

PARTIES:

GRAHAM LAWRENCE DAVIES

v

MAREE LEWIS

TITLE OF COURT:

SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION:

SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction

FILE NO:

AS16 of 1998 (9807240)

DELIVERED:

23 November 2001

HEARING DATES:

3 May 2001

JUDGMENT OF:

THOMAS J

CATCHWORDS:

INTERLOCUTORY APPLICATION

Application by defendant that statement of claim be struck out – whether proceedings were commenced within 3 years of cause of action – whether lodging writ and statement of claim without filing fee constitutes commencement of proceedings.

Limitation Act 1981 (NT), s 12(1)(b)

Supreme Court Act 1979 (NT), s 87

Supreme Court Regulations 1985 (NT), reg 4

Supreme Court Rules 1987 (NT), r 4.01, r 5.01, r 5.10, r 5.11, r 28.01, r 28.02, r 28.03 and r 28.04

Supreme Court Rules 1987 (SA), r 107.04

Supreme Court Regulation 2000 (NSW), reg 11(1) and reg 11(3)

Rules of the Supreme Court (Qld) 1901, rule 87.12

Gower v Woodman Sales Pty Ltd [1988] 2 Qd R 15, referred to

In Re Commercial Union Assurance Company (1900) 18 NZLR 585; *Beecham (Australia) Pty Ltd v Roque Pty Ltd* (1987) 11 NSWLR 1; *Director of Public Prosecutions v His Honour Judge Fricke* [1993] 1 VR 369, cited

REPRESENTATION:*Counsel:*

Plaintiff:	P Day
Defendant:	S Gearin

Solicitors:

Plaintiff:	Collier & Deane
Defendant:	Povey Stirk

Judgment category classification:	C
Judgment ID Number:	tho200129
Number of pages:	11

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

Davies v Lewis [2001] NTSC 105
No. 16 of 1998

BETWEEN:

GRAHAM LAWRENCE DAVIES
Plaintiff

AND:

MAREE LEWIS
Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 23 November 2001)

[1] This is an application by the defendant for the following orders:

1. That the plaintiff's statement of claim filed 26 May 1998 be struck out on the basis that the action is not maintainable as the proceedings were not commenced within three years of the cause of action first accruing to the plaintiff in accordance with s 12 of the Limitation Act 1981 (NT).
2. This application be heard as a preliminary matter to any substantive hearing.
3. That the costs of the proceeding be awarded to the defendant.

4. Any further order this honourable court deems appropriate.

- [2] The substantive action is a claim against the defendant in negligence for damages for personal injuries that occurred when the vehicle being driven by the defendant and in which the plaintiff was a passenger was involved in a motor vehicle accident.
- [3] The date of the accident as claimed on the writ and statement of claim filed by the plaintiff was 27 March 1995.
- [4] Section 12(1)(b) of the Limitation Act provides as follows:

“12. Actions in contract and tort, &c.
(1) Subject to subsection (2), the following actions are not maintainable after the expiration of a limitation period of 3 years from the date on which the cause of action first accrues to the plaintiff or to a person through whom he claims –
.....
(b) an action founded on tort including a cause of action founded on a breach of statutory duty;”
- [5] It is not in dispute that the last day for filing the writ and statement of claim, under the requirements of the Limitation Act, was 26 March 1998.
- [6] The date appearing on the statement of claim is 25 March 1998. The date for filing of the writ with the statement of claim attached is 26 May 1998. (Annexure “A” to the affidavit of Rennie Douglas Anderson sworn 30 March 2001).
- [7] On 16 December 1998, the plaintiff filed an amended statement of claim.

- [8] On 13 April 1999, the defendant filed a defence.
- [9] On 4 April 2001, the defendant filed an amended defence par 9 of which provides as follows:

“The defendant says that the action is not maintainable as the proceedings were not commenced within 3 years of the cause of action first accruing to the plaintiff in accordance with s 12 of the Northern Territory of Australia Limitation Act.

Particulars

The Writ commencing the proceedings was filed on 26 May 1998.”

- [10] Annexure “D” to the affidavit of Rennie Douglas Anderson sworn 30 March 2001 is copy of a letter dated 20 September 2000 from solicitors for the plaintiff to solicitors for the defendant omitting formal parts, this letter reads as follows:

“I refer to your letter of 15 September 2000.

The Writ was filed in time. What follows is the chronology of events:

On 25 March 1998 we received our instructions to file the Writ and Statement of Claim in this matter by 27 March 1998. Although privileged, I can provide you with copies of the correspondence between us.

