

SUPREME COURT OF QUEENSLAND

CITATION: *Randall v Phipps & Ors* [2002] QSC 096

PARTIES: **JOHN JAMES RANDALL**
(plaintiff/applicant)
v
KEITH RALPH PHIPPS
(first defendant/respondent)
HINCHINBROOK SHIRE COUNCIL
(second defendant/respondent)
LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND INC.
(third party)

FILE NO/S: S.178 of 1996

DIVISION: Trial

PROCEEDING: Application for continuation of proceedings

ORIGINATING COURT: Supreme Court at Townsville

DELIVERED ON: 11 April 2002

DELIVERED AT: Townsville

HEARING DATE: 5 April 2002

JUDGES: Cullinane J

ORDER: **Plaintiff granted leave to proceed in respect of the non-personal injury claim in the statement of claim-leave is otherwise refused.**
Costs of the Application reserved to the Trial Judge

CATCHWORDS: PROCEDURE – LIMITATIONS OF ACTIONS – CONTRACT – TORTS - DAMAGES – whether personal injury claim by applicant statute barred – whether limitation period in respect to claim for breach of contract statute barred

COUNSEL: M Sumner-Potts for the plaintiff/applicant
M Fellows for the first defendant/respondent
W Elliott for the second defendant/respondent
T Mylne for the third party

SOLICITORS: Myles Thompson for the plaintiff/applicant

Guides & Elliott for the first defendant/respondent
Roberts Nehmer McKee for the second defendant/respondent
Macrossans Lawyers For the third party

- [1] The Plaintiff seeks leave to proceed in this action pursuant to Rule 389 of the Uniform Court Procedure Rules. No step has been taken for more than two years.
- [2] Indeed it seems common ground that the last step taken in the action was on 4th November 1997 when the Plaintiff provided a list of documents.
- [3] The matter has however progressed in other respects. The First Defendant delivered a list of documents on 17th December 1996 and Third Party proceedings were instituted in late 1997 by the Second Defendant against the Third Party.
- [4] The action arises out of a building contract between the Plaintiff and the First Defendant. This was entered into on 29th September 1991 and the First Defendant pursuant to the contract agreed to construct a dwelling on land owned by the Plaintiff.
- [5] It is the Plaintiff's case that the dwelling which was constructed in late 1991 and early 1992 was so defective as to require substantial demolition and rebuilding.
- [6] The Second Defendant is a local authority and is sued upon the basis of an alleged failure to properly investigate the matter prior to granting the necessary approval. The Local Government Association of Queensland is sued as an insurer by the Second Defendant.
- [7] The Plaintiff claims damages for the cost of rectification and consequential losses. In addition he claims damages for psychiatric illness said to be the consequence of the negligence of the defendants.
- [8] The writ was issued on 23rd July 1996.
- [9] There is a report of Dr Green dealing with the Plaintiff's psychiatric condition. He had seen the Plaintiff prior to the relevant time for psychiatric problems arising out of a work incident but it is clear that in early 1993 the Plaintiff was attributing at least some of his problems to the dispute which he had with the Defendants.
- [10] The Plaintiff suffers a depressive illness of some significance according to the medical evidence.
- [11] The Plaintiff consulted a firm of solicitors in Townsville who issued a writ on his behalf.
- [12] As has already been mentioned certain steps were taken by the Plaintiff, the last of which was the filing of a list of documents on 25th November 1996.
- [13] Application was made by the Second Defendant to add the Local Government Association of Queensland as a Third Party and an order was made on 4th November 1997. This was opposed by the Plaintiff who wished at that time to have the matter come to trial.

