

CITATION: *Street v Arafura Helicopters Pty Ltd*
[2018] NTSC 15

PARTIES: STREET, Ryan Michael

v

ARAFURA HELICOPTERS PTY LTD
t/as ALICE SPRINGS HELICOPTERS
(ABN 19 071 259 606)

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING FEDERAL
JURISDICTION

FILE NO: 11 of 2015 (21556836)

DELIVERED ON: 12 March 2018

DELIVERED AT: DARWIN

JUDGMENT OF: SOUTHWOOD J

CATCHWORDS:

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

PRACTICE AND PROCEDURE – Civil Procedure – Writs – Filing in correct form – Whether jurisdiction of the Court invoked – *Supreme Court Rules* (NT)

Civil Aviation (Carriers' Liability) Act 1959 (Cth) s 34
Supreme Court Act (NT) s 49

Supreme Court Rules (NT) r 2.02, r 4.01, r 4.04, r 5.02, r 5.04, r 5.07, r 5.11, r 6.05, r 27.06, r, 28.02, r 47.04

REPRESENTATION:

Counsel:

Plaintiff:	S Brownhill SC, R Sanders
Defendant:	A Wyvill QC

Solicitors:

Plaintiff:	HWL Ebsworth
Defendant:	Povey Stirk

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

Street v Arafura Helicopters Pty Ltd [2018] NTSC 15
No 11 of 2015 (21556836)

BETWEEN:

RYAN MICHAEL STREET
Plaintiff

AND:

ARAFURA HELICOPTERS PTY LTD
t/as ALICE SPRINGS HELICOPTERS
(ABN 19 071 259 606)
Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 12 March 2018)

Introduction

- [1] The plaintiff has sought to make a claim under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) for damages he sustained as a result of a helicopter accident that occurred in the Northern Territory on 12 November 2013. The defendant has denied liability, among other grounds, on the ground that the defendant's liability has been extinguished under s 34 of the Act because the proceeding was not brought within two years after 12 November 2013.
- [2] 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 s 34

extinguishment of liability issue be tried before the trial of the proceeding.

Below are my reasons for judgment on the preliminary question.

Background

[3] 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.

[4] On 12 November 2013 the plaintiff was a passenger in a Bell 206 helicopter operated by the defendant. The helicopter was flown by a pilot employed by the defendant. The helicopter took off from a position south-east of Alice Springs in the Northern Territory. Approximately one hour into the flight, the plaintiff was told by the pilot that the helicopter was going down and that he should brace for impact. Upon the helicopter impacting with the ground the plaintiff suffered serious injuries.

[5] At some point in time, following the helicopter accident, the plaintiff retained Slater and Gordon Lawyers as his solicitors. Mr Paul Alexander Jones was the solicitor who had the conduct of this proceeding on behalf of

the plaintiff. He was a senior associate employed by Slater and Gordon Lawyers.

- [6] Before 11 November 2015, Mr Jones drafted two documents. The first document 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', immediately 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 but they were not in compliance with those rules. There were a number of defects. For example, the Writ did not contain an Endorsement of Claim, and a Statement of Claim is not an originating process. 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 (drafted) in the Writ under Part 2 of the document. There should not have been two documents.

- [7] On 11 November 2015 Mr Jones engaged Mr Len Robinson who was a private enquiry agent and process server with Griffiths Investigations.

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.

- [8] Instructing Mr Robinson to file the documents was another error. Under the Supreme Court Rules, Mr Robinson could not perform such a task. It was necessary for Slater and Gordon Lawyers to retain solicitors in Alice Springs to act as their town agents.
- [9] On 11 November 2015, Mr Robinson duly delivered the documents to the Alice Springs Registry and they were received by registry staff. He again attended the registry at 8:55 am on 12 November 2015. When he attended he was told that the documents were still with the Registrar and it was necessary to pay a filing fee of \$2,320.00.
- [10] At 10:07 am 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.

- [11] 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”.
- [12] After receipt of the above information, Mr Robinson informed Mr Jones that he had been advised by the Registrar that the documentation did not comply with the Supreme Court Rules and Mr Jones would have to engage a solicitor in Alice Springs to represent the plaintiff 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.
- [13] 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.

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

[15] 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.

[16] 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. Among other defects, they were not signed by her.

[17] 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 that the registry does not provide sealed copies immediately and it may take some time.

