SUPREME COURT OF QUEENSLAND

CITATION:	*Nona v Queensland Rail* [2003] QSC 363
PARTIES:	**NABEA NONA** (Plaintiff / Respondent) v **QUEENSLAND RAIL** (Defendant / Applicant)
FILE NO/S:	S.714 of 2000
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	29 October 2003
DELIVERED AT:	Townsville
HEARING DATE:	24 October 2003
JUDGES:	Cullinane J
ORDER:	1. **Order the stay of proceedings unless and until the plaintiff obtains an order extending the limitation period under the *Limitation of Actions Act* so that it expires no earlier than 2nd November 2000, the day upon which proceedings were instituted.** **2. Order the respondent to pay the applicant's costs of and incidental to the application to be assessed.**
CATCHWORDS:	LIMITATION OF ACTIONS – GENERAL – APPLICATION OF STATUTES OF LIMITATION – where employee brought action for damages against employer more than three years from date of injury but less than three years after receipt of a notice from WorkCover – whether earlier order giving leave to institute proceedings will preclude the striking out of the claim and statement of claim *Limitation of Actions Act* 1974 (Qld) *WorkCover Queensland Act* 1996 (Qld), s 305 *Workers' Compensation Rehabilitation Act* 2003 (Qld), s 252A, s 336

Bonser v Melnacis & Anor (2000) QCA 13, considered
Tanks v WorkCover Queensland [2001] QCA 103, followed

COUNSEL: M Drew for the Plaintiff/Respondent
RC Morton for the Defendant/Applicant

SOLICITORS: Connolly Suthers for the Plaintiff/Respondent
McInnes Wilson Lawyers for the Defendant/Applicant

[1] The respondent/defendant seeks in this application an order for judgment against the plaintiff/applicant on an order that the claim and statement of claim in the action be struck out.

[2] The respondent was injured on 2nd April 1997 in the course of his employment with the applicant.

[3] He applied for workers' compensation on 14th April 1997 under the *WorkCover Queensland Act* and a notice of assessment pursuant to s.203 of the Act was issued on 8th October 1997. The respondent was assessed as having a "non certificate injury".

[4] He elected to reject the offer of a lump sum compensation and to seek damages. This election took place on 3rd November 1997.

[5] He did not give any notice of claim under s.280 of the Act prior to the expiration of three years from the date of his injury.

[6] On 24th October 2000 the respondent applied for and was granted leave pursuant to s.305 of the *WorkCover Act* to institute proceedings notwithstanding the failure to comply with s.280.

[7] The matter came before the court shortly after the judgment at first instance in the matter of *Tanks v WorkCover Queensland* (2000) QSC 326.

[8] The effect of that judgment was that no cause of action arose in the case of an injured worker prior to the receipt of a notice of assessment from WorkCover. This finding was all that was necessary in that case. The effect of the judgment of the Court of Appeal in *Bonser v Melnacis & Anor* (2000) QCA 13 is that no cause of action arose until an election was made. See paragraph 41.

[9] In March 2001 the Court of Appeal delivered judgment in an appeal in the *Tanks* case (see *Tanks v WorkCover Qld* [2001] QCA 103). The court held in effect that, although no cause of action arose until the entitlement conditions, as they are referred to, of the *WorkCover Act* are complied with, the time commenced to run from the time when a plaintiff sustained his injury. The relevant parts of the judgment are to be found at paragraphs 26 and 27 of the judgement of Davies JA:

> "*[26] Consequently the effect of the decision of this Court in* Bonser *is, in my opinion and as the learned primary judge held, to the effect that, generally, no cause of action arises in respect of an injury to which the Act*

applies, before the entitlement conditions are complied with. That is to give the entitlement conditions substantive effect, in the first of the ways referred to earlier, as s 252(2) requires. Is it possible to reconcile that construction with the clear assumption which the Act makes that, for the purposes of the Limitation of Actions Act*, the cause of action arises independently of the operation of the Act? I think it is.*

[27] It requires the Act to be construed as providing an exception to the substantive operation of these provisions for the purposes of the Limitation of Actions Act. *The Act deems the cause of action which it substitutes to have commenced when a cause of action for damages by a worker or a dependant of a deceased worker would have arisen independently of the operation of the Act. In that way a sensible meaning can be given to s 50(2), s 262(3), s 265(4), s 280 and s 308. That construction also gives some content and meaning to the definition of 'damages' in s 11(1). And if the Act is construed in that way the absurdity of, in effect, leaving the commencement of the limitation period in the hands of a potential plaintiff is avoided."*

[10] With some qualifications, Williams JA agreed with the reasons of Davies JA and Mullins J agreed with both.

