

CITATION: *Street v Arafura Helicopters Pty Ltd t/as Alice Springs Helicopters* [2018] NTCA 11

PARTIES: STREET, Ryan Michael

v

ARAFURA HELICOPTERS PTY LTD
T/AS ALICE SPRINGS HELICOPTERS
(ABN 19 071 259 606)

TITLE OF COURT: COURT OF APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION: CIVIL APPEAL from the SUPREME
COURT exercising Northern Territory
jurisdiction

FILE NO: AP 2 of 2018 (21556836)

DELIVERED: 16 August 2018

HEARING DATE: 19 July 2018

JUDGMENT OF: Kelly, Barr and Hiley JJ

CATCHWORDS:

AVIATION – Civil Aviation – Claim for damages caused by injury arising out of helicopter accident – *Civil Aviation (Carriers' Liability) Act 1959* (Cth) s 34 -
Limitation period – Right of person to damages extinguished – Appeal dismissed

PRACTICE AND PROCEDURE - Supreme Court procedure – Period of limitation – When proceedings ‘brought’ for purposes of limitation period – Originating motion – Writs – Whether date of filing is the date the documents are received or date they are accepted as filed by the proper officer – unnecessary to decide – Proper officer did not in fact accept the documents lodged – Appeal dismissed

Civil Aviation (Carriers' Liability) Act 1959 (Cth) s 34

Supreme Court Rules (NT) r 4.01, r 5.11, r 23.03, r 27.02(1), r 28.01, r 28.02(3), r 28.03, r 47.04

Agrack NT Pty Ltd v Hadfield (2005) 223 CLR 251, *Davies v Lewis* [2001] NTSC 105, *Gower v Woodman Sales* [1988] 2 Qd R 15, *Kahn v Trans World Airlines* 82 A.D.2d 696 (1981), *Povey v Qantas* (2005) 223 CLR 189, *Visic v Proude* [2013] 116 SASR 404, referred to

REPRESENTATION:

Counsel:

| | |
|-------------|-------------------------------|
| Appellant: | N Christrup |
| Respondent: | A Wyvill SC with M Littlejohn |

Solicitors:

| | |
|-------------|--------------|
| Appellant: | HWL Ebsworth |
| Respondent: | Piper Ellis |

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| Judgment category classification: | B |
| Number of pages: | 24 |

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Street v Arafura Helicopters Pty Ltd t/as Alice Springs Helicopters

[2018] NTCA 11

No. AP 2 of 2018 (21556836)

BETWEEN:

RYAN MICHAEL STREET

Appellant

AND:

**ARAFURA HELICOPTERS PTY
LTD T/AS ALICE SPRINGS
HELICOPTERS**

(ABN 19 071 259 606)

Respondent

CORAM: KELLY, BARR and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 16 August 2018)

THE COURT:

Introduction

- [1] The appellant has instituted proceedings in the Supreme Court under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) ("the Act") claiming damages for injuries he sustained in a helicopter accident that occurred in the Northern Territory on 12 November 2013. In its defence, the respondent has pleaded that the appellant's right to damages has been extinguished under s 34 of the Act because the

proceeding was not brought within two years after 12 November 2013 as required by that section.

- [2] Section 34 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) states:

The right of a person to damages under this Part is extinguished if an action is not brought by him or her or for his or her benefit within two years after the date of arrival of the aircraft at the destination, or, where the aircraft did not arrive at the destination;

- (a) the date on which the aircraft ought to have arrived at the destination;
or
 - (b) the date on which the carriage stopped;
- whichever is the latter.

- [3] It is common ground that the material date for the purpose of the application of s 34 is 12 November 2013 so that the two year period expired at midnight on 12 November 2015.
- [4] By consent of the parties, the Master of the Supreme Court (as he then was) ordered under r 47.04 of the *Supreme Court Rules* that the question of whether the appellant's right to damages had been extinguished be tried before the trial of the proceeding.
- [5] On 12 March 2018, Southwood J determined that question in favour of the respondent. His Honour found that the appellant's right to damages had been extinguished because he had not brought an action within two years of the material date. The appellant has appealed to this Court against that decision.

