THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: GUlw:1099878

4 May 2016

The Hon Gabrielle Upton MP
Attorney General
GPO Box 5341
Sydney NSW 2001

By email: office@upton.minister.nsw.gov.au

Dear Attorney General,

Jurisdiction of the District Court

I am writing to you in relation to concerns that have been raised by practitioners with respect to an issue of jurisdictional uncertainty in the District Court.

The problem was highlighted in the 2015 unreported decision of Gibson DCJ in *Owners Corporation SP 69,106 v Impression Developer Pty Ltd* (ACN 095 022 192) [2015] NSW DC 79.

In this case, the plaintiff commenced proceedings for damages arising out of alleged breaches of statutory warranties. Gibson DCJ raised the issue of the District Court's jurisdiction in such circumstances where the claim may arguably amount to an equitable claim.

Section 4 of the *District Court Act 1973* (NSW) provides that the jurisdictional limit of the District Court is $750,000. Section 44(1) additionally provides that the District 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

Section 134 provides that the Court should have the same jurisdiction as the Supreme Court in certain proceedings in equity, but only in certain circumstances where the relief sought is the sum nominated, namely $20,000.

Gibson DCJ at [5] referred to Taylor DCJ in *Abbott v Klein* [2015] NSWDC 45 at [33] to [50], who had explained that

> "this puts the Court in the cumbersome position of having to decide whether s 44(1)(a) having been enacted on 2 February 1998, these proceedings would be assigned to the Common Law Division of the Supreme Court, this being a matter determinable by s 53 of the *Supreme Court Act 1970*".

The language of section 53 has been interpreted by the High Court in *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 as having a "fixed in time" construction. Therefore this requires the Court to have regard to whether or not these proceedings would have been commenced in the Equity Division as opposed to the Common Law Division of the Supreme Court in 1998.

Gibson DCJ [7] found that an examination of cases in the Supreme Court since the late 1990s suggested that when proceedings for breach of statutory warranty were commenced outside the Equity Division they were generally transferred to the Equity Division.

Her Honour found that this made the issue of the District Court's jurisdiction problematic.

Taylor DCJ in *NSW Land and Housing Corporation v Quinn* [2016] NSWD27 also raised the question of what is to happen if the action being brought by the plaintiff (in that case under s 57 of the *Housing Act 2001)* was not available on 2 February 1998.

Practitioners have advised the Law Society that this uncertainty about the District Court's jurisdiction creates practical difficulties in advising clients about where proceedings should be commenced.

For example, practitioners who specialise in building disputes are concerned that if a matter is commenced in the District Court they may be met with a successful technical argument about jurisdiction at the time of the hearing. This may prove particularly problematic if the limitation period in which to commence proceedings has expired. Of course this issue is not confined to building and construction matters.

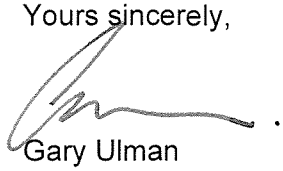
Commencing proceedings in the Supreme Court is not a satisfactory solution because of potential cost implications. A successful plaintiff in the Supreme Court generally does not have the benefit of the usual order for costs unless there is a judgment in their favour of $500,000 or more "unless the Supreme Court is satisfied the commencement and continuation of the proceedings in the Supreme Court, rather than the District Court, was warranted" – rule 42.34 UCPR. Practitioners have also advised that, on a transfer application to the Supreme Court from NCAT, plaintiffs will often be met with an argument that the District Court is the appropriate forum.

As a practical problem, the Law Society also notes that it is difficult to obtain a copy of the *Supreme Court Act* and Supreme Court Rules current at 2 February 1998. For example, the NSW Government website (www.legislation.nsw.gov.au) and the AUSTLII website (www.austlii.edu.au) do not provide historical copies going back to 1998. The same applies to the paid subscription website of Lexis Nexis.

The Law Society submits that practitioners should not be faced with this uncertainty and difficulty in advising clients as to the appropriate Court in which to bring proceedings. The Law Society requests the Department of Justice to consider the introduction of legislative amendments necessary to clarify the position.

Should your Department require any additional information, please contact Ms Leonora Wilson, the policy lawyer for the Litigation Law and Practice Committee, on 9926 0323 or Leonora.Wilson@lawsociety.com.au.

Yours sincerely,



Gary Ulman
President