SUPREME COURT OF QUEENSLAND

CITATION:	*Cyran v Nelson & Ors* [2014] QSC 291
PARTIES:	**MICHAEL ANTHONY CYRAN (BY HIS NEXT FRIEND THOMAS MICHAEL MOYLAN)** (plaintiff) **v** **JEFFREY RONALD NELSON** (first defendant) AND **WAYSTAR ENTERPRISES PTY LTD (ACN 072 151 547) (IN LIQUIDATION)** (second defendant and third party) AND **AP INSURANCE BROKERS PTY LTD (ACN 064 567 620) (IN LIQUIDATION)** (fourth party)
FILE NO/S:	416 of 2014
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX-TEMPORE ON:	23 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2014 and 22 October 2014
JUDGE:	Henry J
ORDERS:	**1.** Pursuant to rule 799(2)(a) *Uniform Civil Procedure Rules* 1999 the plaintiff has leave to start enforcement proceedings against the first defendant pursuant to the Western Australian District Court judgment in this matter registered in the Cairns Supreme Court Registry. **2.** Liberty to apply on the giving of 2 clear business days notice in writing. **3.** Costs reserved.
CATCHWORDS:	PROCEDURE – JUGMENTS AND ORDERS – ENFORCEMENT OF JUDGMENTS AND ORDERS – EXECUTION AGAINST THE PERSON – QUEENSLAND – GENERALLY – where the plaintiff suffered catastrophic, permanently disabling brain injury as a result of the first defendant, a nightclub security guard, assaulting him in 1996 – where the Western Australian District Court awarded judgment for the plaintiff – where the nightclub owner and

insurance company went into liquidation – where the plaintiff, by his next friend, seeks to pursue the first defendant for payment of the judgment sum – whether reasons have been given for the delay in starting enforcement proceedings against the first defendant – whether the court ought give the plaintiff leave to commence enforcement proceedings against the first defendant

Civil Judgments Enforcement Act 2004 (WA) s 13
Limitations of Actions Act 1984 (Qld) s 10(4)
Service and Execution of Process Act 1992 (Cth) s 105
Uniform Civil Procedure Rules 1999 (Qld) r 799

COUNSEL: D de Jersey for the plaintiff
C Ryall for the defendants

SOLICITORS: MacDonnells Lawyers for the plaintiff
Bottoms English Lawyers for the defendant

HIS HONOUR: The plaintiff, by his next friend, makes application for leave pursuant to rule 799 of the Uniform Civil Procedure Rules ("UCPR") to start enforcement proceedings against the first defendant in respect of a Western Australian judgment registered in Queensland pursuant to section 105 of the Service and Execution of Process Act 1992 (Cth).

The reasons for judgment were delivered by her Honour, Judge Kennedy, of the Western Australian District Court on 17 October 2002. According to the reasons for judgment, her Honour awarded judgment for the plaintiff in the sum of $972,067.35. It appears when judgment was entered some days later on 30 October 2012, nearly 12 years ago, it was in the sum of $1,065,097.35. The sum outstanding, without the addition of interest, is said to be $1,020,097.35, reflecting a reduction of $45,000 for restitution paid by the first defendant. A more significant amount is, of course, now owing.

As the reasons for judgment show, the plaintiff suffered a catastrophic, permanently disabling brain injury as a result of the first defendant assaulting him and causing him to fall backwards, hitting his head, outside a Perth nightclub on 3 August 1996, about 18 years ago. The first defendant was a security officer of the nightclub and the plaintiff a prospective patron of the nightclub. The episode was apparently clearly evidenced on videotape. The force of the evidence was such that in a criminal proceeding against the first defendant for doing grievous bodily harm to the plaintiff, he was convicted and fined $45,000, ordered to be paid to the plaintiff (the materials are silent as to, and it is not presently relevant whether, this was the sole punishment imposed).

In the Western Australian civil proceeding, the second defendant and third party was the nightclub owner. Its insurance brokers, who allegedly failed to secure insurance coverage for the second defendant, were joined as a fourth party. Both went into liquidation before judgment was entered on 30 October 2002.