Background

- [6] The following background facts have been taken from the judgment of Southwood J in the court below. None of these facts is in contention.
- [7] On 12 November 2013 the appellant was a passenger in a Bell 206 helicopter operated by the respondent and flown by a pilot employed by the respondent. The helicopter took off from a position south-east of Alice Springs. About one hour into the flight, the pilot told the appellant that the helicopter was going down and that he should brace for impact; the helicopter hit the ground, and the appellant suffered serious injuries.
- [8] The appellant engaged Slater and Gordon Lawyers as his solicitors and Mr Paul Alexander Jones, a senior associate, was the solicitor who had the conduct of this proceeding on his behalf.
- [9] Before 11 November 2015, Mr Jones drafted two documents. The first was headed 'FORM 5A' at the top; immediately below that was the word 'WRIT'; and below that were the names of the parties. The second document was headed 'SUPREME COURT OF THE NORTHERN TERRITORY'; below that were the words '*ORIGINATING PROCESS*'; and below that were again the names of the parties. The documents were intended to have been drafted in compliance with the Rules of the Supreme Court of the Northern Territory. They were not. There were a number of defects: the Writ did

not contain an endorsement of claim; a statement of claim is not an originating process; and the documents were not signed.

[10] Under r 4.01 of the *Supreme Court Rules*, except where otherwise provided, a proceeding shall be commenced by writ or originating motion. The statement of claim should have simply been included in Part 2 of the writ. There should not have been two documents.

[11] On 11 November 2015 Mr Jones engaged Mr Len Robinson who was a private enquiry agent and process server with Griffiths Investigations to file these documents. Mr Jones sent Mr Robinson an email which stated:

I attach a copy of the written Statement of Claim in this matter. I would be grateful if you would attend to the following:

File the attached documents with the Supreme Court of the Northern Territory, Alice Springs Registry.

Attempt personal service of the filed documents on the Defendant at their principal place of business being Alice Springs Airport Precinct, Davis Drive, Alice Springs.

Provide me with an email copy of the signed and sealed Writ and Statement of Claim.

As you are aware time is of the essence and I appreciate your assistance and speed in this matter.

[12] Instructing Mr Robinson to file the documents was another error.

Under the *Supreme Court Rules*, it was necessary for Slater and Gordon Lawyers to retain solicitors in Alice Springs to act as their town agents, and to provide an address for service within the prescribed distance of the Supreme Court Registry in Alice Springs.

[13] On 11 November 2015, Mr Robinson delivered the documents to the Alice Springs Registry and they were received by registry staff. When he returned at 8:55 am on 12 November 2015, he was told that the documents were still with the Registrar and it was necessary to pay a filing fee of \$2,320.00.

[14] At 10:07 am on 12 November, the Registrar of the Supreme Court in Alice Springs sent the following email to Miss Jess Brand who was a member of staff in the Registry of the Supreme Court in Alice Springs.

Please *return* the documents filed by Griffith Investigations on behalf of Slater and Gordon Lawyers. The doc (sic) does not comply with the Supreme Court Rules which require that proceedings be commenced by way of Writ or originating motion (see order 4 and 5). They have not been signed as required by r 5.11 and do not contain Parts 1, 2 and 3 as prescribed. *They are not in acceptable form.* I have provided a copy of the Form 5A and relevant rules with some slight highlights but can you please ask that the Plaintiff comply with the rules in full. *[emphasis added]*

[15] There was also a hand written note on the documents which stated, “Also Jess, Slater and Gordon need to engage a solicitor as an agent”.

