

11 years on, *Forsyth v FCT* (2007) 231 CLR 531 has something new to say about the District Court's Jurisdiction

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It has taken 11 years, but the ramifications of the decision in *Forsyth v FCT* (2007) 231 CLR 531 are now being felt: the question whether the District Court has jurisdiction to deal with commercial matters, has fallen for adjudication. In *Forsyth*, Roger Hamilton SC and I submitted that the District Court did not have jurisdiction to determine tax related matters. The reason, we submitted, was that in 1998 the District Court's jurisdiction (s 44 of the *District Court Act* 1973) was reformulated to comprise actions of a kind that, had they been commenced in the Supreme Court, would be assigned to the Common Law Division. We submitted that this provision should be given an ambulatory construction, in which case, since matters concerning a "tax ..." were, from 2000, assigned to the Equity Division of the Supreme Court, the District Court was not a court of competent jurisdiction with respect to tax recovery proceedings. The High Court however disagreed and held (Kirby J dissenting) that s 44 of the *District Court Act* 1973 was to be given a static construction; and that one must look to the position as it was when s 44 was reformulated, on 2 February 1998.

A sleeping issue, which did not arise in *Forsyth*, has now awoken: where, in 1998, would commercial matters have been assigned? Following *Forsyth*, the Supreme Court (and the District Court) has recently held that matters arising out of commercial transactions or raising an issue of importance in trade or commerce would not, in 1998, have been assigned to the Common Law Division of the Supreme Court, but would have been assigned to the Commercial Division and, accordingly, the District Court does not have jurisdiction with respect to such matters: *NTF Group Pty Ltd v PA Putney Finance Australia Pty Ltd* [2017] NSWSC 1194, *Nova 96.9 Pty Ltd v Natvia Pty Ltd* [2018] NSWSC 1288, *Sapphire Suite Pty Ltd v Bellini Lounge Pty Ltd* [2018] NSWDC 160, *Sapphire Suite Pty Ltd v Bellini Lounge Pty Ltd* [2018] NSWSC 1366, *Commonwealth Bank of Australia v QBE Insurance (Australia) Ltd* [2018] NSWSC 1440, *Tzovaras v Williams* [2018] NSWDC 275. This is so, despite the Court of Appeal having decided that the District Court, in fact, has jurisdiction to deal with commercial matters that arise out of contract or quasi contractual disputes: *Mega-top Cargo Pty Ltd*

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v Moneytech Services Pty Ltd [2015] NSWCA 402, *New South Wales Land and Housing Corporation v Quinn* [2016] NSWCA 338. Recently in *Jefferis v Gells Pty Ltd trading as Gells Lawyers* [2018] NSWDC 288 Dicker DCJ declined to follow the recent slew of Supreme Court decisions, opting instead to follow (as his Honour held, precedent required) the Court of Appeal, in holding that what was a commercial matter was nevertheless within the jurisdiction of the District Court.

This issue has monumental ramifications for the jurisdiction of the District Court which, prior to 1998, had jurisdiction in relation to “any personal action at law” (s 44 of the *District Court Act* 1973) up to a certain monetary limit. Despite the Explanatory Note for the *Courts Legislation Further Amendment Act* 1997 saying that the change was to introduce clarity (*Forsyth* at [40]) and not to wreak havoc upon the jurisdiction of the District Court, the loss of jurisdiction in commercial matters (assuming this to be the case) is anything but a mere clarification.

How is this to be fixed? Sadly, this is not a simple task and this is not the forum in which to undertake it. Still, it is interesting to note that the ambulatory construction that the taxpayer argued for in *Forsyth* may not assist. It is not entirely clear that, today, all commercial disputes are assigned to the Equity Division, although matters assigned to the Equity Division that are of commercial significance are assigned to the Commercial List within the Division: s 53 of the *Supreme Court Act* 1970, rules 1.18(d) and 45.6 of the *Uniform Civil Procedure Rules* 2005. There are also looming questions over what is a commercial matter; or whether the District Court might have jurisdiction via a route other than s 44, such as s 9(1) of the *District Court Act* 1973.

If this dilemma is to be the subject of a legislative fix, it must be a twofold fix – akin to the twofold fix that was brought in after it was found in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 that the Federal Court could not be imbued with jurisdiction from the States, with the consequence that the Federal Court could not deal with matters concerning the Corporations Law. That is to say: first, enact appropriate legislation to invest the District Court with the jurisdiction it is intended to have (perhaps revert to the old wording of “personal action at law”); and secondly, validate the decisions of the District Court with respect to commercial matters, since 1998.

Until this is done, a question hangs over whether commercial disputes may be brought in the District Court and whether commercial matters heard and determined since 1998 were beyond jurisdiction.

I await with interest the legislative fix!