While the applicant was served with the civil claim, and his lawyers filed a defence on his behalf, he took no active part in the proceeding. By the time of the listed proceeding, those lawyers were no longer acting for him, and the trial was actually delayed for him to be notified of the hearing by newspaper advertising, of a kind directed by the court.

Subsequent to judgment, attempts were made to secure payment of the judgment amount through the liquidators. Those attempts failed, hence the plaintiff's interest in pursuing the first defendant. The filing of this application before me in Cairns (heard by me on telelink when on circuit in Brisbane) arises from the first defendant having been located, living and working in Far North Queensland.

Preliminary matters

The matter first came before me last week, on 15 October, at which time the respondent applied for an adjournment to better prepare to meet the application. After hearing the substantive submissions of the applicant plaintiff I adjourned the matter for one week, to 22 October, to afford the respondent first defendant an opportunity to file further evidence. The hearing of the substantive submissions was then completed on that date (yesterday).

It is common ground that the judgment has now been registered in Queensland. That occurred pursuant to section 105 of the Service and Execution of Process Act (Cth) 1992, the practical effect of which is to make registration mandatory on lodgement of a sealed copy of the judgment. By virtue of s 105(5) the judgment is only enforceable in Queensland to the extent it is capable of being enforced in Western Australia.

Western Australia's Civil Judgments Enforcement Act 2004 requires, at s 13, that leave of the court be obtained to enforce a judgment if six years have elapsed since judgment. In this matter such leave was granted ex parte on either 10 or 13 October 2014, depending on how the order (at exhibit MGF1 to the affidavit of Melinda Foley) is read. The respondent has indicated he intends to seek review of that decision, however, that has not moved me to postpone my determination of the present application, given the looming expiration of the 12 year limitation period for enforcement.

I proceed to determine the matter on the factual premise that the judgment is enforceable in Queensland because, as section 105(5) requires, it is enforceable in Western Australia. If it transpires the respondent overturns the recent grant of leave in Western Australia, that would be a fact arising which would at least likely entitle the respondent to be relieved of any adverse order I may now make, so that the respondent could apply to have me set aside or vary my order, pursuant to rule 668. To accommodate the hypothetical possibility of such an application, my order will give liberty to apply.

Another premise on which I determine this application is that an action cannot be brought upon the judgment after the expiration of 12 years from 30 October 2002. Section 10(4) of the Limitation of Actions Act 1974 (Qld) provides:

> *An action shall not be brought upon a judgment after the expiration of 12 years from the date on which the judgment becomes enforceable.*

An "action" is defined at section 5 of the Limitation of Actions Act as including any proceeding in a court of law.

My attention was drawn to a potential argument that an enforcement proceeding is not of itself an action brought within the meaning of section 10(4) and rather is no more than a continuation of the existing action (see the analysis by McPherson JA in Tonkin v Johnson (1999) 2 Qd R 318, 324; also see Dennehy v Reasonable Endeavours Pty Ltd (2003)

FCAFC 158). Conceptualising an enforcement action in the latter way may well be consistent with abstract legal principle, but is arguably inconsistent with section 10(4) and the definition of action, to which I have referred.

It is, however, unnecessary to finally determine this point, because the application is premised on the enforceability of the judgment in Western Australia, and there an order to enforce judgment must not be made if 12 years have elapsed since the judgment took effect (see s 12 Civil Judgments Enforcement Act 2004, interpreted as applying to pre-2004 judgments in Geneva Finance Limited v Bandy (2008) WASC 236). Thus, in determining whether leave ought be given under rule 799, I do so on the basis enforcement proceedings cannot be started after the expiration of 12 years from 30 October 2002.

Rule 799

Rule 799 requires an enforcement creditor to obtain the court's leave to start enforcement proceedings if it is more than six years since the money order was made. Rule 799(4) provides:

> *On an application for leave to start enforcement proceedings, the applicant must satisfy the court -*
>
> *a) as to the amount, including interest, owing at the date of the application; and*
>
> *b) if it is more than 6 years since the money order was made — as to the reasons for the delay; and*
>
> *c) if there has been a change in an enforcement creditor or enforcement debtor — as to the change that has happened; and*
>
> *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.*

If an applicant has satisfied a court of the matters listed in rule 799(4) it does not follow, and nor was it submitted, that the court is bound to grant leave. They are, in effect, mandatory threshold requirements. Subject to them being met it is common ground the discretion is unfettered.

