

CT 1
9-06-00

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: 853/1997**

**BETWEEN : (1) CREDIT ARBITRAGED ASSET BACK 3 LIMITED
(2) CREDIT ARBITRAGED ASSET BACK 4 LIMITED**

PLAINTIFFS

**AND: (1) ITARI ISHII
(2) CAAB INVESTMENT ADVISORS LIMITED
(3) RYOEI MATSUNAMI
(4) IKUKO MATSUNAMI
(5) IYONORI SASAKI
(6) KENZO SASAKI
(7) MICHIKO ISHII
(8) HIROKO IMAI
(9) FUMIE TANNO
(10) KIMI SATO
(11) IKU SAITO
(12) SHIGEMI SASAKI
(13) EMIKO IDE
(14) FUMIE NEZU
(15) HIDEO SASAKI
(16) SHIGEHISA WADA
(17) KIMIE SASAKI
(18) NORIMASA SATO
(19) JUNICHI SATA
(20) HIROKO NAKAYAMA
(21) TOSHIKO OHYAMA
(22) YOSHINORI IMAI**

DEFENDANTS

Ms.Kristen Houghton for the Plaintiffs
Alastair Walters for 1st, 7th and 9th Defendants

BEFORE MR. JUSTICE SANDERSON



RULING

This was an application by the Plaintiffs to extend the validity of the writ of summons.

The application was made pursuant to GCR Order 6 rule 8.

During the course of submissions counsel indicated that it may be possible to extend the validity of the writ in respect of certain Defendants only. In this case there are 4 Defendants that have not been served. In addition, the first Defendant claims that he has not been properly served. The issue that was discussed was whether or not it would be possible to extend the writ in respect of some or all of those Defendants. I have concluded that the validity of the writ must be extended as a whole and not with respect to individual Defendants. Accordingly, I base my decision on that fundamental premise.

The first basic ground advanced by Plaintiffs' counsel for extending the validity of the writ is that the Plaintiff's have not been able to serve 4 of the Defendants. They do not know where those 4 Defendants are, although they believe they are in Japan. No evidence was presented to the Court indicating what efforts have been made to serve those Defendants. During the course of her submissions Ms. Houghton acknowledged that service of those Defendants had "slipped between the cracks". as the Plaintiffs have been primarily involved in attempting to serve the first and primary Defendant as well as the remaining 22 Defendants.



By way of background, the Writ was initially issued in December 1997 has been extended on 3 previous applications by the Plaintiff. During the past 2 ½ years the Plaintiffs have not served the 4 Defendants mentioned above. Ms. Houghton requested a further 6 months extension for the validity of the Writ and indicated that attempts would be made to locate and serve the remaining 4 Defendants. There was no affidavit material filed indicating what steps the Plaintiffs intended to take to locate those 4 Defendants and whether or not service would be likely.

Ms. Houghton conceded that it would be necessary to satisfy the Court that there was justification or good reason for further extending the Writ. Based upon the evidence pertaining to those 4 defendants I am not satisfied that test has been met and I accordingly would not extend the writ based on the evidence advanced relating to the service of those 4 particular Defendants.

The Plaintiff asserts that the 1st Defendant was properly served sometime in late 1999. Recently, (either in December 1999 or March 2000), the 1st Defendant has made it known that it disputes that service was properly made. The Plaintiff, therefore, wishes to have the writ renewed so that it may attempt to properly effect service should the 1st Defendant's argument ultimately prove successful.

The 1st Defendant argues that if the writ is extended that would deprive him of his right to bring an application to have the proceedings struck on the basis of improper service.



As Mr. Walters put it “ it is not open to the Plaintiff to circumvent the Defendant’s right to say they have not been properly served”.

I precieve that the Defendants’ s right to bring an application to have the proceedings struck or stayed on the basis that it has not been properly served as being grounded in common sense – namely that a writ will be set aside if the Defendant can show that he has not been served and has suffered prejudice as a result. However, in this case, even if the 1st Plaintiff is successful in his application to stay the proceedings it would likely be open for the Plaintiff to commence a new and fresh action and go about serving the 1st Defendant in that proceeding. The Plaintiff would then apply to consolidate that proceeding with the present one.

Alternatively, if the time has not expired on an original writ, a Defendant who would ordinarily have been entitled to apply to set aside the writ or stayed on the grounds of improper service could nevertheless still be subsequently served, so long as the writ was valid. In short, it is open to a Plaintiff to serve or attempt to re-serve a party so that the case may be tried on the merits and that in my view defeats Mr. Walters submission, “that it is not open to the Plaintiff to circumvent the Defendants right to say they have not been properly served.”

Fundamentally, I think that the function of the rule is that the dispute between the parties be tried upon the merits and that cannot be done until the parties are properly served and have knowledge of the proceedings.



Accordingly, I believe that the Defendants will not likely suffer any real prejudice should the writ be renewed and I believe there is justification for extending the validity of the Writ namely,

- (1) that the Plaintiff attempted to serve it and believed, until recently, that it had served the 1st Defendant;
- (2) the Plaintiff now requires an extension of the validity of the writ, in order to ensure it can effect service and have the case tried upon the merits.

Accordingly I order that the writ be extended for a period of 6 months from May 29th 2000.

As I indicated to counsel that the conclusion of the hearing I will not be inclined to grant a further extension on this writ of summons.

I order that the costs of this application be the costs in the cause.

Dated this 1st day of June, 2000.



Dale Sanderson

Judge of the Grand Court

