IN THE SUPREME COURT OF CL-78/2022

THE TURKS AND CAICOS ISLANDS

BETWEEN:

(1) SEBASTIAN HOLDINGS INC.

(acting by Shane Crooks and Malcolm Cohen as joint receivers)

(2) SHANE CROOKS

(3) MALCOLM COHEN

Plaintiffs

– and –

(1) SAREK HOLDINGS LTD.

(2) ALEXANDER VIK

(3) PER JOHANSSON

(4) REITEN & CO CAPITAL PARTNERS VI GP LIMITED (in liquidation)

(5) REITEN & CO CAPITAL PARTNERS VII GP LIMITED

(6) SHARIFAH MORRIS

(in her capacity as liquidator of Reiten & Co Capital Partners VI GP Limited)

(7) SEBASTIAN HOLDINGS INC.

(acting by its director)

Defendants

Before: **The Registrar**

Appearances: **Stephen Wilson K.C**

Hearing Date: **19th June 2024**

Venue: **Registrars Chambers**

Delivery Date : **31st October 2024**

DECISION

Background to Application

1. By Letter dated 10th August 2023 Counsel for the Plaintiffs Stephen Wilson K.C applied pursuant to Order 6 rule 8, Order 3, rule 5 and Order 2 rule 1 for an order extending the validity of the Writ in CL 78/2022 which were issued on the 15th of August 2022, for an additional period of 12 months. This application was supported by the 2nd affidavit of Shane Crooks.

2. Mr. Wilson K.C states "*the application is made out of an abundance of caution and is effectually a protective application as all defendants were already served and is made on the following grounds*:
   a. *Certain of the Defendants have indicated an intention to make an application disputing jurisdiction, which application may include arguments alleging irregularity in the service of the Writ.*
   b. *The Defendants may also argue that they have a limitation defence if the Writ is not served within its period of validity and therefore the clients wish to issue a protective application before the expiry of the period of validity for service of the Writ i.e 14th August 2023."*

3. He further stated that given that the application will only need to be determined if the Defendants successfully challenge service of the Writ a request was therefore made to list this application at the same time as the Defendant's intended application to contest jurisdiction.

4. On the 1st of December 2023 the 2nd and 3rd Defendants served their joint summons challenging jurisdiction and their evidence in support was filed on 26th January 2024. In January 2024 the court issued directions and listed an application made by the Defendants to challenge the jurisdiction of the court of Colorado USA to grant an order for substituted service (Jurisdictional Challenge) to be heard on the 11th and 12th of July 2024.

5. By letter dated 14th June 2024 Mr. Wilson K.C wrote to the Court in the following terms:- " *It is imperative that the Extension Application is heard and determined prior to 15th August 2024 and that there is time following the determination thereof for our client to make a second application for a further extension of the validity of the writ prior to 15th August 2024. For that reason and noting that the Court will start the long vacation at the end of July, we had been discussing with you over the course of the last month or so having the Extension Application listed before you in advance of 11 July 2024."*

6. Mr. Crooks in his affidavit states that although all parties have been served, this protective application is made out of an abundance of caution before the expiry of the period of validity for service of the Writ on 14th August 2023. This protective application is made on the basis that:
   (a) By letters, from their TCI attorneys Misick & Stanbrook, dated 25 and 27 July 2023 the First, Second and Seventh Defendants have indicated an intention to make an application disputing jurisdiction (the Jurisdictional Challenge) (which may under Order 12, rule 8 include an application to dispute jurisdiction on the grounds of irregularity in the service of the Writ);

   (b) the Third Defendant, who is represented by the same attorneys, filed an acknowledgment of service on 31 July 2023 without prejudice to any challenge to jurisdiction that he may wish to make; and

   (c) the Defendants may argue that they have a limitation defence if the Writ is not served within its period of validity.

7. The application for extension of the validity of the Writ was heard on the 19th of June 2024 and judgment was reserved. On the 25th of June 2024 an Order was granted by this court extending the validity of the Writ as follows;
   "If and insofar as the Court determines (upon the hearing of the Jurisdiction Challenge or any appeal therefrom) that the Writ has not already been validly served on the Defendants (or any of them), the validity of the Writ is hereby extended for a further 12 months from 15 August 2023 so that it is valid for the purposes of service until 14 August 2024." My written reasons are set out below.

History of Proceedings

8. The Second and Third Plaintiffs (the '**Receivers**') were appointed by an Order of the High Court of England and Wales dated 17 February 2017 (the '**Receivership Order**') as joint receivers over certain interests of Sebastian Holdings Inc. ('**SHI**'), a TCI company that is the First Plaintiff in this action, to collect, get in, take possession of and/or receive all amounts due to SHI in respect of those interests by way of equitable execution of an English judgment debt of US$243,023,089 plus interest owed by SHI to Deutsche Bank AG.

9. On 4 April 2017, the Receivers issued a writ of summons in Action No. CL-44/2017 in the TCI advancing personal and proprietary claims that were similar to those now advanced in the present action. However, the writ in Action No. CL-44/2017 was set aside by Orders of the TCI Court of Appeal dated 31 August 2018 because the Receivers had failed to comply with paragraph 5(h) of the Receivership Order which required the Receivers' right to bring proceedings in the TCI to be either admitted by

the Defendants, recognised by the TCI Court before proceedings were commenced, or raised by the Receivers as an issue in the proceedings at the first opportunity to do so.