[11] An application for special leave was granted and the matter was pending for some time before the High Court, before being withdrawn.

[12] In November 2002 the Act was amended to provide by s.252A as follows.

"252A Period of limitation under Limitation of Actions Act 1974 never affected

(1) It is declared that nothing in this act affects, or has ever affected, the commencement of the period of limitation provided by the Limitation of Actions Act 1974*, section 11.*

(2) To remove any doubt, it is declared that the period of limitation provided by the Limitation of Actions Act *1974 section 11 applicable to an action for damages for injury sustained by a worker in circumstances creating, independently of this Act, a legal liability in the worker's employer to pay the damages for the injury is, and always has been, the same as would have been applicable to that action if this Act had not been enacted."*

[13] Presumably the enactment of this legislation led to the withdrawal of the appeal.

[14] This section now appears as s.336 of the *Workers' Compensation Rehabilitation Act* 2003.

[15] The respondent placed considerable reliance upon the effect of the order of 24th October 2000 giving leave pursuant to s. 305 of the *WorkCover Act* to institute proceedings. This order, it was said, remains undisturbed and confers upon the respondent the right to institute proceedings.

[16] A reading of the transcript of proceedings before the Court on that day shows that the applicant did not oppose the making of the order. It is clear that but for the assumption that the limitation period had not expired, it was common ground that no order granting leave to institute proceedings should be made.

[17] This assumption arose from the judgment at first instance in *Tanks*, which had been given only a few days before, and from what had been said in the joint judgment of the Court of Appeal in *Bonser v Melnacis & Anor* which formed the basis of the judgment at first instance in *Tanks*. At paragraph 41 of the joint judgment in *Bonser* the Court said:-

> "*[41] We should therefore accept the respondent employer's submission that the combined effect of the scheme introduced by the* WorkCover Act *(with particular reference to s 253, s 262 and s 302) effectively abolishes any entitlement on the part of an injured worker to commence proceedings against the employer and that such a right comes into existence only upon compliance with the prescribed steps. Those steps in the present case would include the obtaining of an assessment, followed by an election (assuming that the assessment was of more than a nil disability) either to accept lump sum compensation or to seek damages. Comparison may again be drawn with the s 45 election under the* Comcare Act *where the need for a specific identifiable election is recognised before rights of action are obtained."*

[18] However the order granting leave on 24th October 2000, whilst assuming that the limitation period would not expire until 3rd November 1997 (three years after the notice of election), did not by itself effect an extension of the limitation period. The respondent remained at all times vulnerable to a plea of the limitation period in the event that this was raised. The solicitor for the applicant in this case has deposed to the fact that such a plea would be raised if and when a defence was able to be delivered. It is also worth noting that counsel for the applicant, upon the application by the respondent for leave under s. 305, expressly said that if the applicant on that application sought to assert that the granting of leave involved an extension of the limitation period, then the respondent to that application would require the matter to be adjourned.

[19] The assumption to which I have referred has been shown to be wrong by the judgment of the Court of Appeal in the *Tanks* case. This judgment is of course binding upon me.

[20] Moreover the possibility of the judgment of the Court of Appeal being overturned by a judgment of the High Court has been precluded by the enactment of s. 252A. This provision declares that the limitation period provided for by s. 11 of the *Limitation of Actions Act* is not and never has been affected by the *WorkCover Qld Act* and this provision is reinforced by subsection 2 which in positive terms declares that s. 11 has always been applicable to actions of this kind. These provisions are declaratory and have retrospective effect.

[21] The respondent is therefore faced with insurmountable obstacles.

[22] Nonetheless I do not think that the appropriate order is to grant the judgment sought or to strike out the pleadings. Rather I think the appropriate order is to order the stay of proceedings (in effect a further stay) unless and until the plaintiff obtains an order extending the limitation period under the *Limitation of Actions Act* so that it expires no earlier than 2nd November 2000, the day upon which proceedings were instituted.

[23] I order the respondent to pay the applicant's costs of and incidental to the application to be assessed.