpreted in a manner which excludes many commercial cases from the jurisdiction of the District Court.
4. The analysis below considers the jurisdiction conferred by s 44(1)(a), its recent interpretation by the Supreme and District Courts, and some thoughts as to the future.

Jurisdiction conferred by s 44(1)(a) of the *District Court Act 1973* (NSW)

5. The District Court, as an inferior court of record, has only the jurisdiction conferred on it by statute¹.

¹ *Pelechowski v The Registrar, Court of Appeal* (NSW)(1999) 198 CLR 435 at [121]; *Jago v District Court of NSW* (1989) 168 CLR 23; *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 at [20]; *New South Wales Land and Housing Corporation v Quinn* [2016] NSWCA 338 at [17]



6. The effect of s 9 of the *District Court Act* is to confer upon the District Court, in addition to any jurisdiction conferred by other Acts, the jurisdiction conferred by Part 3 of the *District Court Act*.

7. Within Part 3, s 44 (1) is a primary source of the civil jurisdiction of the District Court. It provides:

44 Actions

(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,

other than an action referred to in paragraph (d) or (e),

(c) any action brought to recover an amount not exceeding \$20,000, which is the whole or part of the unliquidated balance of a partnership account, or the amount or part of the amount of the distributive share under an intestacy or of a legacy under a will,

(d) any motor accident claim, irrespective of the amount claimed,

(d1) any work injury damages claim, irrespective of the amount claimed,

(d2) any substituted proceedings within the meaning of Part 3A of the Civil and Administrative Tribunal Act 2013, so long as the amount (if any) claimed does not exceed the Court's jurisdictional limit,

(e) any proceedings transferred to the Court under section 146 (1) of the *Civil Procedure Act 2005*, irrespective of the amount (if any) claimed in those proceedings.

8. The effect of s 44(1)(a) is to confer upon the District Court jurisdiction in proceedings which are within its monetary jurisdictional limit and which, if brought in the Supreme Court, would be assigned to the Common Law Division of that Court.

9. However, the relevant enquiry is not whether such an assignment would be made *now*, rather the enquiry is whether such an assignment would have been made as at the date of commencement of s 44(1)(a), namely 2 February 1998. This is the effect of the decisions of the New South Wales Court of Appeal and the High Court of Australia in *Forsyth v Deputy Commissioner of Taxation*².

² *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531; affirming the decision of the New South Wales Court of Appeal in *Forsyth v Deputy Commissioner of Taxation* (2004) 62 NSWLR 132.

10. The answer to this enquiry requires an analysis of the provisions of the *Supreme Court Act 1970* (NSW) and the rules made thereunder, as at 2 February 1998. At that time:
- (a) the Common Law Division was one of 9 divisions of the Supreme Court³;
 - (b) the assignment of proceedings to a particular division was governed by s 53 of the *Supreme Court Act* as they then stood, and by the Supreme Court Rules (to which s 53 was expressed to be subject)⁴.
11. Section 53 specified 3 scenarios, each of which is sufficient for a proceeding to have been assigned to the Common Law Division as at 2 February 1998.
12. The *first* is where the proceeding is required by or under any Act to be commenced, heard or determined in the Common Law Division⁵. In this regard, Part 12, rule 4 specified a series of Acts in respect of which proceedings were assigned to the Common Law Division.
13. The *second* is where the proceeding is a proceeding which would have been commenced in the Common Law Division of the Supreme Court prior to the *Supreme Court Act* ⁶.
14. The *third* is where the proceeding is one which would not have been assigned to any other Division by the operation of s 53(1)-(3E). In this regard s 53(4) provided:
- 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.
15. This requires an assessment of whether the proceeding would have been assigned to any of the other 8 Divisions, by reference to s 53 and the relevant rules as they then stood.

³ *New South Wales Land and Housing Corporation v Quinn* at [20]. Other divisions were Administrative Law, Admiralty, Commercial, Criminal, Equity, Family Law, Probate and Protective – see s 38 *Supreme Court Act* (as at 2 February 1998). Cf. *Sapphire Suite Pty Ltd v Bellini Lounge Pty Ltd* [2018] NSWSC 1366 at [7] which suggests that there were 7 divisions.

⁴ See also s 52 which provided that the business of the Court (other than the Court of Appeal) was to be assigned in accordance with the Division in which ss 52 and 53 appear.

⁵ s53(1)(a)

⁶ s53(1)(b)



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The table below summarises the subsections of s 53 and some of the rules which appear to be applicable to each of the Divisions:

Division	Allocating sub-section and rules
Administrative Law	s53(3B); Part 12, rule 6
Admiralty	s53(1); Part 12 rule 5A
Commercial	s53(3E); Part 14
Common Law	s53(1), (4); Part 12, rule 4
Criminal	s53(3D)
Equity	s53(1), (3); Part 12 rule 5
Family Law	s53(3A)
Probate	s53(1)
Protective	s53(1)

16. It is beyond the scope of this paper to analyse the criteria for assignment to each of the other 8 Divisions. Instead, the analysis below focuses upon the criteria for assignment to the Commercial Division as at 2 February 1998. That analysis is undertaken by reference to s 53(3E), Part 14 of the Rules and recent authorities.