On 26 March 1998 my rounds clerk, Sue James, attended at the Court to file the Writ. I enclose (*) a copy of our rounds memo. I also enclose (*) a telephone message from the Registrar noting the Writ was filed on 26 March 1998 but noting the \$150 filing fee was not annexed, and seeking payment of same. The telephone message is accompanied by a filenote where I returned Mr Campbell’s call. Mr Campbell advised me that he could not process the Statement of Claim, ie. issue a sealed copy, until the fee was paid but that he would accept that the Statement of Claim had been filed on 26 March 1998 because that was the date it was indeed sought to be filed and accepted by the Court. However, for some reason it would appear that the Statement of Claim was sent to Darwin in the usual course of

events without the Registrar attending to noting the date of filing as being 26 March 1998.

Mr Campbell tells me that he will acknowledge that the Writ was filed on 26 March 1998 and you are welcome to contact him to confirm this. He is presently requesting the file be sent down from Darwin as the file will contain a ‘date received’ stamp which will show that it was filed at the Court on 26 March 1998.

Could I suggest that you withhold making your application to amend your defence until this issue is resolved. Please advise whether you will agree to this course of conduct.

I look forward to hearing from you.”

A copy of this letter is Annexure “J” to the affidavit of Nardine Rosemary Collier sworn 30 April 2001.

[11] Mr Anderson’s affidavit sworn 30 March 2001 also contains copies of correspondence with the Registrar of the Supreme Court from solicitors for the plaintiff and the defendant. Annexure “G” is copy of a letter from the Registrar of the Supreme Court dated 30 October 2000 to solicitors for the defendant, with copy to solicitors for the plaintiff which omitting formal parts states as follows:

“I refer to your letter dated 18 October 2000.

The writ appears to have been filed on 26 March 1998. I am not aware of any power to amend the date of filing of a writ without reference to the Court. According to the plaintiff’s solicitors, this amendment was made with the concurrence of Mr Stirk.”

[12] The first issue to be determined is whether the lodging of the writ and statement of claim on 26 March without the filing fee constitutes commencement of proceedings.

- [13] In his affidavit sworn 2 May 2001, Mr Peter Campbell the Deputy Sheriff of the Supreme Court, Alice Springs deposed to a number of matters which can be summarised as follows:
- [14] Mr Campbell received for filing a writ and statement of claim in this matter on 26 March 1998. Sometime after that date but before 3 April 1998 he noticed that the filing fee had not been paid. On 3 April 1998, he notified the office of the solicitor for the plaintiff that the filing fee had not been paid and that he could not process the writ and statement of claim and issue a sealed copy for service until the filing fee had been paid. He advised the solicitor he would endorse the writ and statement of claim as having been filed on 26 March 1998 because that was the date it was received by the Court for filing. In Mr Campbell's opinion, the non-payment of the filing fee did not affect the date on which the document was filed. Mr Campbell conveyed this opinion to the solicitor for the plaintiff. Unbeknown to Mr Campbell the writ and statement of claim were forwarded to the Registry Office of the Supreme Court in Darwin where it was dated on his understanding 25 May 1998, which Mr Campbell presumes was the date the document was received by the Registrar in Darwin. Mr Campbell noted from computer records maintained by the Court that the writ was dated and filed 26 March 1998 and processed on 3 April 1998. Mr Campbell was unaware who had added this information. Annexed to Mr Campbell's affidavit and marked "A" is a copy of the page of the writ showing the writ

was received by the Supreme Court in Alice Springs for filing on 26 March 1998.

[15] Evidence was given by Mr Stirk for the defendant. The plaintiff called three witnesses to give evidence Mr Peter Campbell, Ms Susan James and Ms Nardine Collier.

[16] The evidence of Ms James, Ms Collier and Mr Campbell is to the effect that the writ and statement of claim was filed at the Registry of the Supreme Court in Alice Springs on 26 March 1998. The evidence given by Mr Stirk and the affidavit of Mr Anderson sworn 30 March 2001, does not dispute this fact. It is not in dispute that no filing fee accompanied the documents that were lodged on 26 March 1998.

[17] The essential issue between the plaintiff and the defendant is as to what is meant by the commencement of proceedings. Ms Gearin, on behalf of the defendant, submits that the defendant's position is that this date was 26 May 1998 being the date the writ bears. It is the defendant's position that the writ did not issue until 26 May 1998 which is out of time and that the action is not maintainable because the fee was not paid until outside the limitation period. Alternately, the submission on behalf of the defendant is that the action is not maintainable because the writ and statement of claim were filed (within the meaning of that expression in order 28 of the Supreme Court Rules 1987(NT)) on 26 May 1998 and the Supreme Court seal and the stamp

of the Registrar, M. Rischbieth, was affixed to the writ at that time which is outside the limitation period.

[18] The plaintiff's argument is that an analysis of the Supreme Court Rules reveal that the triggering event for the commencement of proceedings is the filing of the writ. Once the writ is filed proceedings are commenced. Mr Day, on behalf of the plaintiff, submits that there is nothing in the Supreme Court Rules 1987 or the Supreme Court Act 1979 (NT) to the effect that payment of the filing fee is a necessary pre-condition to filing, or that an originating process cannot be filed with subsequent payment of the filing fee.