10. On 12 October 2018, the Receivers commenced Action No. CL-119/2018 by issuing an originating summons seeking recognition of the Receivership Order and the Receivers' powers under it in the TCI. The Receivership Order and the Receivers' powers under it, including the power to bring proceedings in their own names or in the name of SHI, were recognised in the TCI by Order of the Supreme Court of the TCI dated 19 February 2021 in Action No CL-119/2018 and by a consent order dated 20 May 2021. Following the recognition of the Receivership Order and the Receivers' powers under it in the TCI, the Plaintiffs issued the Writ in these proceedings on 15 August 2022.

11. In summary, the claims in these proceedings are to recover all amounts due to SHI in respect of its interest in and claims relating to Reiten & Co Capital Partners VI LP ('**Reiten VI**') and Reiten & Co Capital Partners VII LP ('**Reiten VII**') (together, the '**Reiten LPs**'), which are private equity funds registered as limited partnerships in England and Wales but administered in Guernsey. SHI's interests in the Reiten LPs were purportedly transferred away to the First Defendant for no consideration.

12. The First and Seventh Defendants (being TCI companies) were served within the jurisdiction by delivery to the offices of Misick & Stanbrook on 31 August 2022 and by publication in The Gazette on 2 September 2022 in accordance with the order for substituted service made by Order of Mr Justice Hylton QC (as he then was) dated 29 August 2022.

13. The Second to Sixth Defendants are outside the jurisdiction. On 15 August 2022, the Plaintiffs' attorneys wrote to Misick & Stanbrook seeking confirmation that they would accept service on behalf of the First to Third Defendants. On 14 October 2022, Misick & Stanbrook confirmed that they did not have instructions to accept service. The attorneys for the Fourth to Sixth Defendants, Ogier, confirmed that they would accept service if the TCI Court granted leave to serve out of the jurisdiction. The ex parte application for leave to serve the Writ out of the jurisdiction was made by the Plaintiffs' attorneys on 9 November 2022.

14. That application was heard on the 25 May 2023. By Order dated 31 May 2023, I granted the Plaintiffs' application for leave to serve the Writ out of the jurisdiction.

15. They were each served as follows:

    a. Second Defendant – Alexander Vik - The Plaintiffs instructed Zabaldano Avocats, attorneys in Monaco, to effect service on the Second Defendant who was

served with the Writ on 3 July 2023 by handing the documents to the Second Defendant's assistant at the Second Defendant's address, 20 Avenue de Grande Bretagne, 98000, Monaco. The Second Defendant filed an acknowledgment of service on 14th July 2023 giving notice of his intention to defend without prejudice to any challenge to jurisdiction.

c. Third Defendant – Per Johansson - The Plaintiffs instructed Holland & Knight LLP ("Holland & Knight"), attorneys in Colorado, to effect service on the Third Defendant in Colorado, USA. On 27 June 2023, Holland & Knight issued an "Expedited Motion for Substituted Service" of the Writ on the Third Defendant in the District Court of Pitkin County, Colorado. The motion records that the Plaintiffs had, by use of a process server, made six unsuccessful service attempts at the Third Defendant's last known address, 171 Cascade Lane, Aspen, Colorado 816611 (the "Aspen Residence"), between 10 and 20 June 2023 and that on the last attempt two individuals informed the process server that they were renting the property from the Third Defendant and that they believed he was presently in Italy. The motion goes on to state that after the sixth service attempt, the property manager, Mr Anthony Smith, called the process server and indicated that he had just spoken to the Third Defendant who was living in Italy but that he did not know where and that the Third Defendant had told him: *"[I]t's that lawsuit that's been going on forever, just ignore it."* On 23 June 2023, Graham Thompson wrote to Misick & Stanbrook asking for confirmation within 7 days of where the Third Defendant now resided. Misick & Stanbrook did not reply to this letter. On 3 July 2023, District Court Judge Neiley of the District Court of Pitkin County in the State of Colorado granted an order for substituted service of the Writ (and other documents in the proceedings) on the Third Defendant. The Order provides for substituted service on the Third Defendant by: (a) personally serving the local property manager, Anthony Smith, who is responsible for the Aspen Residence; (b) personally serving Michael Hoffman, the registered agent of Cascade Aspen LLC (the owner of the Aspen Residence); (c) mailing the documents to the Aspen Residence; and (d) mailing the documents to Misick & Stanbrook, with service deemed complete on the date of delivery to either of the substituted persons.

d. In reference to this Order the following occurred : (a) Mr. Smith was personally served on 6 July 2023; (b) Mr. Hoffman was personally served on 16 July 2023; (c) the documents were mailed to the Aspen Residence on 6 July 2023; and (d) the documents were mailed to Misick & Stanbrook on 6 July 2023. (11 41 is this an error?). The documents were also emailed by Holland & Knight to Misick & Stanbrook as a courtesy on 6 July 2023. Misick & Stanbrook responded by email on 11 July 2023 stating: *"We are not authorised to accept any documents on behalf of Mr Johansson"*. Holland & Knight responded on 12 July 2023 to explain that service had been completed in accordance with the Order of the District Court of Pitkin County, Colorado. The Third Defendant filed an acknowledgment of service on 31 July 2023, naming Misick & Stanbrook as his attorneys. The acknowledgment of service gave notice of the Third Defendant's intention to

defend and was stated to be without prejudice to any challenge to jurisdiction that he may wish to make. It is important to note that on the 25th of January 2024 the Third Defendant issued a Motion to Quash seeking to challenge the validity of the Colorado Service Order. On the 11th of May the Colorado court denied the Motion to Quash. On the 23rd of May 2024 the Third defendant filed a Motion of Reconsideration which was denied by the Court on the 20th of June 2024.

c. Fourth to Sixth Defendants – Reiten VI, Reiten VII and Sharifah Morris (Liquidator of Reiten VI) – On the 6th of July 2023, the Plaintiffs' Guersey Attorneys, Carey Olsen, served the Fourth to Sixth Defendants by service upon their Attorneys, Ogier. On the 24th July 2023 Ogier entered acknowledgments of service for the Fourth to Sixth Defendants indicating that they did not intend to contest the Plaintiffs Claim.