Criteria for assignment to the Commercial Division as at 2 February 1998

17. Section 53(3E) provided:

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, from time to time in force to be commenced, heard or determined in that Division.

18. Part 14, rule 2 of the Rules provided:

- (1) Subject to subrule (2), 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.
- (2) Subrule (1) does not apply to any proceedings –



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- (a) assigned by the Act or by or in accordance with the rules or by or under any other Act to the Court of Appeal, the Equity Division, the Admiralty Division, the Family Law Division, the Protective Division, the Probate Division, the Administrative Law Division or the Commercial Division;
 - (b) which may be entered in the Construction List; or
 - (c) for defamation.
- (3) In subrule (1), “issue” includes any question or issue in any proceedings, whether of fact or law or both, and whether raised by pleadings, agreement of parties or otherwise.

19. The effect of Part 14, rule 2 (1) (a) is such that it is sufficient for a proceeding to have been assigned to the Commercial Division as at 2 February 1998 (and thus to be beyond the jurisdiction of the District Court now) that it arises out of a commercial transaction.

The application of Part 14, rule 2 (1) (a)

20. Although *Forsyth v Deputy Commissioner of Taxation* was decided in 2007, its implications and in particular that a proceeding arising out of a commercial transaction is beyond the s 44(1) (a) jurisdiction of the District Court, do not seem to have been fully appreciated until more recent times.

21. In *Tzovaras v Williams* [2018] NSWDC 275, Russell DCJ said:

(a) at [11]:

While the High Court decision in *Forsyth v DCT* is 11 years old, the ramifications of that decision are only now working their way through the court system.

(b) at [19]:

I note in passing that the Nova 96.9 proceedings action came before me in March 2018 in the District Court when I heard and determined an application for security for costs —[2018] NSWDC 74. Not a word was spoken about lack of jurisdiction. However, that is not said as a criticism of the parties or their representatives, as there has only been a realisation of the full effect of the High Court decision in *Forsyth* in very recent times.



22. The effect of *Forsyth v Deputy Commissioner of Taxation* upon proceedings arising out of commercial transactions was analysed by Parker J in *The NTF Group Pty Ltd v PA Putney Finance Australia Pty Ltd* [2017] NSWSC 1194 (7 September 2017).
23. His Honour considered whether a Local Court proceeding, which had been removed to the Supreme Court, should be transferred to the District Court. Before such a transfer could be made his Honour needed to be satisfied that the proceeding could properly have been commenced in the District Court.
24. Parker J held that the proceeding could not properly have been commenced in the District Court, reasoning as follows:
 - (a) the District Court's 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 ([42]);
 - (b) those rules included s 53 (3E) and Part 14 ([43] and [44]);
 - (c) as the principal claim in the proceeding was between 2 corporations concerning moneys alleged to be due for the rental of equipment for business purposes, the proceeding arose out of a commercial transaction ([45]);
 - (d) thus, the District Court did not have jurisdiction ([46]).

25. His Honour's analysis has been applied in the following series of cases decided in 2018.

Sapphire Suite Pty Ltd v Bellini Lounge Pty Ltd [2018] NSWDC 160 (24 May 2018)

26. This judgment concerned an application for the adjournment of a District Court proceeding, pending an application to the Supreme Court for a transfer on the basis that the District Court lack jurisdiction to hear a proceeding involving a claim for damages for breach of a commercial lease.



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27. Taylor DCJ granted the adjournment. In the course of his judgment granting the adjournment, his Honour:

(a) expressed the view that it was plain that a claim for damages under a commercial lease arises out of a commercial transaction and this is sufficient for the matter to have been assigned to the Commercial Division rather than the Common Law Division ([6]);

(b) indicated his respectful agreement with the approach taken by Parker J in *The NTF Group Pty Ltd v PA Putney Finance Australia Pty Ltd* (at [6]).

Nova 96.9 Pty Ltd v Natvia Pty Ltd [2018] NSWSC 1288 (10 August 2018)

28. In this judgment, Rein J considered an application to transfer a proceeding from the District Court to the Supreme Court on the basis that the District Court lacked jurisdiction.

29. The proceeding involved a claim for the recovery of fees allegedly due pursuant to advertising contracts between two commercial entities.

30. His Honour, consistently with the approach taken by Parker J in *The NTF Group Pty Ltd v PA Putney Finance Australia Pty Ltd* held that the proceeding arose out of a commercial transaction and thus that the District Court lacked jurisdiction (at [34]).