The respondent submitted the applicant carried the onus of satisfying the court that leave should be granted. The applicant did not submit to the contrary. There is nothing in rule 799 to displace the ordinary principle that it is for an applicant to satisfy the court that an application made ought be granted. I approach consideration of this application on the basis that the applicant carries the onus.

Dealing firstly with the mandatory requirements of rule 799(4), the materials filed show the amount, including interest owing at the date of the application, is $1,752,722.88. That the amount remains owing and has been correctly calculated is not in dispute. There has been no change in an enforcement creditor or debtor, the materials prove the applicant is entitled to enforce the judgment order and the respondent is liable to satisfy it. Accordingly, I am satisfied of the matters listed in rule 799(4)(a), (c), (d), and (e).

It being more than six years since the order, rule 799(4)(b) requires the applicant to satisfy me "as to the reasons for the delay." The respondent submits that in the context of such an application, those words in effect require satisfaction that the court is adequately informed of the reasons for the delay and that those reasons would support a finding that it is just that leave be given. It is uncontroversial that leave ought not be given, unless it is in all the circumstances just to do so. As much might be said of all judicial decision making.

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. As much flows from the obviously temporal focus of rule 799 and the very fact that the court must be seized of what the reasons for the delay are, as one of the pre-requisites to proceeding to determine whether leave ought be granted.

While such consideration of how compelling the reasons for the delay are may often be an important consideration, rule 799 does not identify it as a determinative consideration. The unfettered discretion exercisable under rule 799 inevitably requires consideration of all the relevant circumstances of the case. It cannot be doubted that the reasons for the delay are a relevant circumstance, but they will rarely, if ever, be the only relevant circumstance.

In this case, reasons for the delay were deposed to in the affidavit of Mr Georgiou. He explained of the era around when the hearing occurred:

> *The view was taken, at the time, that if the plaintiff was successful, he would have a substantial claim and the prospects of recovery were likely to be more favourable against the second defendant than the first defendant, an uninsured individual. The assumption was made that the second defendant probably had insurance to cover it against the plaintiff's claim.*
>
> *I nevertheless attempted to keep track of the whereabouts of the first defendant but he soon disappeared. Information, I received, indicated that he may have left the state and that he was (or had been) a student studying psychology.*

Mr Georgiou's affidavit goes on to explain that after judgment was obtained, investigations were undertaken to establish whether there were any prospects of procuring payment of the judgment by the second defendant and or the brokers. There were extensive communications and correspondence with the second defendant's liquidators, the broker's liquidators and the HIH scheme. Notwithstanding some initial promise, all investigations ultimately led to dead ends. Mr Georgiou deposes:

> *So, in the end, little could be achieved. However, in the meantime, investigators were instructed to trace the whereabouts of the first defendant, initially without success. To save costs, I approached investigators on the basis that they would not charge, unless they located him, which yielded no results.*

It ought be understood that on the evidence before me, even much of Mr Georgiou's work was done on a pro bono basis. It will be recalled the catastrophic injury to which I have referred gave rise to a permanently disabling brain injury. It has, at least so far as the evidence touches upon this topic, left the applicant plaintiff unable to earn a living. He is, in essence, reliant upon the goodwill of his family, friends and the solicitor who has assisted him and to some extent the goodwill of some of the investigators who have apparently assisted the solicitor. It is not irrelevant to note that the commitment of investigators assisting the solicitor to effective and efficient investigation would likely be much greater were they dealing with a paying client.

Mr Georgiou's affidavit explains that, beyond what I have so far mentioned, endeavours to locate the respondent appear to have increased from about August of 2009. There was thus a very lengthy intervening period during which the focus was very much on the other parties rather than the respondent, a feature to which I will later return.