[16] Registry staff communicated this to Mr Robinson. He informed Mr Jones that he had been advised by the Registrar that the documentation did not comply with the *Supreme Court Rules* and that Mr Jones would have to engage a solicitor in Alice Springs to represent the appellant and file the documents. Mr Jones then retained Ruth Morley, who was a sole practitioner in Alice Springs, as Slater and Gordon’s town agent.

[17] At 1:28 pm on 12 November 2015 Mr Jones sent the following email to Ms Morley and Mr Robinson.

As discussed if you're able to assist me with the filing of a Writ and a Statement of Claim that would be great.

I have attached the documents Len received from the Court today. The only real issue with the paperwork I see is that I don't have a NT lawyer acting as agent. I've also attached the Word docs (sic) for any amendments needed.

From there, Len, if you could serve the documents in person and then provide me with an email copy of the sealed documents that would be great. As I'm sure you'll see on the paperwork, our date of limitation for filing and serving is today so I really appreciate your help.

[18] Mr Jones clearly failed to understand that the documents themselves were defective.

[19] Ms Morley delivered the documents to the registry under a covering letter. The covering letter stated:

Please find enclosed herewith for filing the following documents in triplicate:

- Writ
- Statement of Claim

Please return two sealed copies of each to the Writer.

[20] The "Writ" and "Statement of Claim" delivered to the registry by Ms Morley were also defective and not in accordance with the *Supreme Court Rules*. She neglected to sign the writ and the documents still suffered from the same defects identified by the Registrar.

- [21] Later that afternoon Mr Jones contacted Ms Morley by telephone to confirm that she had filed the documents. She confirmed that they had been provided to the registry but told him the registry does not provide sealed copies immediately and it may take some time.
- [22] Later still, in the afternoon on 12 November 2015, Mr Jones contacted the Alice Springs Supreme Court registry directly. He explained the circumstances, and asked if he was able to provide his personal credit card details over the telephone to pay the filing fee for the documents. He was told that could be done and his details were taken by a staff member in the registry. Mr Jones was advised that they would process the payment on 12 November 2015.
- [23] On 12 November 2015 Mr Jaswant Sandhu, who is a principal lawyer with Slater and Gordon, sent a letter to the defendant in Alice Springs. The letter enclosed unstamped and unsigned copies of the “Writ” and “Statement of Claim” that had been delivered to the Supreme Court registry that day.
- [24] On 13 November 2015 the Alice Springs Supreme Court registry issued a receipt for a credit card payment of \$2,320.00 being the filing fee for the documents filed by Ms Morley. The receipt was headed, “filing originating motion Ryan Street v Arafura Helicopters”.

[25] At 11:07 am on 16 November 2015 Mr Glenn Biggs of Carter Newell, the solicitors for the defendant, sent the following email to Miss Angela Heather at Slater and Gordon.

We act for Arafura Helicopters Pty Ltd in respect of the above matter. Could you kindly note our interests.

Are we correct in understanding your first correspondence to our client was that of 12 November under which an unsealed and unsigned copy of your clients pleadings were faxed/mailed to our client? You don't otherwise advise in Writing that your firm is acting for Mr Street, and we can merely assume by reference only to the unsealed unsigned pleadings that you in fact represent Mr Street in this matter. Please advise.

It is not apparent - indeed appears not the case - that you have taken steps to serve our client with originating process. Can you please advise, else advise when service has been properly affected on Arafura Helicopters Pty Ltd. In the circumstances, we would appreciate your undertaking not to take steps deleterious to our client without first providing us five days' notice.

[26] On 16 November 2015 Ms Maxine Baloban, the Registry Manager in Alice Springs, returned to work from annual leave. On her return, she noted that the documents filed by Ms Morley on behalf of the plaintiff had been "rejected by the Registrar as they did not comply with the Supreme Court Rules".¹

[27] At 8:37 am on 17 November 2015 Mr Jones sent Mr Biggs the following email.

Dear Glenn,

I confirm that I have taken over carriage of this matter from Angela Heather.