16. The Plaintiffs contend that the Writ was served on all Defendants within the initial twelve-month period of validity for service i.e. by 14 August 2023.

17. Following service of the Writ on all Defendants, the following material events have occurred:

(1) On 25 July 2023 Misick & Stanbrook wrote to the Plaintiffs' attorneys stating that they would shortly be proposing *"a further timeframe for next steps leading to our clients' application disputing jurisdiction"* (thereby indicating that jurisdiction would be challenged). On 27 July 2023, Misick & Stanbrook further wrote to the Plaintiff's attorneys and proposed that the Defendants file and serve their applications contesting jurisdiction by 13 October 2023.

(2) Following such correspondence and therefore in circumstances where it appeared that at least some of the Defendants intended to dispute jurisdiction, the Plaintiffs' protective ex parte application to extend the validity of the Writ, was filed. The Plaintiffs did not seek the determination of the ex parte application at that time because it was not yet known whether the protective application would need to be determined.

(3) There were various correspondence between Misick & Stanbrook (attorneys for the First, Second, Third and Seventh Defendants) and the Plaintiffs' attorneys, Wilson Wells, seeking to agree the timetable for the jurisdiction challenges to be made by the Second and Third Defendants.

(4) The Second and Third Defendants eventually served: (a) their joint summons challenging jurisdiction on 1 December 2023 (the 'Jurisdiction Challenge'); and their evidence in support on 26 January 2024. Although it did not specifically acknowledge the existence of the Plaintiffs' protective ex parte application to extend the validity of the Writ. Mr. Wilson K.C submits that evidence provided by the Second and Third Defendants made it clear that the Second and Third

Defendants were aware of the application. In January 2024, the TCI Court listed the Jurisdiction Challenge to be heard on 11 and 12 July 2024. The parties then agreed a directions order leading to that hearing.

(5) The Plaintiffs filed and served their evidence in response to the Jurisdiction Challenge on 2 April 2024 in accordance with the agreed directions order.

Submissions

18. Mr. Wilson K.C referred to the following Rules of the Supreme Court Rules 2000

a. **Order 6, rule 8** provides:

"*8. (1) For the purposes of service, a writ (other than a concurrent writ) is valid in the first instance for twelve months beginning with the date of its issue.*

(2) Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding twelve months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow."

b. **Order 3, rule 5** provides:

"5. (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period."

c. **Order 2, rule 1** provides:

"*1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*

(2) Subject to paragraph (3) the Court may, on the ground that there has been such a failure as mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendment (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit."

19. Counsel submits that the principles on which a Court will exercise its discretion to extend the validity of a writ under Order 6, rule 8 are set out in the English House of Lords decision in *Kleinwort Benson Ltd v Barbrak Ltd* [1987] A.C. 597 and explained in note 6/8/6 to the Supreme Court Practice 1999 (the '**White Book**') which provides:
"*(1) It is the duty of the plaintiff to serve the writ promptly. He should not dally for the period of its validity; if he does so and gets into difficulties as a result, he will get scant sympathy.*
(2) Accordingly there must always be a good reason for the grant of an extension. This is so even if the application is made during the validity of writ and before the expiry of the limitation period; the later the application is made, the better must be the reason.
(3) It is not possible to define or circumscribe what is a good reason. Whether a reason is good or bad depends on the circumstances of the case. Normally the showing of good reason for failure to serve the writ during its original period of validity will be a necessary step to establishing good reason for the grant of an extension…
(4) Examples of reasons which have been held to be good are:
(a) a clear agreement with the defendant that service of the writ be deferred;
(b) impossibility or great difficulty in finding or serving the defendant, more particularly if he is evading service.
(5) [Gives examples of reasons held to be bad including carelessness].
(6) The application for renewal should ordinarily be made before the writ has expired. The court has power to permit a later application but it must be made within the appropriate period of the first expiry. The laxer practice of allowing two or more successive renewals to bring the writ up to date is no longer available…
(7) A writ will not normally be renewed so as to deprive the defendant of the accrued benefit of a limitation period. The strict view taken in Heaven v. Road and Rail Wagons Ltd [1965] 2 Q.B. 355; [1965] 2 All E.R. 409 was approved by the Court of Appeal in Chappell v Cooper (above), but must be read in light of the decision of the House of Lords in Kleinwort supra. Possible exceptions are the good reasons in 4(a) or 4(b), above, or very sharp practice by the defendants which has deceived the plaintiff into inactivity.
(8) Where application for renewal is made after the writ has expired and after the expiry of a relevant period of limitation the applicant must not only show good reason for the renewal, but must give a satisfactory explanation for his failure to apply for renewal before the validity of the writ expired.
(9) The decision whether an extension to the validity of a writ should be allowed or disallowed is a matter for the discretion of the court dealing with the application…

20. Counsel further submits that *"Applications involve a two-stage enquiry. At stage I the court must be satisfied that there was a good reason to extend time, and also that the plaintiff had given a satisfactory explanation for his failure to apply before the validity expired. If the court was so satisfied then it should proceed to stage II and decide whether or not to exercise its discretion in favour of renewal by considering all the*

circumstances of the case including the balance of prejudice or hardship… The court must consider in all cases, even when the limitation period has not expired and the application is made before the initial period of validity has expired whether there was good reason for not serving the writ before the expiry of that period before moving on to the second stage of considering whether there was good reason to extend the validity. The test was the same whether the limitation period expired or not though the court might apply the test with less rigour where the limitation period has not expired…"