- [14] I should add that both the First Defendant and the Second Defendant have pleaded the Statute of Limitations in so far as the claim includes a claim for damages for personal injuries.
- [15] According to the Applicant the litigation seemed to stall during 1998, something which he accepts was at least partly the consequence of his psychiatric condition. Nonetheless he asserts that he had specifically instructed his then solicitor that the matter was to be brought to trial.
- [16] Difficulties arose between the Plaintiff and his then solicitor and the Plaintiff made a complaint to the Law Society alleging that his then solicitor was not prosecuting the matter as he ought to have. Some of the documentation relating to this has been placed before the court.
- [17] An affidavit by the then solicitor for the Plaintiff was filed on 30th October 1997 in opposition to the application to join a Third Party. In paragraph 6 of that affidavit it is said:
- “I will be seeking instructions from the Plaintiff to not persist with that part of his claim against the First and Second Defendant being a claim for damages for negligence occasioning personal injury. Once those instructions are received, a Certificate of Readiness will be delivered to both Defendants certifying that so far as the Plaintiff is concerned, the action is in all respects ready to be entered for hearing.”*
- [18] The solicitor for the Second Defendant deposes in an affidavit that on 26th March 1998 he received a telephone call from the solicitor for the Applicant, the effect of which was that provided that the Applicant gave him instructions to not persist with the personal injuries claim he would “start delivering certificates etc”.
- [19] The solicitor for the Second Defendant deposes that on 26th July 1999 he telephoned the then solicitor for the Applicant and in the course of that conversation the then solicitor for the Applicant informed him that the Applicant would not be pursuing a claim for personal injuries.
- [20] The Applicant deposes to the fact that his complaint to the Law Society did not progress the case as he expected and having lost confidence in his then solicitors he went to see another firm of solicitors, in this case a Cairns firm, in July 2000. After some delays during which the solicitor who was approached referred the material to a barrister he was told on 15th March 2001 that those solicitors did not wish to act for him in the matter.
- [21] He then consulted his present solicitors in August 2001 and they sought advice from counsel.
- [22] The Applicant denies that he at any time agreed to drop the personal injury claim.
- [23] When this application first came before the court counsel for the First and Second Defendant and the Third Party indicated that if the Plaintiff abandoned the claim for personal injury they would not oppose the granting of leave in respect of the action otherwise. The Applicant ultimately persisted in the application so far as it concerns each of the claims raised.

- [24] On the face of things it seems clear that the claim for personal injury was statute barred. The events which are said to have given rise to the psychiatric condition occurred well over three years prior to the issue of the writ and it is plain that the Applicant was ascribing his psychiatric condition at least in part to those events in April 1993.
- [25] Moreover I am satisfied that the Applicant's then solicitor informed the solicitor for the Second Defendant that the matter would not be proceeding so far as the personal injury claim was concerned and that the Second Defendant acted accordingly and did not thereafter regard the matter as being on foot so far as such a claim is concerned. I accept that the Second Defendant as a result failed to make any further enquiries or seek any medical examination in relation to this aspect of the matter. The Second Defendant deposes to having done nothing about the matter also claiming to have been under a similar understanding since 31 October 1997.
- [26] In my view the appropriate course to take so far as the claim for personal injury is concerned is to refuse leave.
- [27] The Plaintiff having pursued the application for leave to proceed in relation to the claim generally including the claim for personal injury, the respondents oppose the application to proceed as a whole.
- [28] However it was made clear by all respondents that no prejudice could be pointed to so far as the non-personal injury aspects of the claim were concerned and I think it fair to say that the opposition to the grant of leave in this regard was not strenuously advanced. The delays have been significant but on the other hand it is plain that the Applicant who has been suffering significant psychiatric problems was desirous of proceeding with the matter. In addition it is clear that there were significant difficulties with his representation during this time which I infer were not unrelated to the psychiatric problems that he was suffering. The Applicant during this time pursued a complaint against one of his former solicitors to the Law Society.
- [29] The absence of any suggested prejudice is also in my view significant in the circumstances of this case.
- [30] I do not accept the submission of counsel for the Second Defendant that the limitation period in respect of the claim for breach of contract (that is, the non-personal injury claim) is also a three year period. As will be seen in any case from the defences as delivered the statute is pleaded only in respect of the personal injury claim.
- [31] I grant leave to the Plaintiff to proceed in respect of the non-personal injury claims in the statement of claim. Leave is otherwise refused.
- [32] I reserve the costs of the application to the trial judge.