¹ Affidavit of Maxine Baloban sworn on 15 April 2016 at [2]

I can confirm we act for Mr Street in this matter and that the relevant pleadings were filed in the Supreme Court of the Northern Territory, Alice Springs Registry, on 12 November 2015. We have an agent acting for us from Alice Springs and they have advised that the court does not provide a signed and sealed copy of the file documents immediately. We are waiting on a sealed copy and will provide a copy to you and your client upon receipt.

I trust this is of assistance.

[28] At 9:18 am on 17 November 2015 Ms Baloban sent the following email to Ms Morley.

This registry has received a filing by you in the above matter. Registrar has *rejected* this filing as it does not comply with the requirements of the Supreme Court as per rules 4 and 5 of the Supreme Court Rules.

The documents will be *returned* to your court box at reception for you to collect.

Cheers Max

PS - helpful hint: a form 5A with the Statement of Claim attached (one document) should be all that is required (in triplicate) as it is now the Statement of Claim is a separate doc (sic) with the words ‘originating process’ included. This should be removed. [*emphasis added*]

[29] On 18 November 2015 Ms Morley forwarded Ms Baloban’s email to Mr Jones. On the same day Mr Jones replied by email to Ms Baloban saying that he would attend to what was required. In that email Mr Jones also wrote: “In the meantime, I note that payment has been taken from my personal credit card. Can this be reversed now that *the documents have not been filed?*” [*emphasis added*]

[30] After receiving Mr Jones’ email, Ms Baloban telephoned Mr Jones on 18 November 2015. In her affidavit made on 15 April 2016 Ms Baloban says she told Mr Jones that, as the registry was expecting replacement

documents to be filed, the filing fee could be applied to those replacement documents. She cannot recall if she told Mr Jones that the registry would treat any replacement documents as being filed on 12 November 2015. However, she said that it is common practice for documents to be backdated to the date of original filing when they have been returned due to irregularities.

[31] Mr Jones' recall of the telephone conversation he had with Ms Baloban on 18 November 2015 is as follows. Ms Baloban confirmed that payment for the filing of the pleadings had been processed and said that, given the reason for rejecting the pleadings being due to format only, the registry would accept the date of filing as 12 November 2015. She further explained that a back sheet relating to the Writ had already been date stamped 12 November 2015 and that this date would be taken to be the date of filing. Ms Baloban confirmed that once the formatting errors had been attended to, the amended pleadings could be provided to the registry to be sealed and signed.

[32] On 19 November 2015 Mr Jones sent an email to Ms Morley asking her to collect the documents which had been rejected by the registry so he could review the documents. On 20 November 2015 Mr Jones sent a letter to the Supreme Court Registry in Alice Springs. The letter stated, among other things, the following:

Please find enclosed our client's Writ, including the Statement of Claim.

I can confirm that payment has already been made.

I note that the documents were originally provided to the court on 12 November 2015, however, due to a technical fault the documents were returned unsealed.

I have been advised by Ms Maxine Baloban that you still retain the back sheet confirming that this was the date the documents were originally provided.

I would be grateful if the attached documents could be filed and sealed by the Court with the date of filing being 12 November 2015.

[33] The letter enclosed a set of documents that had been amended by Mr Jones. They were still defective. The document described as a “Writ” included the names of the solicitors acting for the plaintiff and their town agent, Ms Morley, and the “Statement of Claim” no longer included the words “Originating Process”. However, the documents were still not signed, and the writ still did not contain an endorsement of claim; the “Statement of Claim” was still a separate document and not in Part 2 of the writ as required by the *Supreme Court Rules*. It is unclear what became of these documents.

[34] By 14 December 2015 Slater and Gordon appear to have terminated Ms Morley’s engagement, at her request, and engaged HWL Ebsworth to act as their town agents. On 14 December 2015 Mr Jones sent a letter to HWL Ebsworth which stated:

I refer to the above named and request that you act as our agent in this matter.