[19] I have set out hereunder the relevant provisions of the Supreme Court Act and the Supreme Court Rules:

[20] The Supreme Court Act (s 87), empowers the Administrator to make regulations prescribing the fees to be paid in respect of a proceeding in the Court.

[21] Pursuant to regulation 4 of the Supreme Court Regulations 1985 (NT), the schedule provides \$300 fee for filing of an originating process which includes a writ.

[22] Rule 4.01 of the Rules provides that proceedings "shall be commenced by writ or by originating motion".

[23] Rule 5.01 provides that the concept of "originating process" includes a writ.

[24] Rule 5.10 **Petition** provides that:

“A petition shall include at the end the name of the person intended to be served, if any, or, if no person is intended to be served, a statement to that effect.”

[25] Rule 5.11 provides that “a proceeding shall be commenced by filing the originating process in the Registry”.

[26] Rule 28.01 **How document is filed** provides that:

“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.”

[27] Rule 28.02 **Place of filing** provides that:

“(1) In respect of a proceeding for trial in Darwin, documents shall be presented in the Registry at Darwin for filing.

(2) In respect of a proceeding for trial in Alice Springs, documents shall be presented in the Registry at Alice Springs for filing.

(3) A document received in a registry for filing is not filed until it is accepted by a Proper Officer.

(4) Notwithstanding subrules (1) and (2), where an urgent application is made in a proceeding, a document may be filed in connection with that application at the Registry at the place where the application is made.”

[28] Rule 28.03 **Date of filing** provides that:

“The Registrar or Proper Officer, as the case requires, shall endorse the date and time of filing on every document filed.”

[29] Rule 28.04 **Seal of Court** provides that:

“(1) The Master, a Registrar, the Sheriff and a Proper Officer shall each have in his custody a stamp of a design approved by the Chief Justice.

(2) A Registrar, a Deputy Sheriff and a Proper Officer at Alice Springs Registry shall have in their custody a stamp of a design approved by the Chief Justice with or without the additional words "Alice Springs Registry".

(3) Marking of a document or a copy of a document with the Seal of the Supreme Court of the Northern Territory of Australia or with a Stamp of a design approved by the Chief Justice is sufficient compliance with a requirement of this Chapter or an order of the Court that the document or a copy be sealed with the Seal of the Court.”

[30] Mr Day, on behalf of the plaintiff, draws attention to the Northern Territory being in a different position to other jurisdictions. For example, in South Australia, rule 107.04 of the Supreme Court Rules 1987 (SA) provides that payment of court fees must be made before any process is issued from, or filed in the Registry.

[31] In New South Wales the Supreme Court Regulation 2000 (NSW), relating to payment of court fees, in particular regulation 11(1) provides that a fee charged under this regulation becomes payable when the document concerned is filed or the service concerned is rendered. Regulation 11(3) invests the Registrar of the Supreme Court with a discretion to waive such fee or requirement pre-payment.

[32] A reading of the authority upon which the defendant relies *Gower v Woodman Sales Pty Ltd* [1988] 2 Qd R 15 at 19 Macrossan J refers to rule 87.12 of the Rules of the Supreme Court (Qld) 1901 which is in these terms:

“No document in respect of which a fee is payable shall be sealed or received or filed until the fee has been paid”.

- [33] I agree with the submission made by Mr Day on behalf of the plaintiff that there is no equivalent provision in the Supreme Court Act (NT) Supreme Court Rules (NT). Whilst the Supreme Court Act contains a power to prescribe a fee and such fee is prescribed in regulation 4 on an originating process there is no reference to the timing of the payment of such fee.
- [34] I accept the argument on behalf of the plaintiff that filing occurs when the document is deposited at the court office. *In Re Commercial Union Assurance Company* (1900) 18 NZLR 585 at 588 – see also *Beecham (Australia) Pty Ltd v Roque Pty Ltd* (1987) 11 NSWLR 1 at 10 and *Director of Public Prosecutions v His Honour Judge Fricke* [1993] 1 VR 369 at 372.
- [35] I accept the evidence of Ms Collier, Ms James and Mr Campbell that in the present case the writ was deposited at the Supreme Court Registry office in Alice Springs on 26 March 1998. On the evidence of Mr Campbell I find that the writ and statement of claim was accepted by a “proper officer”, namely, Mr Campbell. I find that accordingly the writ was filed on that date. The late payment of the fees may have delayed the processing and sealing of the writ with a copy for service but does not affect the fact that it was filed on 26 March 1998.

[36] The writ having been filed on 26 March 1998, I find that the proceedings were commenced within three years of the cause of action first accruing to the plaintiff in accordance with s 12 of the Limitation Act.

[37] I would dismiss the defendant's application that the plaintiff's statement of claim be struck out.

[38] I grant liberty to the parties to apply on the question of costs.