In about August 2009, the plaintiff's stepfather, an estate agent who conducted regular title searches, found information linking the first defendant to a property at Wanneroo. A consumer mortgage dated 5 July 2007, pertaining to that property is in evidence before me. While the defendant apparently resided at that address at some stage, he was apparently no longer there on the initiation of inquiries. The inquiries made on the applicant plaintiff's behalf later discovered there might be a relationship between the respondent and Suk Man Wong, who was once the registered owner of the property I have referred to. In January 2011, when a copy of the certificate of title of that property was obtained, her address was recorded at a property in Nilgen. On the assumption that the first defendant may have resided at that address, application was made by Mr Georgiou to the District Court of Western Australia for enforcement of the judgment through a means inquiry. In April 2011 a means inquiry summons was issued by the court. An attempt was made to serve it on the respondent through Mr Georgiou's firm's process server. The server was unsuccessful in serving the defendant at the Nilgen property. The process server apparently conducted an electoral roll search for the respondent, but there was no entry shown for him.

Mr Georgiou deposes, that after that "the first defendant's track went cold again", Mr Georgiou, armed with the past knowledge of the first defendant possibly being a psychology student, made inquiries with universities in Perth. They were not fruitful, nor were inquiries of a professional body in Western Australia, which represents clinical psychologists.

Mr Georgiou recommended the engagement of investigators, this time on a paid basis, because of the previous lack of positive outcome. "In Depth" investigators were instructed in May 2012 to undertake inquiries to locate the first defendant.

Their report was received in July of 2012. The investigations discovered the first defendant was associated with Southern Cross University. On inquiry, it was discovered he had moved between a number of its campuses and was last at its Tweed Heads campus.

Mr Georgiou perceived the need to engage New South Wales solicitors to commence enforcement proceedings, having become aware of the respondent being in New South Wales. 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.

Unfortunately the engagement of law firms necessarily involved an element of delay. It ought again be borne in mind that I am not here dealing with an applicant said to have any significant assets. By the time lawyers were instructed in New South Wales, it was discovered that the first defendant had transferred to James Cook University in Far North Queensland. This led Mr Georgiou to contact "All North Queensland Services", investigators based in Cairns. They confirmed that the respondent was based at JCU, working on its Smithfield campus at Cairns. Mr Georgiou then set about engaging solicitor agents in Cairns and that resulted in the engagement of the solicitors of record in this application, MacDonnells Law, who have apparently been providing advice to Mr Georgiou since August 2013.

It is apparent there was a period of some further delay before MacDonnells Law initiated the present application about a year or so later. Whilst not directly explained, there is a general explanation about delay and its connection with finance appearing in the affidavit of Mr Georgiou. He deposes:

> *I have acted for the plaintiff pro bono since the inception of this matter on the basis that he and his family have, by and large, paid the disbursements which I have incurred in order to prosecute the matter.*
>
> *Paying for disbursements such as Court filing fees, the fees and expenses of the process server, investigators and interstate lawyers have proved to be a challenge for the plaintiff along the way. This has unfortunately caused delays.*
>
> *A factor always weighing heavily, particularly because of the unfortunate history of the claim, was the likely prospect of the first defendant having the financial capacity to pay the judgment, or at least paying a meaningful portion thereof. The risk of "throwing good money after bad" was part of the consideration at every stage. The substantial value of the judgment has however motivated the plaintiff to at least take the further step (and incur the further cost) of holding a formal enquiry to establish the first defendant's financial status.*

Having regard to the information I have briefly reviewed above, I am satisfied as to the reasons for the delay, as required by rule 799(4). In summary, those reasons are that a forensic decision was made to first try and pursue the other parties, because the prospects of securing payment from them, or the liquidators, were considered better than as against the respondent. When those avenues were exhausted, inquiries were then directed to locating the respondent. Those inquiries and their efficiency were hampered by the plaintiff's limited means. Those inquiries were repeatedly unsuccessful until 2012 when the plaintiff's agents found the respondent in New South Wales. However the respondent moved before lawyers were engaged to initiate New South Wales enforcement proceedings. The respondent was thereafter located in Cairns, and lawyers were then engaged in Cairns to initiate enforcement through the present application.

Merits

In turning to the exercise of the discretion, I identify a feature of this matter that I regard, with respect, as irrelevant. Material has been laid on in this application by the respondent for the apparent purpose of evidencing, at least the prospect, that the respondent ought not have been held liable, or at least wholly so, for occasioning the injury which has resulted in the significant damages award.