Please find enclosed our client’s Writ, including the Statement of Claim.

I confirm that all that is required of your firm is to peruse and settle the Writ and Statement of Claim (making any changes deemed necessary), file

the documents, obtain a sealed copy and return such to me. Should any action further than this be required then we intend to make the relevant application to the Supreme Court of the Northern Territory so that we can act directly.

I have previously *attempted to file the relevant documents without success*.

I can confirm that payment has already been made. Please obtain a copy of the receipt from the Court for our records.

I confirm that we undertake to pay your reasonable fees in the matter.
[emphasis added]

[35] Attached to Mr Jones' affidavit of 15 February 2016, is a letter from Mr Jones to the Supreme Court of the Northern Territory Alice Springs registry dated 14 December 2015. The letter states that it encloses "a Writ" and "Statement of Claim". It is unclear if this letter was sent and the enclosed documents received by the Supreme Court registry in Alice Springs. The documents were still not in accordance with the *Supreme Court Rules*.

[36] In any event, on 18 December 2015 HWL Ebsworth filed a writ endorsed with the statement of claim that was in accordance with the *Supreme Court Rules* and was accepted by the Supreme Court registry in Alice Springs. The writ was attached to a covering letter which stated:

We are instructed that a Writ and Statement of Claim was filed on 12 November 2015 and the filing fee accepted. Subsequently, the Writ was returned to comply with technical faults. Please find enclosed a Writ and Statement of Claim (undated and in duplicate) for filing. We request that the Writ be endorsed with the original filing date and the filing fee receipt be provided in due course.

[37] That writ was sealed in the registry and date stamped on the back “received 12 November 2015”. Also, the date 12 November 2015 was inserted by registry staff after the word “Filed” on page 3. The document was returned to HWL Ebsworth on or about 21 December 2015. HWL Ebsworth forwarded the sealed documents to Mr Jones. He received them on 11 January 2016 and served the writ on the solicitors for the respondent under cover of a letter dated 13 January 2016.

[38] On 15 January 2016 there were two telephone conversations between Ms Baloban and the solicitors for the respondent. Ms Baloban told the solicitors for the respondent that:

- (a) the documents were not accepted on 12 November 2015 because of formatting non-compliance;
- (b) the formatting of the documents had now been corrected and the Registrar had backdated the document to 12 November 2015; and
- (c) the errors in the document had nothing to do with the contents of the documents.

[39] The solicitor for the defendant asked Ms Baloban if there was a rule permitting the backdating of the filing of documents in the registry. She told him that such matters were at the discretion of the Registrar.

The appellant’s case

[40] The appellant contended that the proceeding was commenced by the lodgement of the originating process on 12 November and the

subsequent acceptance of that document by a proper officer either on 16 or 17 November 2015 (Grounds 1 and 2) or, alternatively, on 18 December 2015 on the filing of the Writ in proper form by HWL Ebsworth (Grounds 3 and 4).

[41] The appellant advanced four propositions.

[42] The first proposition is that an action is brought by a plaintiff within the meaning of s 34 of the Act when the action is commenced according to the law of the *lex fori*, and in this case that is the law of the Northern Territory in particular the *Northern Territory Supreme Court Rules*.

[43] The second proposition is that on the proper construction of those rules, it is the date of lodgement of the writ or originating motion at the registry and not the date of acceptance which determines when a proceeding is commenced.

[44] The third proposition is that the originating process, consisting of the documents lodged by Ruth Morley, was presented for filing on 12 November, prior to the expiry of the two year limitation period specified under s 34.

[45] The fourth proposition is that, as a matter of fact, the Registrar or the proper officer accepted that originating process as commencing a proceeding.

[46] The first proposition was common ground between the parties.²

[47] The argument advanced by the appellant to support the second proposition is as follows:

(1) Rule 5.11 provides: “A proceeding shall be commenced by filing the originating process in the Registry.” This is a reference to an act of the party done at a particular moment in time.