[18] Later still, in the afternoon on 12 November 2015, Mr Jones contacted the Alice Springs Supreme Court Registry. 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.

[19] 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.

[20] 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".

[21] 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.

[22] 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.

[23] 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.

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.

[24] 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.

- [25] 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. Mr Jones stated that he would attend to what was required. He also asked if the credit which had been taken from his personal credit card could be reversed now that the documents *had not been filed*.
- [26] After receiving Mr Jones' email, Ms Baloban telephoned Mr Jones on 18 November 2015. In her affidavit made on 15 April 2016 Ms Baloban states 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, it is common practice for documents to be backdated to the date of original filing when they have been returned due to irregularities.
- [27] 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 will 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. This date will be taken to be the date of filing. Ms Baloban confirmed that once the formatting errors had been attended to, the amended pleadings can be provided to the registry to be sealed and signed.

[28] 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 clients 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.

[29] The letter enclosed a set of documents that had been amended by Mr Jones.

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 Statement of Claim was still a separate document. It was not simply contained in Part 2 of the Writ as required by the Supreme Court Rules.

[30] It is unclear what became of these documents.

[31] 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.

[32] Attached to Mr Jones' affidavit of 15 February 2016, as part of attachment PJ8, is a letter from Mr Jones to the Supreme Court of the Northern Territory Alice Springs Registry dated 14 December 2016. 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.

[33] In any event, it seems that 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.

[34] The sealed Writ, which was endorsed with a Statement of Claim, and backdated to 12 November 2016 was received by HWL Ebsworth on or about 21 December 2015. On 11 January 2016 the signed and sealed pleadings were received by Mr Jones at his office. The Writ appears to have been served on the solicitors for the defendant by way of letter dated 13 January 2016.

[35] On 15 January 2016 there were two telephone conversations between Ms Baloban and the solicitors for the defendant. It appears Ms Baloban informed the solicitors for the defendant of the following matters. The documents were not accepted on 12 November 2015 because of formatting non-compliance. The formatting of the documents had now been corrected and the Registrar had backdated the document to 12 November 2015. The errors in the document had nothing to do with the contents of the documents. Ms Baloban was asked if there was a rule permitting the backdating of the filing of documents in the registry. She stated that such matters were at the discretion of the Registrar.

Originating process - the requirements of the Supreme Court Rules

[36] Prior to the commencement of the current Supreme Court Rules, no single term described a matter in the civil jurisdiction of the Court. A civil proceeding was called variously ‘any cause’, ‘any action or proceeding’, ‘any action’, ‘any cause, matter or other proceeding’ and ‘any cause or matter’.¹ These expressions no longer appear. ‘Proceeding’ is now the only term denoting a civil matter in the Court.

[37] Under the Supreme Court Rules a proceeding, and therefore ‘an action’, is constituted once it is commenced and a proceeding is commenced when the appropriate step is taken under the rules to invoke the jurisdiction, power and authority of the Court to grant some relief or remedy. The correct

¹ NJ Williams, *Supreme Court Civil Procedure* (Butterworths 1987), at [2.01].

commencing step is either one established by the Supreme Court Rules themselves or one established by an Act of Parliament. The Supreme Court Rules recognise that the procedures prescribed by the Rules are not exhaustive of the methods by which a proceeding to which Chapter 1 of the Rules applies may be commenced.²

[38] Rule 4.01 of the rules states, “Except where otherwise provided by or under an Act or this Chapter, a proceeding shall be commenced by Writ or by originating motion.” Rule 4.04 states, “Except as provided by rules 4.05 and 4.06, a proceeding shall be commenced by Writ.” Rule 5.02(2) states, “A Writ shall be in Form 5A. Rule 5.04(1) states, “A Writ shall contain an Endorsement of Claim.” Rule 5.04(2) states, “The Endorsement of Claim shall be: (a) Statement of Claim; or (b) statement sufficient to give, with reasonable particularity, notice of the nature of the claim and the cause of the claim and of the relief or remedy sought in the proceeding.” Further, under r 5.07(1)(a) and (b) and r 5,07(1)(c) of the Supreme Court Rules a Writ shall contain the following:

1. the address of the plaintiff and, where the plaintiff sues in person and that address is outside the territory, also an address within the Territory, or an email address, for service in accordance with rule 6.05;
2. the address of all defendants; and

² Ibid., at [2.02].