21. In respect of proposition (6) above, Counsel submitted that the English Court of Appeal in *Singh (Joginder) v Duport Harper Foundries Ltd.* [1994] 1 W.L.R. 769 at p.775 concluded (in the context of the English Order 6, rule 8 under which the relevant period of validity was four months rather than twelve months): "*It is difficult to reconcile the authorities cited above but the following propositions should be applied: (1) where a litigant seeks an extension of the validity of a writ the provision of Ord. 6, r. 8 will apply; (2) an application under that rule must be made during the validity of the writ, i.e. four months in the usual case, or during the four months next following; (3) only one extension of time can be granted on a particular application and that must be for a period not exceeding four months; (4) if the litigant has not conformed with the requirements of the rule he cannot be granted relief under Ord. 6, r. 8; and (5) in exceptional circumstances and where the interests of justice so require the court will entertain an application to extend the validity of the writ under the provisions of R.S.C., Ord. 2, r. 1 and Ord. 3, r. 5 .*"

22. In support of the proposition that in exceptional circumstances and where the interests of justice so require the Court will entertain an application to extend the validity of the writ under Order 2, rule 1 and Order 3, rule 5, Counsel submitted that the English Court of Appeal in *Singh supra* relied upon the earlier English Court of Appeal decision in *Ward-Lee v Linehan* [1993] 1 W.L.R. 754, which pertained to the English County Court Rules 1981 that contained similar provisions to those in the Rules of the Supreme Court. In relation to the argument that Order 6, rule 8 (and the equivalent in the County Court Rules) were rules of a special character that could not be overridden by Order 3, rule 5 or Order 2, rule 1 (or their equivalents), Sir Thomas Bingham M.R. rejected that submission in these terms (at p.763):

> "*So far as Ord. 7, r. 20 and Ord. 6, r. 8 are concerned, the submission is in our judgment unsound. It is not consistent with Lewis's case [1978] 1 W.L.R. 403 , Robt. Baxendale Ltd. v. Davstone (Holdings) Ltd. [1982] 1 W.L.R. 1385 or Leal v. Dunlop Bio-Processes International Ltd. [1984] 1 W.L.R. 874, and it is not supported by Bernstein v. Jackson [1982] 1 W.L.R. 1082 as explained in Leal's case [1984] 1 W.L.R. 874. It is not supported by the wide terms of R.S.C., Ord. 2, r. 1 and Ord. 3, r. 5 and Ord. 13, r. 4 and Ord. 37, r. 5 of the County Court Rules 1981. And it is not in our view consonant with the requirements of justice in some cases*."

23. The present application to extend the validity of the Writ for service is not typical because the application is protective in the sense that the Plaintiffs contend that the Writ has already been validly served on all the Defendants within the initial twelve-month period of validity. Whether the Plaintiffs are correct in this contention will only be decided upon the final determination of the Jurisdiction Challenge.

24. Order 6, rule 8 opens with the words "*Where a writ has not been served on a defendant…*" This raises an issue whether the Court has jurisdiction to extend the validity of the Writ in circumstances where the applicants contend that the Writ has been served on all defendants.

25. Mr. Wilson K.C submits that the Court does have jurisdiction to extend the validity of the Writ in these circumstances, and that the order in this case should be expressed in the form: "*If and insofar as the Court determines (upon the hearing of the Jurisdiction Challenge or any appeal therefrom) that the Writ has not already been validly served on the Defendants (or any of them)…*".

26. He further submits that the two alternative analyses available to the Plaintiffs are:
(1) Under Order 6, rule 8 the words "*Where a writ has not been served on a defendant…*" are to be interpreted to include a situation where a plaintiff claims that the writ has been validly served but a defendant claims that the writ has not been validly served on them and their challenge to service has not yet been determined.
(2) Alternatively, if Order 6, rule 8 is not available in such a case, then it is an exceptional case where the interests of justice require the Court to entertain an application to extend the validity of the Writ under Order 3, rule 5 and/or Order 2, rule 1 in accordance with the English Court of Appeal decisions in *Singh* and *Ward-Lee*.

27. Counsel further submitted that it would be unjust if the Court had no jurisdiction to entertain the Plaintiffs' application to extend the validity of the Writ in the circumstances of the present case because the consequence would be that the Plaintiffs would very likely be unable to apply after the 2nd anniversary of the Writ, which would cause further uncertainty and difficulties for the Plaintiffs as referred to above.

28. Mr. Wilson K.C submits that in the circumstances of this case, the Court should extend the validity of the Writ for an additional twelve months until 14 August 2024 for the following reasons:

    (1) There is a "good reason" to grant an extension of time. The Plaintiffs contend that the Writ has already been validly served on all Defendants within its initial period of validity, but Mr Johansson contends otherwise and his challenge to service is unlikely to be finally determined before the 2nd anniversary of the Writ on 14 August 2024. This amounts to a good reason to extend the period of validity of the

Writ as a protective measure in case Mr Johansson's challenge to the regularity of service upon him is successful, so that (if necessary) the Writ can be validly re-served upon him. A twelve-month extension should be granted now to ensure that the extension is obtained before the 2nd anniversary of the Writ and to enable the Plaintiffs to make a further application to further extend the validity of the Writ as a protective measure before 14 August 2024 within its period of validity (as extended).

(2) This is not a case where the Plaintiffs have dallied during the initial period of validity of the Writ. The steps taken by the Plaintiffs in this initial twelve-month period amounted to successful service on all seven defendants, including service of five defendants out of the jurisdiction.

