SUPREME COURT OF QUEENSLAND

CITATION:	*Nelson v Cyran* [2015] QCA 226
PARTIES:	**JEFFREY RONALD NELSON** (appellant) **v** **MICHAEL ANTHONY CYRAN (BY HIS NEXT FRIEND THOMAS MICHAEL MOYLAN)** (respondent)
FILE NO/S:	Appeal No 10948 of 2014 SC No 416 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns – [2014] QSC 291
DELIVERED ON:	13 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	26 May 2015
JUDGES:	Margaret McMurdo P and Morrison JA and North J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is dismissed.** **2. Upon Mr Moylan's filing, within 14 days from today, a consent to be Mr Cyran's litigation guardian under rule 95(1) of the *Uniform Civil Procedure Rules* 1999 (Qld), the Court declares pursuant to r 371(2)(d) of the *Uniform Civil Procedure Rules* 1999 (Qld) that the steps taken in the proceedings from the filing of the application on 3 October 2014 are effectual.** **3. The appellant is to pay the respondent's costs, of and incidental to the appeal, to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – ENFORCEMENT OF JUDGMENTS AND ORDERS – EXECUTION AGAINST THE PERSON – QUEENSLAND – GENERALLY – where the appellant, while working as a bouncer in Western Australia, caused the respondent catastrophic brain injury – where the Western Australian District Court awarded judgment in favour of the respondent – where the appellant's employer and the relevant insurance company, who were parties to the proceedings, went into liquidation – where the

appellant was initially represented in the proceedings through his solicitors but did not appear at the trial and his whereabouts became unknown – where the respondent's efforts to locate the appellant were constrained by the respondent's financial position and other factors – whether the trial judge erred in the exercise of his discretion in granting the respondent leave to commence enforcement proceedings against the appellant

Civil Judgments Enforcement Act 2004 (WA), s 12, s 13
District Court Rules 2005 (WA), r 6
Rules of the Supreme Court 1971 (WA), r 4A, r 4B
Service and Execution of Process Act 1992 (Cth), s 105
Uniform Civil Procedure Rules 1999 (Qld), r 8, r 93, r 95(1), r 371(1), r 793, r 799

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170; [1981] HCA 39, cited
Aimtek Pty Ltd v Flightship Ground Effect Pte Ltd [2014] QCA 294, cited
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25, distinguished
Cyran v Nelson & Ors [2014] QSC 291, related
Geneva Finance Ltd v Bandy [2008] WASC 236, distinguished
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
World Square Pty Ltd v Taylor [1990] 1 Qd R 583, cited

COUNSEL: C Ryall for the appellant
D de Jersey for the respondent

SOLICITORS: Bottoms English Lawyers for the appellant
MacDonnells Law for the respondent

[1] **MARGARET McMURDO P:** I agree with Morrison JA's reasons for dismissing this appeal with costs and with the orders proposed.

[2] **MORRISON JA:** On 3 August 1996 Mr Nelson was a bouncer at a club in Western Australia, when Mr Cyran tried to enter. Mr Cyran was wrongfully assaulted in the course of Mr Nelson's preventing him from entering, and sustained severe personal injuries including brain damage.

[3] On 11 August 1998 Mr Nelson was convicted of unlawfully doing grievous bodily harm, and fined $45,000.

[4] Mr Cyran issued proceedings for damages in August 1998. The proceedings were against Mr Nelson and the owner of the club who employed Mr Nelson. The owner defended the claim, and brought its insurance broker into the action, on the basis that it was supposed to arrange insurance which would have responded to Mr Nelson's claim.

[5] The proceedings were served on Mr Nelson, who was represented by solicitors. The solicitors entered an appearance on his behalf, and filed a defence on his instructions. That is where Mr Nelson's active participation in the civil proceedings ended.

[6] Before the trial started Mr Nelson could not be found. In accordance with an order by the Court, notice directed to Mr Nelson was given by advertisements in *The West Australian* and *The Australian*, and the trial was delayed until those notices were given.

[7] Mr Nelson did not appear at the trial, and was no longer represented by his solicitors. On 30 October 2002 judgment was entered against him for $1,065,097.35, plus costs.

[8] Mr Cyran's solicitors did not locate the whereabouts of Mr Nelson until late 2012. He was then in New South Wales. Before local solicitors could be engaged to pursue him there, he moved to North Queensland. It was not until August 2013 that local solicitors were engaged to advise in relation to pursuing enforcement of the judgment against him.

