SUPREME COURT OF QUEENSLAND

CITATION:	*Hudson v Rammas Pty Limited* [2002] QSC 172
PARTIES:	**RALPH JOSEPH HUDSON** **(applicant plaintiff)** **v** **RAMMAS PTY LIMITED** **(respondent defendant)**
FILE NO/s	SC No 911 of 2002 Application for Extension of Time
PROCEEDING:	
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	3 June 2002
JUDGE:	de Jersey CJ
ORDER:	**The application is refused, with costs to be assessed.**
CATCHWORDS:	LIMITATION OF ACTIONS – CONTRACTS, TORTS AND PERONAL ACTIONS - PERSONAL INJURY CASES where proceedings commenced after expiration of the limitations period – where proceedings under *WorkCover Queensland Act* initially commenced, then ceased – where applicant sought to extend the period within which he could sue for damages and re-open proceedings under the Act. *Limitation of Actions Act* 1974 (Qld) s 31 *WorkCover Queensland Act* 1996 (Qld) s 280, s 305 *Ipswich City Council v Smith* (1997) QCA 263, applied *Moriarty v Sunbeam Corporation Limited* [1988] 2 Qd R 325, applied *Peabody Resources Limited v Norton* (Appeal No 200 of 1994, judgment delivered 16 June 1995, applied *Taggart v Workers' Compensation Board of Queensland* [1983] 2 Qd R 19, applied
COUNSEL:	K Boulton for the applicant G Mullins for the respondent
SOLICITORS:	Maurice Blackburn & Cashman for the applicant Bradley & Co for the respondent

[1] The applicant seeks an order under s 31 of the *Limitations of Actions Act* 1974 extending the period within which he might sue for damages for the alleged negligence of his former employer, the respondent, in respect of injuries he sustained on 4 December 1997 in the course of his employment. The applicant commenced the relevant proceedings on 29 January 2002. The statutory limitation period expired on 4 December 2000.

[2] In para 43 of his affidavit filed on 29 January 2002, the applicant identified the "material fact of a decisive character" on which he relies under s 31(2) as "that (he) would not be able to return to truck driving" because of prescribed narcotic medication, the source of that advice, given in April 2001, being his general practitioner Dr Towner. The applicant consulted a solicitor in relation to a possible claim on 18 May 2001.

[3] The applicant would contend that because that fact was not within his means of knowledge until a date "after the commencement of the year next preceding the expiration of the period of limitation for the action" (s 31(2)(a)), that is, after 4 December 1999, the court may order that the period of limitation be "extended so that it expires at the end of one year after that date"; in other words, in April 2002, which would authorise the proceedings in fact commenced on 29 January 2002.

[4] The respondent conceded that if such an extension is granted, then the applicant should be granted leave, under s 305 of the *WorkCover Queensland Act* 1996, to start proceedings for damages despite non-compliance with s 280 of that Act. The respondent also conceded "there is evidence to establish the right of action apart from a defence founded on the expiration of (the) period of limitation" (s 31(2)(b)).

[5] As the case was presented, the substantial issue was whether, before coming to the realisation in April 2001 that he could not in the course of his employment drive a truck, what the applicant otherwise did know of his condition justified his earlier commencing an action for damages. It is helpful to set out this passage from the judgment of Davies JA in *Ipswich City Council v Smith* (1997) QCA 263, p 4:

> "The test for decisive character of material facts, stated in s 30(b) and which I have set out above, was the subject of decisions of the Full Court, in relation to nature and extent of personal injury, in *Taggart v Workers' Compensation Board of Queensland* [1983] 2 Qd R 19 and *Moriarty v Sunbeam Corporation Limited* [1988] 2 Qd R 325. Adopting the construction adopted in those cases this Court said in *Peabody Resources Limited v Norton* (Appeal No 200 of 1994, judgment delivered 16 June 1995) that s 30(b):
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> > "…requires the respondent to show that, without the fact said to be decisive, a reasonable person would have thought, even with the benefit of appropriate advice, that the prospects of an award of damages did not justify bringing an action or that, in his own interest, taking his circumstances into account, the respondent acted reasonably in not bringing it."
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> The Court went on to say that generally a material fact which merely increases an applicant's damages is unlikely to be decisive. Thus the questions will generally be whether without the fact said to be

> decisive it would have been reasonable not to sue and whether that fact made it reasonable to sue.

[6] The respondent was last discharged from hospital on 25 January 2001. On 30 January 2001 he wrote to WorkCover seeking the reopening of his claim. In that letter (RMP 6) he spoke of being "in continual pain in the stomach", and not knowing if he would be able to work, adding: "I am not sure how long I will be able to keep my employment…(because of) the amount of time I have had to take off because of my condition". Those are significant acknowledgements of the chronic nature of the pain and the applicant's own view (one infers, as at and prior to 25 January 2001) as to the vulnerability of his employment.