(3) The application was made by letter to the Court dated 10 August 2023 before the Writ expired. It is submitted that it was reasonable not to seek the determination of the application at that time because it was not then known whether the protective application would need to be heard. Insofar as the Defendants would argue that the Plaintiffs should have ensured that the application was determined by 14 August 2023 (or at least sooner than it has been), the Plaintiffs contend that the Second and Third Defendants eventually served: (a) their joint summons challenging jurisdiction on 1 December 2023 (the 'Jurisdiction Challenge'); and (b) their evidence in support on 26 January 2024.

(4) The Court should exercise its discretion to extend the validity of the Writ as only Mr Johansson challenges the regularity of service on him, so that (at least) six of the seven defendants have been validly served with the Writ. Additionally if Mr Johansson's challenge to the regularity of service on him is successful and the Writ cannot be validly re-served on him within an extended period of validity, he may argue that he has a limitation defence to any fresh proceedings now that the Limitation of Actions Ordinance has come into force and the twelve-month grace period under section 49(2) thereof has expired (on 11 October 2022).

(5) In all the circumstances set out above, even if there is no jurisdiction to make an order under Order 6, rule 8 in this case, it is an exceptional case where the interests of justice require the Court to extend the validity of the Writ under Order 3, rule 5 and/or Order 2, rule 1.

Law and discussion

Order 6 Rule 8

29. In Heavan v Road and Railwagons [1966] 2 All ER at 292, [1966] 1 WLR at 866 1965 on an application to extend the validity of a Writ, Megaw J ruled that such extension would only be granted in exceptional circumstances. He also considered issues of hardship as it related to the Plaintiff.

30. Jones v Jones and another 1970 3 ALL ER 47 which followed Heavan involved a road traffic accident claim where the Plaintiff while a passenger in a car driven by the 1st Defendant was injured in a collision with a car driven by 2nd Defendant. The Plaintiff's Solicitor issued a Writ against both Defendants on the 13th of June 1968. The Writ was validly served on the 1st Defendant on 11th June 1969. The Plaintiffs solicitor reasonably believed that, he could have served the 2nd Defendant outside the 12 month period. The 2nd Defendant was served on the 3rd of July 1969 after the 12 month period of validity. On the 17th of July 1969 the 2nd Defendant applied to set aside service, on the 29th of July 1969, a Master extended the validity of the Writ on an exparte application by the Plaintiff and the Writ was re-served on the 2nd Defendant. This service and the extension of the Writ was set aside by a Master on the application of the 2nd Defendant. By order of a Judge in Chambers the Writ was extended on an appeal by the Plaintiff. On appeal by the 2nd Defendant to the Court of Appeal it was held :

    i. The service of the writ on the second defendant more than 12 months after its issue was not, under RSC Ord 6, r 8 rendered valid by the fact that the first defendant was validly served within the 12 months

    ii. There was good and sufficient reason for extending the time for service of the writ on the second defendant, because—
    (a) the solicitor's error was not unreasonable in the circumstances; consequently
    (b) the plaintiff would have had no redress in negligence against his solicitor, if the second defendant had in fact been held solely to blame for the plaintiff's injuries, but could not be served; and
    (c) (Sachs LJ reserving his opinion on this point) the court was entitled, in exercising its discretion whether to extend validity of the writ, to balance the hardship to the plaintiff which would have followed had the validity of the writ not been extended against the hardship which the second defendant might have suffered through such extension.

31. In Jones *supra* Lord Salmon LJ referred to *Battersby v Anglo-American Oil Co Ltd [1944] 2 All ER at 391, [1945] KB at 32*. In that case Lord Goddard, in delivering the judgment of the court said: *'In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case, it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order. The best reason, of course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others. But ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried, or to await some future development*.'

32. In *Baker v Bowketts Cakes Ltd* ([1966] 2 All ER 290 at 292, [1966] 1 WLR 861 at 865), Lord Denning MR said: *'In seeing whether the discretion should be exercised under that rule [that is RSC Ord 6, r 8(2)] we must remember the Limitation Act, 1939. A*

plaintiff in an action for personal injuries has three years to issue his writ. If he issues it within those three years, he has another twelve months within which he can serve the writ. If he requires to extend it for a further time before service, he ought to show sufficient reason for an extension of time.' Lord Denning MR then referred to Lord Goddard's judgment in *Battersby's* case, and to what Megaw J said in *Heaven v Road and Rail Wagons Ltd*: *'In particular, when the Limitation Act, 1939, has run or is running in favor of a defendant, as here, the plaintiff who desires a further extension must show sufficient reason for an extension. These cases ought to be brought on for trial as soon as reasonably may be, while the facts are fresh in people's minds and while medical evidence and so forth can be obtained. If the plaintiff delays until the very last minutes he has only himself to thank. If it is his solicitors' fault, he can blame them; but he ought not to get an extension, to the prejudice of the defendants, except for good cause*.'