3. where the plaintiff sues by a solicitor, the name of the firm and the business address within the Territory of the solicitor and also, if the solicitor is the agent of another, the name or firm and the business address of the principal.

[39] Orders 4 and 5 of the Supreme Court Rules contain the rules about how proceedings are commenced and the content and filing of originating process. Under Rule 5.11(1), (2), and (3) of the Supreme Court Rules, a proceeding shall be commenced by filing the originating process in the Registry. The originating process filed shall be signed by the solicitor for the plaintiff or by the plaintiff where the plaintiff sues in person. On an originating process being filed or at a later time, the Proper Officer, on the request of the plaintiff, shall seal a sufficient number of copies of the originating process for service and proof of service.

[40] Rule 27.06 of the Supreme Court Rules deals further with the sealing and acceptance of an originating process. The rule states:

- (1) The Proper Officer may refuse to seal an originating process without the direction of the Court where he considers that the formal contents of the document show that were the document to be sealed the proceeding so commenced would be irregular or an abuse of the process of the Court.
- (2) Where a document for use in the Court is not prepared in accordance with this Chapter or an order of the Court:
 - (a) the Proper Officer *may* refuse to accept it for filing without the direction of the Court; or

(b) the Court may order that the party responsible shall not be entitled to rely on it in any manner in the proceeding until a document which is duly prepared is made available.

(3) The Court may direct the Proper Officer to seal an originating process or accept a document for filing.

[41] Further, rule 28.02(3) of the Supreme Court Rules states, “A document received in a registry for filing is not filed until it is accepted by the Proper Officer.”

[42] It is arguable that under r 27.06(2)(b) of the *Supreme Court Rules*, a Registrar is able to order that the party responsible for filing an 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. Under s 49 of the *Supreme Court Act* a Registrar has, and may exercise and perform, all the powers and functions of an Associate Judge under any law in force in the Territory, and the Master (now Associate Judge) had power to make an order under r 27.06(2)(b) of the Rules. If such an order was made the proceeding would have commenced on the date the original irregular document was received by the registry.

Consideration

[43] As s 34 of the *Civil Aviation (Carriers Liability) Act 1959* (Cth) imposes as a condition which is of the essence of the right to damages under that Act that an action be brought within two years of the stipulated event, the

burden of proving that a proceeding was brought within the time prescribed is on the plaintiff.

[44] It is common ground between the parties that in determining whether the proceeding in this case was brought within the time limit prescribed by s 34 of the Commonwealth Act involves a consideration of both the Supreme Court Rules and s 34. The Supreme Court Rules are relevant but not necessarily determinative. The critical question is on what date was the jurisdiction of the Supreme Court of the Northern Territory invoked. It seems to me that this question can only be determined by what the Supreme Court Rules provide. As is apparent from what is set out at [36] to [42] above, the jurisdiction of the Supreme Court is invoked when a Writ is delivered to the Alice Springs Supreme Court Registry and is accepted by a Proper Officer of the Court. On the evidence before the Court, this only occurred on 18 December 2015 after HWL Ebsworth filed a Writ which was in accordance with the rules. None of the documents filed before that date were accepted by the Registrar.

[45] While r 2.02 of the Supreme Court Rules provides:

The Court shall not wholly set aside a proceeding or the originating process by which a proceeding was commenced on the ground that the proceeding was commenced by the wrong process.

Rule 2.02 is of no assistance in this proceeding because the documents filed on behalf of the plaintiff up to and including 12 November 2015 were not accepted by the Registrar.

[46] Further, while the registry in the Supreme Court in Alice Springs appear to have had a practice of backdating originating process that had not been formatted correctly, and did so in this case, there is no power for them to do so. Further still, it has not been established by the plaintiff that the Registrar made an order in accordance r 27.06(2)(b) of the Supreme Court Rules. On the contrary, in her email of 11 November 2015 to Ms Brand, the Registrar states that the documents filed by Mr Robinson were not in acceptable form. Again, on 17 November 2015 Ms Baloban advised Ms Morley by email that the Registrar had rejected the documents she filed on behalf of the plaintiff on 12 November 2015.

Conclusion

[47] In the circumstances, my judgment is that the plaintiff's claim was extinguished by the operation of s 34 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth).

[48] I will hear the parties further as to any ancillary orders and costs.