[9] The judgment was registered in Queensland and an application was brought under r 799 of the *Uniform Civil Procedure Rules* 1999 (Qld) (the UCPR), for leave to commence enforcement proceedings against Mr Nelson. That application was served on Mr Nelson on 7 October 2014, which was the first notice he had of the enforcement steps.

[10] On 23 October 2014 the learned primary judge ordered that leave be granted. Mr Nelson seeks to challenge that order. The order below was discretionary, and one on a matter of practice and procedure. The settled rule is that the Court should exercise restraint and be reluctant to interfere with interlocutory decisions which do not determine substantive questions but are concerned only with practice and procedure.[1] Further, because it was an appeal from an exercise of discretion, the appellants must therefore establish appealable error as identified in *House v The King*:[2]

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."

[11] Therefore the issues raised by the appeal are:

(1) was there an error of principle or mistake of fact; and

(2) has that error caused Mr Nelson a substantial injustice.

Legislative background

[12] The *Civil Judgments Enforcement Act* 2004 (WA) governs enforcement of judgments in that State. Once six years has elapsed from when the judgment became enforceable, s 13 provides that no execution could be issued without leave. Once 12 years have elapsed from when the judgment became enforceable, s 12 of that Act bars the issue of execution proceedings on the judgment.

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1 *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177; *Aimtek Pty Ltd v Flightship Ground Effect Pte Ltd* [2014] QCA 294 at [3].

2 (1936) 55 CLR 499 at 504-505 (Dixon, Evatt and McTiernan JJ).

[13] Leave under s 13 of the *Civil Judgments Enforcement Act* 2004 (WA) was granted in Western Australia no later than 13 October 2014.

[14] The judgment was registered in Queensland under s 105 of the *Service and Execution of Process Act* 1992 (Cth), which provides that the judgment is only enforceable to the extent it is enforceable in Western Australia.

[15] The application proceeded on the basis that the enforceability of the judgment in Western Australia was the relevant feature.

[16] In this case the application for leave under UCPR r 799 was heard 15 days before the 12 year period expired.

[17] UCPR r 799(4) provides:

> "On an application for leave to start enforcement proceedings, the applicant must satisfy the court–
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> (a) as to the amount, including interest, owing as at the date of the application; and
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> (b) if it is more than 6 years since the money order was made–as to the reasons for the delay; and
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> (c) if there has been a change in an enforcement creditor or enforcement debtor–as to the change that has happened; and
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> (d) that the applicant is entitled to enforce the order; and
>
> (e) that the enforcement debtor against whom enforcement is sought is liable to satisfy the order."

[18] It was common ground that subrule (c) was irrelevant, and subrules (a), (d) and (e) were satisfied. Mr Nelson's contentions also accept that under r 799(4)(b) reasons were given for the delay, but says that they were inadequate to justify the exercise of the discretion in favour of relief.

Grounds of appeal

[19] Mr Nelson advanced a number of grounds of appeal asserting error on the part of the learned primary judge, which can be summarised in the following way:[3]

- Ground 1: failing to have regard to public policy and expectation derived from the fact that statutory time limits set what is reasonable as to the time within which to enforce a judgment;
- Ground 2: failing to have regard to Mr Cyran's decision not to pursue Mr Nelson for the first six years, which amounted to a decision to ignore the six year time limit;
- Ground 3: failing to have regard to the fact that Mr Nelson was unaware of any step being taken against him from when the statement of claim was served until he was served with the application in October 2014;

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[3] Grounds 4 and 9 were abandoned.

- Ground 5: taking into account that Mr Nelson took no step to find out if there was a judgment against him, and the way he responded to the claim;
- Ground 6: failing to take into account that Mr Cyran did not take any step to bring the judgment to Mr Nelson's attention after July 2012 when the whereabouts of Mr Nelson became known;
- Ground 7: finding that Mr Nelson had an obligation to find out if the proceedings were continuing when he received no notice after service of the statement of claim;
- Ground 8: it was plainly unreasonable or unjust to grant leave when the delay, explanations for delay, and prejudice to Mr Nelson and his wife, are taken into account.

[20] It is convenient to deal with each ground even though there is a degree of overlap. At the same time the primary judge's approach will be identified.