(2) Rule 28.01, provides:

A document in a proceeding is filed by filing it:

- (a) in the Registry where the proceeding commenced; or
- (b) with the Proper Officer in Court.

This is also a reference to an act of the party done at that moment in time.

(3) Rule 28.02(3) provides: “A document received in a registry for filing is not filed until it is accepted by a Proper Officer.” The appellant contends that despite the use of the word “until” (which ordinarily has a temporal connotation) rather than “unless”, that

² *Agtrack NT Pty Ltd v Hadfield* (2005) 223 CLR 251 at [54]: “Given the subject, scope and purpose of the statute as a whole, it is readily apparent that s 34 should be given a construction harmonious with that which applies to the international carriage dealt with under the Conventions, in particular with reference to Art 29 of the Warsaw Convention.” This may require reference to cases from other convention countries: *Povey v Qantas* (2005) 223 CLR 189, 202 at [24] and [25]. *Kahn v Trans World Airlines* 82 A.D.2d 696 (1981) (US Supreme Court) emphasised that to determine whether a plaintiff has brought an action within the meaning of s 34, one looks at the rules of the particular court to determine whether the plaintiff has taken the necessary measures within the two year period to invoke the jurisdiction of that court.

The Warsaw Convention is attached as Schedule 2 to the *Civil Aviation (Carriers Liability) Act 1959* (Cth). Article 28.2 provides “Questions of procedure shall be governed by the law of the court seised of the case.” Article 29.2 provides “The method of calculating the period of limitation shall be determined by the law of the Court seised of the case.” None of this was in contention.

provision does not dictate when the document is filed and hence the proceeding commenced. All that provision does is insert a condition subsequent. On its true construction this simply means that the document will not have been filed unless it is accepted by a Proper Officer at some stage. This introduces what counsel for the appellant described as a period of limbo during which it is uncertain whether or not an action has been brought, but once the document which was lodged is accepted for filing, the commencement date of the action is the date of lodgement of the originating process.³ Counsel for the appellant submitted that no purpose would be served by construing Rule 28.02(3) as a provision which determines the time at which the action commences and every reason why it should not, and characterised such an interpretation as “impractical and unfair”. He pointed to the potential injustice that could occur if a plaintiff lodged a document for filing on the last day of the limitation period, and because of events beyond his control (for example an unusually busy day in the registry or a number of registry staff away sick) the document was not assessed and accepted for filing until, perhaps, days later. He also relied on the present practice of the registry which is to date stamp each document the day it is

3 The appellant relied on *Davies v Lewis* [2001] NTSC 105 at [14] in which Thomas J said: “I accept on behalf of the plaintiff that filing occurs when the document is deposited at the court office.” The appellant also referred to *Visic v Proude* [2013] 116 SASR 404 at [53] and *Gower v Woodman Sales* [1988] 2 Qd R 15 as supporting the general proposition, though conceding that these related to different rules and different factual situations.

received and, in the case of writs and originating motions, for the proper officer to hand write in the date of lodgement as the date of filing.⁴ Counsel characterised the purpose of Rule 28.02(3) as creating a mechanism whereby the court can control what documents come onto its file rather than fixing a time when proceedings are deemed to have commenced.

- (4) Rule 28.03 provides: “The Registrar or Proper Officer, as the case requires, shall endorse the date and time of filing on every document filed.” Mr Christrup for the appellant contended that this could only refer to the date of lodgement of the documents – and not to some later time when the Registrar or proper officer makes a subjective decision to accept the documents for filing. He relied on this as an express rule supporting the appellant’s contention that the time of filing (and hence commencement of a proceeding) is the time the originating process is lodged for filing provided it is subsequently accepted. Alternatively, he submitted that such meaning arose as a matter of implication from the combined effect of the Rules relied upon by the appellant.