33. Lord Salmon LJ continued in Jones supra *"So, as a rule, the extension will not be granted. It is for the person asking for it to show, as Lord Denning MR said, 'sufficient reason' or 'good cause', or as Lord Goddard said 'good reasons … to excuse the delay'. I ought perhaps finally to refer briefly to Heaven v Road and Rail Wagons Ltd, the decision of Megaw J which was quoted with approval by Lord Denning MR in the passage in his judgment which I have just read in Baker's case ([1966] 2 All ER 290 at 292, [1966] 1 WLR 861 at 865). The only part of Megaw J's judgment which I need read is as follows ([1965] 2 All ER at 416, [1965] 2 QB at 366): 'The rules of court provide twelve months—a not ungenerous time, it might be thought—within which the plaintiff can hold up proceedings by not serving his writ, Surely, beyond that period the same public policy requires that the court should ensure that it is only in really exceptional cases that the effective start of litigation should be yet further delayed; especially where the twelve months allowed for service extends beyond the end of the limitation period; and, above all, where the application is not made until after the period of twelve months, and with it the validity of the writ, has expired.'*

34. Lord Salmon in analyzing the cases above stated that much depends on how the words 'really exceptional cases' are construed in relation to the other phrases referred to—'sufficient reason' or 'good cause' or 'good reason'. He stated *"I suppose that it is only in an exceptional case that 'sufficient reason' or 'good cause' or 'good reasons' exists. It is of great importance that the rules should be observed. The writ should certainly be served within the 12 months, especially if it is not issued until just before the expiration of the three-year period, unless there is good cause for extending the time for service; and I hope that nothing that I say in this case will be construed as an encouragement for anyone to imagine that, even if he lets the 12-month period go by, he has only to come to the courts with some fairly plausible excuse, in order to get the time extended. Certainly, anyone who takes that view would be disappointed. The only question here is whether the learned judge could in his discretion properly take the view that there was 'good cause' or 'sufficient reason' for extending the time for service."*

35. In *Kleinwort Benson Ltd v Barbrak Ltd* [1987] A.C. 597 the Plaintiff bank was mortgagee of a ship. In 1977 they brought proceedings against the ship to enforce security and arrested it. They attempted to get the cargo owners to pay for unloading unsuccessfully. In 1980 they issued a Writ against the owner with the greatest amount of cargo. In 1982 they issued an omnibus Writ against the other owners. In 1983 the Plaintiff was granted an exparte extension to the validity of the first Writ for 12 months then a further extension of 3 months. In 1985 they served the Writs and an account of the actual amount owed by each cargo owner. The main Respondent applied to set aside the Writ, this was dismissed by the Registrar and upheld by the Admiralty Judge. The Respondent appealed to the Court of Appeal, which allowed the appeal and set aside service on the ground that there was no difficulty in serving it. The Plaintiff appealed to the House of Lords. It was held that :

"On the true construction of RSC Ord 6, r 8 the power to extend the validity of a writ was not limited to exceptional circumstances but could be exercised if, in the circumstances and balancing the hardship to the plaintiff were an extension to be refused against the hardship to the defendant were an extension to be allowed, there was good reason to do so. Where an application for an extension was made when the writ had ceased to be valid and the relevant limitation period had expired the applicant was also required to give a satisfactory explanation of his failure to apply for an extension before the expiration of the validity of the writ. Since there was good reason for allowing the extensions of the bank's writ to stand, namely the saving of unnecessary proceedings and costs without prejudice to the respondents, the appeal would be allowed"

36. Lord Brandon in reference to Ord. 6 r.8 discussed that this rule provides an express provision permitting a Plaintiff to apply for an extension not only before the validity of a writ has expired, but also after such expiry to the extent that the court allows. He stated that 3 main categories of cases exists for extension of validity where questions of limitations arise. "*Category (1) cases are where the application for extension is made at a time when the writ is still valid and before the relevant period of limitation has expired. Category (2) cases are where the application for extension is made at a time when the writ is still valid but the relevant period of limitation has expired. Category (3) cases are where the application for extension is made at a time when the writ has ceased to be valid and the relevant period of limitation has expired. In both category (1) cases and category (2) cases, it is still possible for the plaintiff (subject to any difficulties of service which there may be) to serve the writ before its validity expires, and, if he does so, the defendant will not be able to rely on a defence of limitation. In category (1) cases, but not category (2) cases, it is also possible for the plaintiff, before the original writ ceases to be valid, to issue a fresh writ which will remain valid for a further 12 months. In neither category (1) cases nor category (2) cases, therefore, can it properly be said that, at the time when the application for extension is made, a defendant who has not been served has an accrued right of limitation. In category (3) cases, however, it is not possible for the plaintiff to serve the writ effectively unless its validity is first retrospectively extended. In category (3)*

cases, therefore, it can properly be said that, at the time when the application for extension is made, a defendant on whom the writ has not been served has an accrued right of limitation."

37. Lord Brandon referred to Jones *supra* and the decision of Sachs LJ stating "*Where it is desired to deprive a defendant of his ability to plead a statute of limitation, naturally the good cause to be put forward must be strong. It is quite impossible to define the circumstances which can constitute "good cause". It is sufficient in the present case to say that here we find a most unusual set of circumstances. Probably they are and will remain unique … In this class of case, where the effects of statutes of limitation have to be taken into account, it may very well be that the climate of opinion, both in the legislature and in the courts, is … moving more towards an ascertainment of how lies the balance of justice between the parties.".* In reference to Sachs LJ he continued *"I regard this case as a significant milestone on the road of authority with regard to cases of this kind and I do so for two reasons. First, it strengthens the view already adumbrated in earlier cases that what is required to justify extension is 'good cause' or 'good reason' rather than the more stringent 'exceptional circumstances'. Second, it introduces for the first time as a relevant consideration the balance of hardship to the plaintiff if extension is refused and hardship to the defendant if it is allowed."*

38. In his analysis of Ord. 6 r.8 Lord Brandon considered the following ;

a. There is an implied condition that the power to extend shall only be exercised for good reason.