In that regard I particularly note that there has been filed as an exhibit to the respondent's most recent affidavit, a document he says is a true copy of a bio-mechanics ergonomic report, prepared by Dr T.R. Ackland, dated 3 July 1998, that he has obtained from Dr Ackland. The respondent deposes, "I believed this report could show that the plaintiff's injury was at least partly caused by his own negligent actions." The report was plainly prepared in connection with the criminal proceedings, for its sub-heading is "Crown v Jeffrey R Nelson."

Dr Ackland's report deposes to the fact that he viewed the surveillance videotape of the episode in question. At the heart of his conclusions lies an observation that at the moment of critical contact between the two men, in circumstances where, he asserts, the applicant's head would be expected to have jolted forwards, it jolted backwards, inconsistently with the normal physics expected of the human body, if the reason for him falling backwards was that he had been the recipient of an application of significant force by the respondent.

The admissibility of evidence of this kind, were it sought to be led in either the criminal or civil actions that occurred, would probably have been borderline. The foundation for the opinion proffered is really little different than a normal member of the community's understanding of how their body responds to an application of force. It is unclear in the materials whether the report became an exhibit in either of those proceedings, or indeed whether Dr Ackland gave evidence, although it seems that was unlikely so far as I can glean from the civil judgment.

I mention these matters by way of background to preface the obvious point that my approach to this matter is premised on evidence that a court of law ordered judgment against the respondent. The proper approach in circumstance such as this is to accord appropriate force to that order. It was never challenged. This is not a case in which any form of evidence has been laid on to suggest, exceptionally, that such should the concern be about liability it ought feature as a consideration in the exercise of my present discretion. If the prospect of an erroneous judgment were ever potentially relevant to the exercise of a discretion of the present kind, at the very least one would expect that quite exceptional evidence would be pointed to. In any event, it is unnecessary to finally resolve whether potential doubt about the correctness of a conclusion as to liability is a relevant consideration in an application of this kind for, on the evidence such as it is on this topic, it is well short of the exceptional nature that might potentially give rise to concern.

I approach this matter on the basis that the respondent was properly found liable in the civil action. I am of course conscious in taking that course that he chose not to be an active participant in that proceeding, but would most certainly have been a present participant in the criminal proceeding, a proceeding in which the standard of proof was higher than the civil action, and notwithstanding that he was convicted.

Turning then to relevant considerations going to the issue of leave, it is undoubtedly a very significant relevant consideration that there has been a very long delay and that with more effective searching the respondent could have been located much earlier.

It is apparent that for over six years after the judgment, there was no real attempt to actively seek out the respondent at all. That is one of the respondent's most powerful points in this application. Nevertheless, its force is tempered by the reason for that initial significant delay. That reason, in essence, is that the applicant, no doubt on advice, perceived the better prospects of expending limited resources lay in pursuing enforcement against the other parties. 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 reasonable course to take.

I do not lose sight of the fact that it meant for a lengthy period of time the respondent was not being pursued, with the consequence that he likely became harder to find by reason of that lapse of time. By the time the applicant started to pursue the respondent in an active sense, he had already engaged in university studies, becoming an academic and a psychologist. Simply put, however difficult he may have been to find for the purpose of the trial, for at least a substantial period of the era since it is self-evident that he has not been in hiding. Some of his academic work would likely have been discoverable through online searching and his academic post thereby become discernible.

That said, the plaintiff's agents did pursue inquiries and initially without success, premised on him once having been a psychology student. Further, the reality is that he has moved addresses on multiple occasions, over the years. In hindsight a more rigorous approach to electoral roll and titles office searches might have been made. A lateral thinking investigator might even have searched for a marriage certificate. I have already made reference to at least one investigator making an unsuccessful electoral roll search. I have also alluded to evidence of two titles searches in respect of properties at Wanneroo and Nilgen. None of those attempts resulted in any particular success but it does provide some evidence that those involved in this process did not ignore the concept of electoral roll and titles office searches.