Ground 1

[21] Mr Nelson contends that the statutory regime of limitation periods is based on a rationale that it is oppressive to defendants to allow proceedings to be brought long after the circumstances that gave rise to them have passed, and people should be able to arrange their affairs and utilise their resources on the basis that claims will no longer be made against them after no action is taken for a given period.[4] Reliance is placed on comments by McHugh J in *Brisbane South Regional Health Authority v Taylor*.[5]

[22] It is contended that the primary judge did not advert to that rationale and therefore erred when he said of Mr Nelson:[6]

> "He could, if he chose, have confronted the action. He could, if he chose, have forced on a resolution of some kind as between he and the plaintiff. It is an unremarkable incident of human nature that he chose not to do so, but in my view it remains a significant consideration in the exercise of my discretion that he cannot assert that he was a litigant who never knew that he was being sued, and was thus entitled to live his life as if he had not been sued."

[23] There are difficulties confronting that contention. First the discussion in *Brisbane South Health Authority* was concerned with actions that had not been started within the limitation period, and the existence of a claim was therefore unknown to the defendant.[7] In that respect the Court held that the real question was whether the delay meant that the chances of a fair trial were unlikely.[8] That is the basis upon which McHugh J made his comments.

[24] That is not the case here where Mr Nelson was aware of the claim, and participated in it, at least for a time. He had solicitors who, on his instructions, lodged a defence which disputed the claim and contended that Mr Cyran was the cause of his own loss.[9] That was done after Mr Nelson had been involved in the criminal proceedings arising out of the same incident. There could be no reasonable conclusion other than that he knew that a civil claim had been brought and was being pursued.

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4 Outline paragraphs 8-14.
5 (1996) 186 CLR 541 at 552 (*Brisbane South Health Authority*).
6 *Cyran v Nelson & Ors* [2014] QSC 291 at page 12 (Reasons).
7 *Brisbane South Health Authority* per Dawson J at 544 and McHugh J at 551-552.
8 *Brisbane South Health Authority* per Toohey and Gummow JJ at 550.
9 AB 147.

[25] Secondly, whilst the limitation periods are there, so are the possibilities of extending them or bringing enforcement proceedings after the six year period, with leave of the Court. Here that leave was given in Western Australia, and the application to enforce in Queensland was brought within the 12 year period.

[26] Thirdly, the primary judge gave prominence to the consideration that there had been "very long delay",[10] acknowledged that whilst the application had been made close to the end of the 12 year period, nonetheless it was within the period,[11] and took into account that in the interim Mr Nelson, and his wife, had got on with their lives, and made their financial arrangements, without knowledge of the debt.[12]

[27] Fourthly, the primary judge expressly took into account the contention that "after so long it was not unreasonable for him to assume he was entitled to make his life decisions in the understanding that he did not have a liability of the kind or magnitude which the evidence shows he in fact did".[13] The passage cited above in paragraph [22] follows immediately upon his Honour's analysis of the competing aspects of that contention.

[28] Fifthly, the contention has to confront the established facts, namely:

- Mr Nelson was heavily involved in the criminal case resulting from the assault;[14] he was convicted and fined $45,000;
- that must have made him aware of the serious injuries inflicted on Mr Cyran;
- Mr Nelson's solicitors obtained a report from an expert as to the bio-mechanics of the movements of Mr Cyran at the time of the assault;[15] that report was dated prior to the entry of an appearance in the civil proceedings,[16] and was produced after the author had conferred with Mr Nelson;[17]
- he was served with the civil proceedings[18] and defended them through his solicitors,[19] answering the statement of claim, and giving instructions for that purpose.[20]

[29] Those matters were weighed by the primary judge, and in respect of the consideration that Mr Nelson had got on with his life without notice of the judgment.

[30] In my view this ground does not succeed.

Grounds 2 and 3

[31] These grounds attack the primary judge's finding as to there having been no real attempt to actively seek out the respondent at all for over six years after the judgment:[21]

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10 Reasons page 9.
11 Reasons page 10.
12 Reasons page 10-11.
13 Reasons page 11.
14 AB 182-184, 199.
15 AB 190.
16 The appearance was dated 4 September 1998: AB 144. The report was dated 3 July 1998: AB 190.
17 AB 193.
18 AB 206.
19 AB 146.
20 AB 177.
21 Reasons page 9.

> "That was an unremarkable exercise in forensic judgment of a kind I accept is likely to be common in practice. Put differently it was, so far as decision making in the best interests of the plaintiff was concerned, an imminently [sic] reasonable course to take."