⁴ In fact in this case that procedure was not followed. When the complying writ was filed on 18 December 2015, the proper officer stamped it on the back as received on 12 November 2015 and hand wrote in over that stamp the amount of the filing fee and the receipt number of the receipt issued on 13 November. (There is no issue in the case about the filing fee. The Rules do not make commencement of a proceeding conditional upon payment of the filing fee and, in any case, credit card details were provided on 12 November 2015.)

- [48] The third proposition, that on 12 November 2015 Ruth Morley lodged for filing two documents which purported, together, to be an originating process is non-contentious.
- [49] The appellant relied on the following evidence as making good the fourth proposition, namely that the Registrar or proper officer accepted the originating process lodged by Ruth Morley on 12 November 2017.
- [50] Rule 27.02(1) provides: “A document shall be headed ‘In the Supreme Court of the Northern Territory of Australia at’, stating in which Registry of the Court the proceeding commenced, and shall show an identifying number assigned by the Court to the proceeding.” The evidence is that on either 16 or 17 November 2015, someone in the registry allocated an identifying number to the present proceeding which would not have been done had there not been a proceeding on foot. From that it can be inferred that the Registrar or proper officer must have considered there to have been a proceeding on foot, which would not have been the case unless the originating process lodged on 12 November had been accepted for filing.
- [51] The appellant also relied on the fact that the filing fee was paid by credit card on 12 November 2015 (and receipted on 13 November 2015) and on the telephone conversation between Mr Jones and Ms Baloban on 18 November 2015. In that telephone conversation Ms Baloban confirmed that payment for the filing of the pleadings had

been processed; said that, given the reason for rejecting the pleadings being due to format only, the registry would accept the date of filing as 12 November 2015; and confirmed that once the formatting errors had been attended to, the amended pleadings could be provided to the registry to be sealed and signed.

[52] Counsel for the appellant submitted that the irresistible inference to be drawn from this evidence is that the Registrar had accepted the documents lodged by Ruth Morley on 12 November 2015 for filing.

[53] The appellant contended that the email from Ms Baloban to Ruth Morley on 19 November 2015 should not be construed as a rejection for all purposes. That email said:

This registry has received a filing by you in the above matter. Registrar has rejected this filing as it does not comply with the requirements of the Supreme Court as per rules 4 and 5 of the Supreme Court Rules.

The documents will be returned to your court box at reception for you to collect.

The appellant contended that this was a reference to sealing the document rather than filing it and that, in effect, it meant no more than an indication by Ms Baloban that the originating process would not be signed by the Registrar or sealed with the court seal unless and until the identified formal defects had been attended to.

The respondent's case

- [54] The respondent contended that the evidence supported the conclusion that the documents lodged by Ms Morley had not been accepted by a Proper Officer.
- [55] The respondent also contended that the construction of the Rules advanced by the appellant in support of the appellant's second proposition was incorrect; that the plain meaning of the Rules was that a document was not filed until accepted by a Proper Officer [Rule 28.02(3)] and that, accordingly, under the *Northern Territory Supreme Court Rules*, the date of filing (and hence of commencement of proceedings) is the date of acceptance of the originating process by a Proper Officer.⁵
- [56] The respondent also relied on Rules 5.11(1), 28.02(3), and 28.03. As set out above, r 5.11 provides: "A proceeding shall be commenced by filing the originating process in the Registry"; r 28.02(3) provides: "A document received in a Registry for filing is not filed until it is accepted by a Proper Officer"; and r 28.03 provides: "The Registrar or Proper Officer shall endorse the date and time of filing on every document filed."

⁵ The respondent also mounted a subsidiary argument that if the rules were to be construed in the manner contended for by the appellant, that would not avail the appellant because s 34 of the Act requires the jurisdiction of the court to have been invoked – and for that act of invoking the jurisdiction to be complete – within two years. If all such requirements had not all been met by midnight on 12 November, the appellant's claim would have been extinguished and that could not be changed by events afterwards. Further, to the extent that the *Northern Territory Supreme Court Rules* purported to retrospectively revive the appellant's claim, the Rules would be invalid by reason of inconsistency with s 34. It is not necessary for us to determine this question.