Further, the likely better source of success of those two forms of search, an electoral roll search, may well, even if engaged in more frequently, still have met with a lack of success. I make that observation having regard to the content of exhibit JRN1 to the affidavit of Mr Nelson, filed 21 October 2014, court document 14. I note that in the list of enrolment details in that document there have been occasions when his Christian name is spelt differently and in some instances where his Christian name has been shortened and his middle name is not present. The exhibit itself contains at least one entry where there is a temporal overlap as between two different addresses. In addition, the evidence is silent about the historical ease and accessibility of electoral roll searching.

The forceful theme of the points made by the respondent nonetheless remains. It is that considered overall more could have been done and in a more timely fashion to attempt to locate the respondent. As against this, as the evidence explains, the brain damaged plaintiff's agents were hampered by limited resources. That does not neutralise the respondent's points, but it is obviously a relevant consideration.

The respondent made the point that while the plaintiff might be brain damaged, he has had people acting for him and that includes his next friend who might be expected to act properly in that capacity. Nonetheless, that point does not remove the point of economic disadvantage to which I have referred. Doubtless, had the respondent not brain damaged the plaintiff, the plaintiff could have earned a living and garnered resources sufficient to search more effectively and rigorously for the respondent. Weight must surely be given to the reality that the efficiency and inefficacy of the process, so criticised by the respondent, is, to a not insubstantial extent, the product of the impecuniosity occasioned by the respondent.

The respondent's counsel also emphasised through his chronology and reference to the evidence that in each instance when there was ultimately success in locating the respondent, firstly in New South Wales and then in Queensland, there was an ensuing delay. I have already explained why it would not have been unreasonable to set about engaging lawyers to initiate proper service upon the respondent, and why, having regard to the geographical removal of Mr Georgiou from New South Wales and Queensland, and the plaintiff's impecuniosity, that may have taken longer than at first blush would seem reasonable. In short, while again I do not disregard the force of the points made by the respondent about those two delays, they do not fall to be considered in isolation from the obvious difficulties confronting the plaintiff which flow, at least to a not insubstantial extent, from an impecuniosity occasioned to him by the actions of the respondent.

The respondent also placed particular emphasis on the delay being close to the expiration of the 12 year limitation period. The point is tempered by the reality that the legislature has seen fit to allow for a limitation period of 12 years for this process and the applicant remains within that limitation period. However, it is of course evident that the giving of leave should be approached with greater caution the longer the delay has been within the long period represented by 12 years in the respondent's life.

The respondent emphasises he has got on with and lived his life in the interim period, without knowledge of the debt he owes pursuant to the judgment. His initial affidavit in this matter provided some evidence about the progress of his academic career, culminating in his move to Cairns, which according to his affidavit at least, was in 2010. He resigned from James Cook University effective on 30 June 2012. He is presently involved in volunteer work with a federal department, the Royal Flying Doctor Service and the Cape York Aboriginal Australian Academy. He and his wife, Ms Suk Man Wong, purchased a house together in Palm Cove in Cairns in about 2013. He explains the purchase was partly funded by loan funds secured by mortgage over their home. The amount owing thereunder is said to be $450,000. He and his wife are each parties to the mortgage. He explains he and his wife have previously bought and sold houses together at other places.

He goes on to depose that he is currently also working two days a week for Queensland Health and is in the process of setting up in private practice as a clinical psychologist. On advice from an accountant in respect of the best structure for his practice, they set up a discretionary trust with a corporate trustee, the Nelson Wong Trust. On 19 September 2014 the trust entered into a contract to buy a commercial unit in Grafton St at Cairns, from which location he proposes to trade in his practice as a clinical psychologist and pay a commercial rent to the trust. The purchase was funded by drawing down on a loan facility secured over the Palm Cove home. The draw down was $97,000.

His wife is a director of the trust to which I have referred. The combination of her interests with the respondent's, so far as the mortgage is concerned and the equity in their home being used in respect of the trust arrangements and the acquisition of the commercial premises, has the consequence, I accept, that she may be adversely effected, as might the trust be, in the event that enforcement action is taken as against the respondent. Put simply, their financial affairs are obviously entwined.