[32] It was contended that it was an error to look at the reasonableness of that conduct only from the point of view of Mr Cyran, and ignore the impact on Mr Nelson. In that respect it was said that, had Mr Nelson been given notice, he could have had the judgment set aside or varied. Further, it was said that Mr Cyran's conduct was an election not to pursue Mr Nelson, or an abandonment of the judgment against him.[22]

[33] The reasons given for not pursuing Mr Nelson were explained by Mr Georgiou, who had acted for Mr Cyran from the start:

- Mr Cyran was impecunious as a result of his injuries, and couldn't afford representation except on a pro bono basis; therefore costly searches and the like were not reasonable;[23]
- Mr Nelson's whereabouts were unknown;[24]
- for some time the better prospect of recovery was seen, on advice, to be against the other parties;[25]
- that process was complicated by the fact that the other defendants were put into liquidation prior to judgment being entered, and the broker's insurer (HIH) also went into liquidation.[26]

[34] As there was no challenge to those explanations, and Mr Georgiou was not cross-examined, it is not surprising that they were accepted by the learned primary judge.[27] Acceptance of those reasons compels the conclusion, in my view, that these contentions cannot succeed.

[35] Mr Nelson knew about the proceedings and participated in them up to a point. For reasons which were not explained, at some point he ignored the proceedings, and did not thereafter appear or participate. Had he done so, there was every opportunity to attack the judgment. Indeed, the primary judge gave consideration to that prospect and the evidence that Mr Nelson suggested would be the basis for such an attack, and correctly found it wanting.[28] The lost chance to attack the judgment was not compelling.

[36] In the circumstances as explained by Mr Georgiou, the failure to actively pursue Mr Nelson within the first six years cannot be said to be an election or an abandonment. Nor can that be said of the contended decision "not to pursue [Mr Nelson] for a period of approaching 4 years between the time [of] filing of the defence and the listing of the case for trial".[29] Mr Nelson had appeared and filed a defence. It was up to him to pursue his interests. The rules applicable in the District Court of Western Australia at the time have an underlying philosophy similar to the UCPR, in that each party is obliged to conduct the proceedings with efficiency, timeliness and economy.[30]

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22 Outline paragraphs 16-19.
23 Affidavit of Mr Georgiou, paragraphs 7, 24-26, AB 87, 90.
24 Affidavit of Mr Georgiou, paragraphs 4(d) and 7, AB 86-87.
25 Affidavit of Mr Georgiou, paragraphs 4(c), 6, AB 86-87.
26 Affidavit of Mr Georgiou, paragraphs 4 and 6, AB 86-87.
27 Reasons pages 5-7, 9-10.
28 Reasons page 8.
29 Outline paragraph 19.
30 *District Court Rules* 2005, rule 6; *Rules of the Supreme Court* 1971 (WA), applicable to the District Court, Order 1, rules 4A and 4B.

[37] These grounds do not succeed.

Grounds 5 and 7

[38] These grounds overlap with Grounds 2 and 3. The contention is that the primary judge erred by taking into account, as a factor against Mr Nelson, that he did not actively pursue his defence, or find out if he had a judgment against him.

[39] In my view the contention attributes too much to the findings of the learned primary judge. His Honour refers in several places to the fact that Mr Nelson did not take an active part in the civil proceedings. The first is to simply record that undeniable fact in the course of his preliminary comments.[31] The second was when he assessed the evidence that was suggested to form a basis to challenge the judgment, and whether Mr Nelson was properly found liable.[32]

[40] The third reference was the only one made in the context of those matters relevant to the grant of leave, and was a balancing factor against the contention that it was not unreasonable for Mr Nelson to order his life on the basis of no liability to a judgment.[33] In that respect it was relevant that Mr Nelson had turned away from the civil proceedings. He did so in the circumstances referred to in paragraphs [28] and [36] above. Those matters amply justify the conclusion that Mr Nelson's failure to pursue the civil proceedings could be characterised, as it was by the learned primary judge, as "wilful blindness",[34] and a course by which he ran the risk of an adverse outcome.[35]

[41] In my view these grounds cannot succeed.