b. He stated *"The question then arises as to what kind of matters can properly be regarded as amounting to 'good reason'. The answer is, I think, that it is not possible to define or circumscribe the scope of that expression. Whether there is or is not good reason in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the judge who deals either with an ex parte application by a plaintiff for the grant of an extension, or with an inter partes application by a defendant to set aside an extension previously granted ex parte. Good reason is necessary for an extension in both category (2) cases and category (3) cases. But in category (3) cases the applicant for an extension has an extra difficulty to overcome, in that he must also give a satisfactory explanation for his failure to apply for extension before the validity of the writ expired. The decision whether an extension should be allowed or disallowed is a discretionary one for the judge who deals with the relevant application. Jones v Jones shows that, in exercising that discretion, the judge is entitled to have regard to the balance of hardship. In doing so, he may well need to consider whether allowing an extension will cause prejudice to the defendant in all the circumstances of the case. Once a judge has exercised his discretion, it is only on very limited grounds, too well known for it to be necessary for me to set them out here, that an appellate court will be justified in interfering with his decision."*

39. In Baly and Another v Barrett and others [1989] Lexis Citation 2361 Lord Brandon referred to Kleinwort Benson *supra* summarizing the decision of the House in the following principles :

    (1) On the true construction of Ord 6, r 8 the power to extend the validity of a writ should only be exercised for good reason.
    (2) The question whether good reason exists in any particular case depends on all the circumstances of that case. Difficulty in effecting service of the writ may well constitute good reason, but it is not the only matter which is capable of doing so.
    (3) The balance of hardship between the parties can be a relevant matter to take into account in the exercise of the discretion.
    (4) The discretion is that of the judge and his exercise of it should not be interfered with by an appellate court except on special grounds the nature of which is well-established.

40. Lord Brandon continued and referred to the case of Waddon v Whitecroft Scovell Ltd [1988] 1 All ER 996, in this case he stated that the House corrected an apparent misunderstanding of principle 3 above by emphasizing "*that the question of the balance of hardship between the parties can only arise if matters amounting to good reason for extension, or at least capable of so amounting, have first been established. In that case the balance of hardship between the parties may be a relevant factor in the exercise of the court's discretion. But, if no matters amounting to good reason for extension, or capable of so amounting, have been established, the effect of principle (1) is that there is no room for the exercise of discretion at all, and that the question of the balance of hardship between the parties does not therefore arise."*

41. In allowing the appeal in this matter Lord Brandon had this comment about the decision of Carswell J "*With respect to the different view taken by the majority of the Court of Appeal, these three passages in the judgment of Carswell J leave me, as they did Kelly LJ, with the clear impression that he was treating the question of balance of hardship, not as something to which regard should be had in exercising his discretion following a primary finding that matters constituting, or capable of constituting, good reason for an extension had been shown, but rather as one of a number of factors relevant to the making of that primary finding. In doing so, Carswell J departed from the principles laid down by this House in the two cases to which I referred earlier, and must in that respect be held to have erred in law. The consequence of that error is that, even though the decision of Carswell J was a discretionary one, an appellate court is entitled to review it and to reach its own decision on the evidence which was before him. All that evidence was written, so that no question of the judge's view of the credibility of any witness giving oral evidence is involved."*

42. The House was therefore of the view that the question of balance of hardship between the parties only arise if matters amounting to good reason for an extension or at least capable of so amounting, have been established. In that case the balance of hardship between the parties may be a relevant factor in the exercise of the court's discretion,

but if no matters amounting to good reason for extension have been established the effect of the principle above is that there is no room for exercise of discretion at all and that the question of the balance of hardship does not arise.

43. Before Kleinworth *supra* O.6 r.8 only applied to instances of exceptional circumstances and only in such circumstances could a good reason be found. From Kleinworth and Waddon the two-stage test was formulated. As correctly submitted by Mr. Wilson K.C, firstly a good reason or reasons must be established, and secondly, only if so established can the court consider the balance of hardship.

Order 2 Rule 1

44. In Singh v Duport 1993 1 WLR, the Plaintiff issued a writ for personal injuries just before the expiry of the limitation period, but did not serve it. Five months after the validity of the Writ expired, the Plaintiff applied for an extension explaining that the reason for not serving within the required time was that the Solicitor was of the view that a medical report was required before service. The district Judge granted the extension, which on appeal to a Judge was upheld. The Defendants appealed to the Court of Appeal where the appeal was allowed on the following grounds:
    a. Ord 6 r.8 applied to instances where despite making all reasonable efforts, it was not possible to serve the Writ
    b. An application under Ord. 6 r.8 (2) had to be made during the original validity of the Writ or 4 months next following.
    c. In exceptional circumstances the court would consider an application to extend the validity of the Writ under R.S.C Ord 2 r.1 and Ord 3 r.5

45. Farquharson LJ considered Ord. 6 r.8. and provided the following propositions:
    a. Where a litigant seeks an extension of the validity of a writ the provision of Ord.6 r.8 will apply
    b. An application under that rule must be made during the validity of the writ or during the four months next following
    c. Only one extension of time can be granted on a particular application and that must be for a period not exceeding four months
    d. If the litigant has not conformed with the requirements of the rule he cannot be granted relief under Ord. 6 r.8
    e. In exceptional circumstances and where the interests of justice so require the court will entertain an application to extend the validity of the Writ under the provisions of R.S.C Ord. 2 r.1 and Ord. 3 r. 5.

46. In Amerada Hess and others v CW Rome and others (2000) All ER 29 Colman J sought to consolidate the cases above as follows:
    a. An extension of validity will not be granted in a category (2) or category (3) case unless the applicant establishes good reason for the extension
    b. A claimant who, in a category (3) case, is unable to give a "satisfactory explanation" for his failure to apply for an extension before the period of validity

of the writ expired will not be able to show by any other means that there is nevertheless good reason for the extension.

c. Where a case for there being good reason is provisionally made out the court should consider, in its exercise of the discretion to extend validity, the balance of hardship as between the parties, even in a category (3) case.

