

How not to file a document: lessons in what can go wrong

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Time limitation problems sometimes arise because practitioners are unaware of relevant time limitations. A good place to start in this regard is the recently updated Limitation Schedule which is available in the Law Society website. Sometimes, however, the time issue arises not because the practitioner doesn't know about the time limit but because practical difficulties mean that what should be done is not done in time.

An acute and almost Kafkaesque example of this can be found in the recent case of *Street v Arafura Helicopters Pty Ltd* [2018] NTSC 15. In this case, the solicitor, Mr Jones, was instructed to make a claim for personal injuries suffered by his client. Mr Street was involved in a helicopter accident which occurred in the Northern Territory (NT) on 12 November, 2013. The legislation applicable to aviation accidents – the *Civil Aviation (Carriers Liability) Act 1959 (Cth)* – provides for, in effect, a two year limitation period. Mr Jones was aware of this (rather unusual) time limit and had, sometime prior to 11 November, 2015, drafted what he thought were the relevant documents necessary to commence Mr Street's claim against the helicopter in the Alice Springs registry Supreme Court of NT. He prepared a Form 5A/Writ and another document entitled "Originating Process" which contained the pleading of Mr Street's claim. These documents were intended to be in compliance with the NT Supreme Court Rule but were not in a number of respects. There should have been only one document, properly endorsed, with the pleading/Statement of Claim contained as part of the document. This was Mr Jones' first mistake.

Mr Jones sent the documents to a process-server in Alice Springs and instructed the process server to file the documents at the Registry and then serve them on the defendant. The forms in the Court Rules provided however that the document should have been filed by Mr Street's solicitor (i.e. Mr Jones) or by "town



agent" (being an Alice Springs solicitor) retained by Mr Jones. This was Mr Jones' second mistake.

The process-server promptly attended at the Registry on 11 November, 2015 and the documents were received by the Registry Staff. He went back when the Registry opened on 12 November, 2015 (the last day for filing) and was told that the documents were still with the Registrar but that there was a filing fee of \$2,320 which needed to be paid. Not knowing or not letting the process server know about this fee was Mr Jones' third mistake.

At 10.07am on 12 November, 2015 the Registrar sent an email to another member of the Registry asking her to return the documents to the process server because they were not in an acceptable form (and pointing out the defects) and noting that town agents needed to be instructed. The process server informed Mr Jones about these matters. This led to Mr Jones instructing Ms Morley, a solicitor in Alice Springs to file the documents, but he did not properly inform her about the defects in the documents: he said that the only problem was that he didn't have a town agent. This was his fourth mistake.

Ms Morley then attempted to file the same (defective) documents. Mr Jones then rang the Registry and managed to pay the fee on his personal credit card. Needless to say the documents were not sealed by the Registry on 12 November, 2015.

Mr Jones' firm faxed and emailed unsealed copies of the documents to the defendant on 12 November, 2015. On 16 November, 2015 another member of the Registry staff noted that the documents still did not comply with the Rules and on 17 November informed Ms Morley that they had again been rejected. On 18 November, 2015 Ms Morley had a conversation with a Registry staff member and was told that as the payment of the filing fee had been processed and that once a document in the correct format had been received it was common practice for the Registry to back date the documents to the date they were first received.

Mr Jones had another go at getting the form of the documents right on 19 November, 2015 but still fell short of what was required. This was his fifth mistake.

In December, 2015 Mr Jones instructed new town agents and they (finally) filed a document which was compliant with

the Rules. The Registry backdated the documents to 12 November, 2015.

By reason of the fact that the defendant had been provided with the non-compliant documents on 12 November, 2015 it must have known something was amiss when it did not receive a properly sealed document (in a different form) until much later. The defendant sought to have the claim dismissed on the ground that its liability had been extinguished on 12 November, 2015.

Southwood J found that the defendant's liability had been so extinguished because no proceedings had in fact been brought within the relevant time limit. Not only that, his Honour also found that the practice of the Registry to backdate documents which had not been formatted

correctly was *ultra vires* and should not have been done.¹

Don't think that these sorts of issues won't happen to you or will only arise in unfamiliar jurisdictions: it is Law Claims' experience that problems of this nature regularly arise for SA practitioners and SA Courts.

So, what lessons can be learnt from the travails of Mr Jones?

- never leave things until the last minute. You never know what issues might arise. You need to give yourself enough time to sort out whatever problems might arise **before** the time limit expires.
- whenever you are dealing with matters in an unfamiliar jurisdiction make sure you get expert assistance from an agent who can help you get things right.

- pay close attention to the requirements for the filing of documents set out in the relevant Court rules.
- make sure that you know about any relevant fees and have arrangements in place for the payment of those fees.
- when dealing with issues raised by the Court make sure you pay close attention and get it right the second time so you don't have to try a third time.
- never rest until the task has been properly completed.

Endnotes

- 1 Could Mr Jones somehow rely on this mistake by the Court to retrieve the position? In my view any such argument would not succeed, not the least because by the time the Court backdated the documents the time period had already run.