Ground 6

[42] The contentions here are that the learned primary judge erred by failing to take into account that no notice was given to Mr Nelson after he was located in July 2012, that decision to give no notice to Mr Nelson was "unfair", and the changes to the positions of Mr Nelson and his wife mean that the discretion should have been exercised against the grant of leave.[36]

[43] Mr Georgiou deposed to the reasons why no notice was given. They include, relevantly:

- after the judgment he and the investigators retained to locate Mr Nelson were acting pro bono;[37]
- in 2009 and 2011 some record was found of where Mr Nelson was located, but he had moved, and then the trail went cold;[38]
- in May 2012 investigators were retained on a paid basis, and they ascertained the connection between Mr Nelson and a New South Wales university;[39]

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31 Reasons page 2.
32 Reasons page 8.
33 Reasons page 11.
34 Reasons page 11.
35 Reasons page 11-12.
36 Outline paragraphs 22-24.
37 Affidavit, paragraphs 7 and 24.
38 Affidavit paragraphs 8-14.
39 Affidavit paragraphs 17-21.

- Mr Georgiou wished to retain local solicitors to assist with advice as to local procedures and practices; however, before they were able to be secured, Mr Nelson had moved to North Queensland;[40]
- by July and August 2013 investigators and solicitors in North Queensland had been retained;[41]
- Mr Cyran's impecuniosity was a relevant factor in the work done.[42]

[44] Those facts were not challenged, and were accepted by the learned primary judge. His Honour also inferred that there was a probable explanation for Mr Georgiou's not making direct contact:[43]

> "True it is, he might simply have contacted the defendant directly at the relevant campus; a point emphasised by the respondent's counsel. However, I readily infer that an experienced legal practitioner - particularly given the long intervening period - may have perceived it to be more prudent for any such first initiated contact to itself involve service of process. Putting it bluntly, Mr Georgiou would not know whether or not the defendant might take flight if forewarned of that prospect. That is not to suggest that the respondent would have done so, and is merely to note as a matter of self-evident explanation why solicitors acting prudently, might take the course favoured by Mr Georgiou."

[45] Mr Nelson does challenge that the inference was open to be drawn. That inference, in combination with the facts referred to above in paragraph [43], reveal that the primary judge did take into account that no notice had been given after 2012, and why it had not. They provide an ample foundation to explain why the failure to give immediate notice was not unfair.

[46] The matters referred to above in paragraph [40] demonstrate why it was open to the learned primary judge to conclude that there was no prejudice in Mr Nelson's change in position (and that of his wife) between 2012 and 2014 that would weigh against the exercise of the discretion in favour of leave. They do not depend on notice of the judgment, or lack of it. It was open to find, as his Honour did, that Mr Nelson had taken the risk of an adverse outcome in the trial, and that the change in position did not outweigh the prejudice to Mr Cyran if he was prevented from pursuing enforcement of the judgment.

[47] This ground does not succeed.

Ground 8

[48] The contention here is that the decision to grant leave was unreasonable or plainly unjust. The basis for that submission is, by and large, a summation of factors advanced under the other grounds.[44] For the reasons given in respect of the earlier grounds, the complaints are not justified. The learned primary judge took those matters into account in a way that cannot be shown to be in error.

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40 Affidavit paragraph 21.
41 Affidavit paragraphs 22-23.
42 Affidavit paragraphs 26.
43 Reasons pages 6-7.
44 Outline paragraph 25.

[49] An added contention is that the explanations of delay were broad and general, or non-particularised.[45] That complaint is not compelling given that there was no cross-examination of Mr Georgiou. In any event, as the learned primary judge held:[46]

> "However, rule 799(4)(b) does not have the effect of elevating the adequacy or sufficiency of the reasons given to a mandatory or determinative level. It requires the court to be satisfied as to the reasons for the delay, not as to how compelling those reasons may be. That said, if satisfied as to what the reasons are for the delay, and of the other matters in rule 799(4), it is of course appropriate for a court, when in turn exercising its discretion under rule 799, to have regard to how compelling those reasons are, in the sense of providing a reasonable explanation why enforcement proceedings were not started earlier."

[50] The contention was also advanced that the total of about 14 years from taking a step against Mr Nelson[47] until notice was given, was 'just too long", relying on *Geneva Finance Ltd v Bandy*.[48] That case concerned an application to enforce a judgment after 14 years. However, the judgment was obtained on a summary judgment application, in an action commenced two years earlier. It seems plain from the report that the judgment debtor was part of the action and therefore knew the judgment had been obtained. Unlike the case here there was no suggestion that the judgment debtor had ignored the proceedings, taking the risk of an adverse outcome. Further there is nothing in the report to suggest facts similar to those affecting Mr Cyran, and in particular those relating to the fact that part of the difficulty in pursuing Mr Nelson has been the impecuniosity caused by Mr Nelson's assault. Each case depends on its own facts, and I am not persuaded that *Geneva Finance Ltd v Bandy* offers any persuasive authority.