47. He went on further to state that in cases where a writ has been defectively served within the period of its validity and where service is then sought to be set aside after the period has expired consideration must be given to RSC Order 2 rule 1.

48. In Ward-Lee v Lineham (1993) 1 WLR 754 which dealt with whether an applicant should be permitted to serve out of time an originating application under section 24 of the Landlord and Tenant Act 1954. The County Court Rules in effect at that time applied which were substantially similar to RSC Order 6 r.8 and Order 2 r.1. The Court of Appeal in that matter held there was a jurisdictional overlap and omission to serve within the prescribed time was capable of being an irregularity which did not nullify the proceedings in a case where a retrospective extension is requested, due to the length of time which expired the court could not grant the extension, the Court of Appeal therefore concluded that the only route available to serve out of time was O.2 r.1. Additionally, it is important to note that Sir Thomas Bingham M.R applied precisely the same test as that under Order 6 r.8.

49. In Amerada *supra* Colman J followed Ward-Lee and concluded that when considering whether the irregularity of serving writs outside their period of validity can be cured under O.2 r.1 and whether time for service can be extended retrospectively under O.6 r.8 (2) the same discretionary considerations should apply.

Order 3 Rule 5

50. The object of this rule is to give the court a discretion to extend time with a view to the avoidance of injustice to the parties. In Regalbourne Ltd v Est Lindsey District Council (1994) 158 L.G Rev. 81 it was held that in deciding to extend time by exercising its inherent jurisdiction the court must consider the prejudice to the Defendant.

51. In Singh supra it was stated only in exceptional circumstances and where the interests of justice so require will the court entertain an application to extend the validity of a writ where O.2 r.1 and O.3 r.5 have to be relied upon. As stated in R v Bloomsbury and Marylebone County Court ex p. Villerwest Ltd (1976) I WLR 362 apart from the powers within O.3r.5 there is a very wide inherent jurisdiction in the High Court to enlarge any time. Reference is also made of the propositions of Farquharson at paragraph 45 above.

Triggering the respective rules

52. The question arises as to whether O.6 r.8 applies in these circumstances. O.6 r.8 states that *"where a writ has not been served the court may extend the validity of the writ"*. Only in such a circumstance is the two-stage test applied. I am not of the view in the present case that O.6 r.8 applies. The Plaintiff's application for extension of the validity of the writ was made at a time when the writ, had been properly served on all Defendants, while the writ was still valid. Due to jurisdictional challenges and out of an abundance of caution an application was made to extend the validity of the writ within the validity of the writ and within the limitation period, coming under a category 1 case as referred in Kleinworth *supra* .

53. In my view O.6 r.8 and the tests of good reason and balance of hardship can only be considered by the court in an instance where there has not been service and a Plaintiff is asking the court to use its discretion to extend the validity of the Writ after providing good reasons for not effecting service within the initial period of validity. This is not the case here.

54. The present case is not yet a category 2 or 3 case and may never be. An application such as this may be properly made in an instance where the court finds that there was no service and the validity has expired at which time both O.6 r.8 and O.2 r.1 applies.

55. The suite of Orders namely O.6 r.8, O.3 r.5 and O.2 r.1 grants a court, the jurisdiction to extend the validity of a writ. To do so the authorities show that the court must be satisfied firstly that good reasons exist for granting such extension and if so established, the court can then proceed to consider the balance of hardship between the Plaintiff(s) and Defendant(s). O.6 r.8 must apply in instances where the application is being made either within the validity of the writ or the 12 months next following. In cases where the application is made outside this period of validity only then would O.2 r.1 and O.3 r.5 apply. In my view these Orders have not been triggered since there has been purported service with acknowledgments of service entered for all defendants. Therefore until a decision is made on the setting aside application, there is deemed to be proper service.

56. The Plaintiffs in order to protect their interests, decided that in the instance the setting aside application is heard and determined against them, after the validity of the writ expires, they would want the opportunity to serve the writ on the respective Defendants. To do this, a valid writ is required. I therefore take note of the reason for the Plaintiff's application. On the facts tentative dates for the challenge and setting aside hearing is scheduled for March 2025 by which time the validity of the Writ would have expired.

57. Currently the validity of the writ expired on 14th August 2023. An application to extend validity was submitted on the 10th of August 2023 (within the period of validity). An Order granting the extension was issued on the 25th of June 2024 extending the writ retrospectively to 14th August 2024. It is important to note that on the 29th of July 2024, the Plaintiffs submitted an application for a further extension from 14th August 2024 to 14th August 2025 (this has not yet been determined).

Disposition

58. I find that the prejudice or hardship on the Plaintiffs if the validity of the writ is allowed to lapse outweighs that of the Defendants. This is primarily due to the fact that in my view the Plaintiffs have not been tardy, lazy or negligent in propelling this claim forward.

59. My reasons for granting this protective extension of validity are as follows:
    a. To prevent an instance where both the validity of the writ and limitation period has expired leaving the Plaintiff in a position where the Writ cannot be served.
    b. The hardship of not extending the validity of the writ on the Plaintiffs outweighs that of the Defendants in this matter.
    c. The extension does not prejudice any defence which the Defendants may have.
    d. The Plaintiff worked with speed and dispatch in the service of the Writ on all Defendants.
    e. Acknowledgments of Service was entered for all Defendants.
    f. The jurisdictional challenge is tentatively estimated to be heard in March of 2025.
    g. In the event that the Defendants are successful, the option is available to them to apply to set aside this extension.

60. For these reasons I find it prudent within the inherent jurisdiction of the court and in the interests of justice to grant a conditional extension retrospectively to 14th August 2024.

Registrar

31st October 2024