[57] The respondent contended that in these three Rules, the words “filing” and “filed” are used in a formal technical sense. They refer to the formal act of placing a document on the court file following its acceptance by the relevant court officer. The respondent submitted that this formality is important because it is the physical manifestation of the state of mind of the relevant court officer who has decided to accept the document for filing. Hence when r 28.03(3) talks about a document received in a registry for filing, there’s a clear distinction between receipt and filing. The potential litigant (or solicitor) lodges the document in the registry for filing; the Registrar or proper officer decides whether to accept it; if the decision is to accept it,⁶ the document is formally filed by placing it on the Court file [Rule 28.02(3)]; the Registrar or proper officer is obliged to endorse on the document the date and time when the document is placed on the Court file [Rule 23.03]; the document has then been filed and, if it is an originating process, the proceeding has commenced [Rule 5.11(1)].

[58] There is a compelling logic to the contentions of the respondent. However, it is not necessary for this Court to decide between the competing constructions of the Rules. For the appellant to succeed, he must establish two things:

6 Where a document is not in proper form (like the ones at issue here) Rule 26.07(2) provides that the Proper Officer may refuse to accept the document for filing [Rule 27.06(2)(a)] or the Court may order that the party responsible for filing the irregular originating process shall not be entitled to rely on it in any manner in the proceeding until a document which is duly prepared is made available [Rule 27.06(2)(b)]. It is common ground that in this case, no order under Rule 27.06(2)(b) was made or applied for.

- (a) that on the true construction of the Rules, the date of commencement of a proceeding is the date that the originating process is lodged for filing in the registry, provided that it is at some time accepted for filing by the Registrar or proper officer; and
- (b) that a proper officer in fact accepted the documents that Ms Morley lodged on 12 November 2015, whether that occurred on 16 or 17 November, or on 18 December on the filing of the complying Writ.

[59] In our view, the appellant fails in relation to (b). The judge at first instance was correct in determining that the proper officer did not accept those documents for filing. Notwithstanding the ingenious arguments of Mr Christrup for the appellant, we are unable to see how one can infer that the documents were accepted for filing when they were returned to the lodging party and an email sent advising that the documents had been rejected. The email communication from Ms Baloban to Ruth Morley on 17 November was unambiguous: the Registrar rejected the documents for filing and that rejection was manifested by returning the physical documents to Ms Morley.

[60] The very same documents had been lodged for filing the day before, the Registrar had examined them and had sent an email to a staff member at the Registry saying, “Please *return* the documents
They are not in acceptable form.”

[61] In light of this unambiguous rejection of the documents lodged for filing by Ms Morley, the allocation of a number to the proceeding on 16 or 17 November must be seen as part of the procedure then adopted in the registry, described in Ms Baloban's affidavit, of backdating documents to the date of original filing when they had been returned due to irregularities, rather than as evidence that the documents had in fact been accepted for filing. The conversation between Ms Baloban and Mr Jones concerning the filing fee must be seen in the same context.

[62] We consider that the judge at first instance was correct to find⁷ that the first document to be delivered to the registry of the Supreme Court and accepted for filing was the writ which was filed on 18 December 2015: none of the documents that were delivered to the registry before that date was accepted for filing; none of the documents that were delivered to the registry before that date was on the Court file at the date of hearing the preliminary question at first instance or on appeal.

[63] We also consider that his Honour was correct to hold that while the registry in the Supreme Court in Alice Springs had a practice of backdating originating process that had not been formatted correctly, and did so in this case, there is no power to do so.⁸

⁷ *Street v Arafura Helicopters Pty Ltd* [2018] NTSC 15 at [44]

⁸ *Street v Arafura Helicopters Pty Ltd* [2018] NTSC 15 at [46]

[64] The appeal is dismissed.