Sapphire Suite Pty Ltd v Bellini Lounge Pty Ltd [2018] NSWSC 1366 (5 September 2018)

31. The Supreme Court application in *Sapphire Suite Pty Ltd v Bellini Lounge Pty Ltd* was determined by Harrison J on 5 September 2018. His Honour held, following the same line of reasoning, that the District Court lacked jurisdiction.



Commonwealth Bank of Australia v QBE Insurance (Australia) Ltd [2018] NSWSC 1440 (19 September 2018)

32. In this judgment, N Adams J considered an application to transfer a proceeding (involving the construction of an insurance contract and a dispute as to whether the insurer should have paid out under an insurance policy in favour of a person to whom the bank had lent money) from the District Court to the Supreme Court, on the basis that the District Court lacked jurisdiction.

33. Her Honour found that the proceeding arose out of a commercial transaction and following the line of cases set out above held that the District Court lacked jurisdiction and ordered that the proceeding be transferred to the Supreme Court.

Tzovaras v Williams [2018] NSWDC 275 (27 September 2018)

34. In this judgment, Russell DCJ considered whether the District Court had jurisdiction to entertain the Notices of Motion listed for hearing before his Honour. His Honour found that the proceeding arose out of a quite complicated commercial transaction ([33]-[34]), and following the above line of cases, held that the District Court lacked jurisdiction ([36]).

Inconsistent Court of Appeal authority?

35. There are several statements by the Court of Appeal which are potentially inconsistent with the above line of cases.

36. In *May v Brahmhatt* [2013] NSWCA 309, Beazley P (Basten JA and Bergin CJ in Eq agreeing) said at [3]:

Pursuant to the *District Court Act* 1973, s 44, the District Court has jurisdiction to hear and dispose, inter alia, of any action of a kind which, if brought in the Supreme Court, would be assigned to the Common Law Division. A claim such as this would, in the normal course, be assigned to the Common Law Division: see the *Supreme Court Act* 1970, s 53(1).

37. The claim in that case involved a claim for recovery of rental payments pursuant to a guarantee.
38. In *Mega-top Cargo Pty Ltd v Moneytech Services Pty Ltd* [2013] NSWCA 402, Leeming JA (Gleeson and Emmett JJA agreeing) said at [46]-[49]:

[46] The primary judge was, with respect, incorrect to form the view that she lacked jurisdiction to deal with a restitutionary claim. She was wrong to treat it as an equitable claim.

[47] The gravamen of the pleading alleges a claim in debt arising from the terms of the contract between Mega-top and Moneytech, or alternatively arising out of the fact that Mega-top as agent paid taxes and charges on behalf of Moneytech...

[48] Mega-top's claim for reimbursement of amounts paid by it as agent *of, or for the benefit of, Moneytech, was a common law claim. It was, as French J observed in Re Clune; Ex parte Verge v Isabella Nominees Pty Ltd (in liq)* (1988) 14 ACLR 261 at 266, either a claim in contract or quasi-contract. Mega-top's claim to be repaid \$233,989.62 was therefore an action within the jurisdictional limit of the District Court. That court's jurisdiction is relevantly defined by s 44(1) of the *District Court Act*, which (omitting exclusions not presently relevant) is as follows:

“[T]he 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”

[49] Section 44(1)(a) is to be construed in the manner indicated by *Forsyth v Deputy Commissioner of Taxation* [2007] HCA 8 ; 231 CLR 531 at [45], which is to say, historically, as at 2 February 1998. Had 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 of the Supreme Court, and so, pursuant to s 53(4) of the Supreme Court Act 1970 (NSW) as it then stood, were assigned to the Common Law Division: see Forsyth at [29].

(emphasis added)

39. In *New South Wales Land and Housing Corporation v Quinn* [2016] NSWCA 338, Ward JA (Beazley P and Davies J agreeing) considered whether a proceeding was beyond the jurisdiction of the District Court on the basis that it would have been assigned to the Administrative Law Division as at 2 February 1998. At [71], her Honour said:



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Housing NSW's action, for the purpose 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.

40. The above quoted statements from these Court of Appeal authorities might be taken to suggest that proceedings arising from commercial transactions were capable of being assigned to the Common Law Division as at 2 February 1998.
41. However, these statements by the Court of Appeal have been distinguished in some of the recent Supreme and District Court cases discussed above on the basis that in none of the Court of Appeal authorities was the Court of Appeal considering whether or not the proceeding would have been assigned, on 2 February 1998, to the Commercial Division of the Supreme Court, if brought in that Court (and thus Part 14.2 was not considered)⁷.
42. Thus, on the present state of the authorities, there is real doubt as to the District Court's jurisdiction to determine proceedings arising out of commercial transactions. This is particularly so given the breadth of the expression "*arising out of a commercial transaction*"⁸.