All of that said, it ought be borne in mind that the arrangements to which I have referred are capable of alteration. More importantly though, the level of inconvenience potentially occasioned, as significant as it may be perceived by the respondent and his wife, is not, with respect, comparable to the life shattering consequences with which the plaintiff must live. The gravity of the consequences of the actions giving rise to the award for damages is of itself, surely, a relevant consideration. My focus is not merely the respondent's interests in weighing up the exercise of the discretion. The plaintiff's position cannot be ignored.

The respondent emphasises he has got on with his life in the long period of intervening time. The theme of one of the submissions made on his behalf was, in effect, 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. This submission does not fit easily with the reality that he adopted a position of wilful blindness when the proceeding was afoot.

Doubtless alive to the force of that point, evidence has been laid on by his representatives in relation to his scattered emotional state back in that era. The point of the evidence is to diminish the force of the point I have just made. I do not regard any of that evidence as compelling the conclusion that he was unaware, when the action was afoot, of the action or of the potentially adverse consequence of the action for him. At best the evidence about his scattered emotional state in that era helps explain his, at first blush, remarkable assertion that he has no memory of having given instructions to a solicitor in respect of the civil action. The fact remains though, that, on the evidence, he was properly served in respect of that matter, indeed that his legal representative filed a defence containing substantive factual assertions therein on his behalf in the civil action. He knew that he was a defendant in a civil suit in respect of injuries, which he must have known were catastrophic, by reason of his participation in a criminal trial.

The solicitors who acted on his behalf in filing the defence were, by the time of trial, no longer in the matter, hence the delay to which I have referred, to allow for advertising. It may be, as was speculated by his counsel, that he received certain advice in relation to what he ought do in relation to that proceeding, in particular, as to how active a role he should play. If the submissions about that were correct, and there is no specific evidence on the point, they were doubtless driven by the same consideration that led the plaintiff's lawyers to initially take the view that they should try and pursue the other parties, who are likely to have more money.

The course taken by the respondent, even if he now forgets it, had to have been that he made a choice not to actively participate in proceedings of which he was undoubtedly aware. In so doing he ran the risk that he would be the subject of the adverse outcome that in fact occurred, and would potentially run the gauntlet of a significant financial judgment being out there against him as we went on to live his life. If he in fact forgot that he was ever an active participant through the filing of the defence and being served with the civil

proceeding, it must be that, at least before he forgot, he embarked upon living his life choosing to "run the gauntlet". 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.

Giving full weight to the matters raised on the respondent's behalf, and including, to remove any doubt, the potentially catastrophic consequences of the enforcement action now being taken against him, in all the circumstances of the case I consider the applicant has fulfilled his onus in respect of this application and that it is proper that I give leave.

In so doing, I will, as I envisaged, give liberty to apply. There is a draft order before me. Amendments to that draft are as follows. The date of the order is amended from the 22nd to the 23rd of October. Order 1 remains unchanged: it is, pursuant to rule 799(2)(a) Uniform Civil Procedure Rules 1999, the plaintiff has leave to start enforcement proceedings against the first defendant pursuant to the judgment filed in the Cairns Supreme Court registry on 29 September 2014. The existing paragraph 2, about costs, is deleted and replaced with the following:

> *Liberty to apply on the giving of two clear business days notice, in writing.*

…

In paragraph 1, after the words "the first defendant, pursuant to the," insert, "Western Australia District Court." The word "judgment" follows. After the word "judgment," delete the word "file" and insert, "in this matter registered." It then continues "in the Cairns Supreme Court registry," and delete, "on 29 September 2014." So paragraph 1 will now read:

> *Pursuant to rule 799(2)(a) Uniform Civil Procedure Rules 1999, the plaintiff has leave to start enforcement proceedings against the first defendant, pursuant to the Western Australia District Court judgment in this matter, registered in the Cairns Supreme Court registry.*

Two, as I say, will be:

> *Liberty to apply on the giving of two clear business days notice in writing.*

Three, I will simply put:

> *Costs reserved, as indicated by virtue of liberty to apply provisions.*

Once the issue about Western Australia, as flagged by the respondent's lawyers has been tended to, or alternatively, if there's such a delay as to suggest nothing's happening about that, either party can of course bring on an application for the hearing of costs argument.

…

I order as per the amended draft order, signed by me and placed with the papers.