[7] The applicant made further important concessions in cross-examination. They were as follows. By 25 January 2001 the applicant had been admitted to hospital on as many as 16 occasions in respect of abdominal pain following his original injury in December 1997; that pain had been "particularly bad" in the six months from June 2000; things were "getting worse not better"; since June 2000, he had had almost 25 days off work; as he saw things, he would need more time off in the future; he had been on regular medication throughout those 6 months; by the end of 2000, he had no hope of resuming truck driving if it involved heavy lifting and his position with Pioneer was in that regard uniquely beneficial: if he lost that position, he would have a lot of trouble securing another.

[8] In the context of those circumstances, the respondent submitted that well prior to the applicant's receiving the advice of Dr Towner in April 2001, he should have appreciated that he already had a worthwhile action which in his interests should have been pursued; significantly, prior to the end of January 2001, he knew that his future in the workforce was at risk. That appreciation should have matured during the second half of the year 2000.

[9] The applicant's problems derive from an umbilical hernia which he suffered on 4 December 1997. That was repaired by an operation on 9 December 1997. A residual haematoma led to continuing pain. Although he continued work as a truck driver for Southside Tippers, persisting difficulties led to his admission to hospital on a number of occasions. He left that employment in May 1998, and from the next month worked for Pioneer driving trucks but, unusually, not involving heavy lifting. Continuing pain, medication and occasional hospitalisation left him dispirited, but his employment continued. The issue of his continuing with truck driving was raised with him in early 2001. Then in April of that year he was told by Dr Towner that he should no longer drive because of the necessary narcotic medication.

[10] The essential position taken by Mr Boulton, who appeared for the applicant, was that until the second half of the year 2000, the applicant was assured that relief would be forthcoming. His condition then deteriorated, it was acknowledged, but it was not until April 2001 that his knowledge of the existence of a worthwhile cause of action came to fruition.

[11] Mr Boulton relied on this aggregation of features in support of the application;

> "(a) The Applicant suffered a fairly straight-forward injury. The aftermath of the surgery he underwent in December 1997 was quite unexpected.

(b) The medical practitioners have had great difficulty in diagnosing the cause of the Applicant's ongoing symptoms.
(c) The Applicant's condition was not aggravated by his work. Rather, it prevented him, periodically, from working.
(d) The Applicant's condition was described as "very rare" by Dr O'Rourke and as "complex" by Dr Bell.
(e) The Applicant's condition was manageable for over two (2) years from about May 1998 till July 2000.
(f) As the letter of 30th January 2001 shows, by that time the Applicant was becoming concerned that his condition would cause the loss of his employment.
(g) It reasonably took some time for the Applicant to appreciate the fact that his condition would seriously interfere with his ongoing employment and to obtain relevant advice about that fact."

[12] On the other hand Mr G R Mullins, for the respondent, submitted that these circumstances warranted the view that the applicant had not discharged his onus:

> "he sustained an injury on 4 December 1997, the consequences of which had caused him pain;
> he needed strong medication to continue working;
> the pain was sufficiently bad to require many admissions to hospital;
> the problem was chronic and he was not getting better;
> he had lost a considerable period of time from work, well in excess of his allotted sick leave;
> his working future was uncertain and he may require considerable time away from work in the future;
> the pain precluded him from engaging in heavy lifting work and may preclude him from truck driving in the future."

[13] I am satisfied that had the applicant taken appropriate legal advice, substantially prior to the end of January 2001, he would have been advised that he had a cause of action which was substantial and worth pursuing. The fact is that well before that time, his symptoms had become chronic and likely to persist indefinitely into the future. Sixteen hospital admissions, the prescription of narcotic medication and the chronic pain would have justified a substantial award in respect of pain and suffering; as would the element of future economic loss. Since mid-2000, he had taken eleven days sick leave, his WorkCover claim had been reopened for three weeks, and to deal with his problems, it had been necessary for him to take his annual leave and rostered days off: he was overall away from work about 30 per cent of the time. Any truck driving job requiring heavy lifting – and most do, would be beyond his capacity. His risk if thrown on to the open labour market would have warranted the award of a not insubstantial amount in respect of reduced earning capacity. Other components – *Griffiths v Kerkemeyer* and special damages – would have fallen for more than merely nominal consideration.

[14] Giving proper allowance especially to the matters to which the applicant agreed in cross-examination, I am not satisfied that any relevant material fact of a decisive character was not within the applicant's means of knowledge at relevant times. He should have known that he had a cause of action worth pursuing: he knew, in short, that he was subject to an unresolved problem causing chronic pain imperilling the security of his future employment. That should have been enough to encourage an

ordinary person acting reasonably to seek legal advice, and to have done so as the year 2000 drew on. Had it been sought, an action would undoubtedly, and reasonably, have been forthcoming.

[15] The application is refused, with costs to be assessed.