The future

43. A conclusion that the District Court lacks jurisdiction in many commercial matters runs counter to the experience of many practitioners in the District Court, including those who recall the Commercial List in that Court.
44. Several members of the District and Supreme Courts have expressed their surprise at this conclusion, while accepting that it is correct:

(a) in *The NTF Group Pty Ltd v PA Putney Finance Australia Pty Ltd*, Parker J said at [46]:

⁷ *Sapphire Suite Pty Ltd v Bellini Lounge Pty Ltd* [2018] NSWDC 160 at [12]; *Sapphire Suite Pty Ltd v Bellini Lounge Pty Ltd* [2018] NSWSC 1366 at [10]-[12]; *Tzovaras v Williams* at [22]-[23].

⁸ See *The NTF Group v PA Putney Finance Australia Pty Ltd* at [45], *Nova 96.9 Pty Ltd v Natvia Pty Ltd* at [18]-[27], *Commonwealth Bank of Australia v QBE Insurance (Australia) Ltd* at [8], *Tzovaras v Williams* at [8]-[10].



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This is (it seems to me) a surprising and unwelcome result. But I see no alternative to it given the decision in *Forsyth* and the wording of the rules at the relevant time.

(b) in *Sapphire Suite Pty Ltd v Bellini Lounge Pty Ltd*, Taylor DCJ said at [7]:

It may be thought that Pt 14 r 2 significantly impacts upon the commercial jurisdiction of this Court. So it may but the rule is plain.

(c) in *Nova 96.9 Pty Ltd v Natvia Pty Ltd*, Rein J said at [35]:

Like Parker J and Taylor DCJ, I regard the conclusions in *NTF Group*, *Sapphire Suite* and this case as to the limit of the District Court's jurisdiction as a most inconvenient and unfortunate outcome for litigants in this State. If, as I understand may be the case, consideration is being given to legislative reform in this area, hopefully steps can be taken in the very near future to remove the lacuna identified.

(d) in *Commonwealth Bank of Australia v QBE Insurance (Australia) Ltd*, N Adams J said at [9]:

I agree with the observations made by Harrison J at [13] of *Sapphire Suite* (approving the conclusion of Parker J in *NTF Group*) that it is a "surprising and unwelcome result" that the District Court would not have jurisdiction to hear a matter such as the present matter. However, as both of their Honours have observed, as a simple matter of statutory construction, it seems to be the only course to take. Justice Parker did express some concern about this, as did Harrison J. I echo the comments made by Rein J in *Nova 96.9 Pty Ltd v Natvia Pty Ltd* [2018] NSWSC 1288 ("*Nova 96.9 Pty Ltd*"), that Parliament may well need to give consideration as to whether there is a legitimate intention that the District Court not have jurisdiction in matters of this nature. The circumstances are, anecdotally at least, that such matters have been conducted in the District Court from time to time until now.

45. The effect upon the distribution of cases between the District Court and the Supreme Court is obvious.
46. For parties involved in such proceedings presently before the District Court, doubts as to that Court's jurisdiction adversely affect the attainment of a quick, cheap and just



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resolution of their disputes⁹. The safest course for those involved in a District Court proceeding arising out of a commercial transaction is to seek a transfer to the Supreme Court.

47. For those about to commence such a proceeding in the District Court, the safer course would seem to be to commence in the Supreme Court.
48. The potential to revisit judgments delivered in matters in which the District Court did not have jurisdiction, whilst beyond the scope of this paper, should also be borne in mind¹⁰.
49. Several of the judges quoted above have referred to the possibility of legislative reform. Presumably such legislative reform would include a clear conferral of jurisdiction in commercial matters upon the District Court. Such reform might also address the validity of judgments delivered in cases where the District Court lacked jurisdiction.
50. Finally, as noted at paragraph 16 above, in order for the s 44(1)(a) jurisdiction to arise through s 53(4) it is necessary to first be certain that the proceeding would not have been assigned to *any* of the other 8 Divisions. The analysis above has concerned only one of those Divisions, i.e. the Commercial Division. Other Divisions may have issues which are yet to be explored.
51. In this regard, it may be hoped that any legislative reform also contains a clear, concise and precise delineation of the District Court's jurisdiction and removes the need to step through the criteria for assignment to the 9 Divisions of the Supreme Court as found in legislation and rules as they existed more than 20 years ago.

Scott Goodman SC

Greenway Chambers

9 October 2018

⁹ See *Parramatta Operations TC Pty Ltd v Consulting Professional Engineers Pty Ltd* [2018] NSWDC 202 at [1] (Taylor DCJ).

¹⁰ See *Bendigo and Adelaide Bank Limited v Jaeger* [2018] NSWDC 244 at [18] (Taylor DCJ).