[51] In my view this ground does not succeed.

Consent to act as Mr Cyran's litigation guardian

[52] During the hearing a question was raised with the parties arising from the fact that the proceedings in Western Australia were conducted in the name of "Michael Anthony Cyran (by his next friend Thomas Michael Moylan)" as plaintiff. The judgment obtained there was in the same name as plaintiff.[49] The application to register the judgment in Queensland was brought in the same name as plaintiff.[50] However, assuming that Mr Moylan was acting in Queensland as a litigation guardian for Mr Cyran, no written consent had been filed under r 95(1) UCPR. The question was whether the position of Mr Moylan ought to be regularised, and how. The parties were given the chance to file supplementary submissions on that point, and they have done so.

[53] Each agree that the appropriate course is for Mr Moylan to file the consent required under r 95(1), and that the absence of such consent to the present time ought to be excused under r 371(1) as an irregularity.

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45 Outline paragraphs 25(j) and (k).
46 Reasons page 5.
47 Presumably the time from the proceedings issuing in 1998.
48 [2008] WASC 236.
49 AB 208.
50 AB 207.

[54] In my view that is the course that should be followed because, by filing the application for leave to enforce the judgment, Mr Cyran was starting a proceeding while he was under a legal incapacity:

1. a person under a legal incapacity may "start or defend a proceeding" only by a litigation guardian: r 93(1);
2. a "proceeding" is started when an "originating process" is issued by the Court: r 8(1); for the purposes of that rule an originating process includes an application unless it is interlocutory in nature: r 8(2) and (3);
3. under r 799 "enforcement proceedings" may be started by an "enforcement creditor"; the enforcement creditor means the "person entitled to enforce an order for the payment of money": r 793;
4. an enforcement creditor requires the court's leave to start "enforcement proceedings" if more than six years has passed since the order was made: r 799(2)(a); that requires an "application for leave to start enforcement proceedings" under r 799(3);
5. where an interstate judgment has been registered under s 105 of the *Service and Execution of Process Act* 1992 (Cth) that does not start a proceeding even though the registry will assign a number to it, as it did here;
6. an application for leave to enforce a registered interstate judgment cannot be construed as interlocutory, and therefore comes within the definition of an originating process for the purpose of r 8;
7. that means that by filing the application Mr Cyran started a proceeding while under a legal incapacity, and r 93 provides that he can only do so by a litigation guardian.[51]

Conclusion

[55] None of the grounds of appeal establish error on the part of the learned primary judge in exercising his discretion in favour of granting leave. As all grounds have failed I would dismiss the appeal. There is no reason why costs should not follow the event.

[56] The orders I propose are:

1. The appeal is dismissed.
2. Upon Mr Moylan's filing, within 14 days from today, a consent to be Mr Cyran's litigation guardian under rule 95(1) of the *Uniform Civil Procedure Rules* 1999 (Qld), the Court declares pursuant to r 371(2)(d) of the *Uniform Civil Procedure Rules* 1999 (Qld) that the steps taken in the proceedings from the filing of the application on 3 October 2014 are effectual.
3. The appellant is to pay the respondent's costs, of and incidental to the appeal, to be assessed on the standard basis.

[57] **NORTH J:** I have had the advantage of reading the reasons for judgment of Morrison JA with which I agree.

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[51] The *Uniform Civil Procedure Rules* 1999 (Qld) probably have the effect that distinctions between suing on a judgment and enforcing a judgment, and treating enforcement as a matter of procedure, are no longer applicable; see for example the approach in the pre UCPR case, *World Square Pty Ltd v Taylor* [1990] 1 Qd R 583 at 588.

[58] With respect to the question of the consent to act as Mr Cyran's litigation guardian the evidence summarised by the trial judge in Western Australia[52] suggested that the respondent suffered significant head injuries with consequent significant cognitive impairment. While some evidence before this Court from the respondent's Western Australian solicitor suggests there may have been some improvement in the respondent's functioning the parties agreed that it was appropriate for the respondent's next friend to file a consent.

[59] For the reasons given by Morrison JA I agree with the orders proposed by his Honour.

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52 AR 98-102.