PARTIES:	NT PAK PTY LTD (In Liquidation)
	v
	O'BRIEN, Maurice Alexander
	AND
	BYRNES, Rosslyn Lee
	AND
	BYRNES, Patricia Mary
	AND
	DEPUTY COMMISSIONER OF TAXATION
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	APPELLATE; Appeal from Master
FILE NO:	213 of 1989
DELIVERED:	22 DECEMBER 1994
HEARING DATE:	2 NOVEMBER 1994
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Practice and procedure - Service of originating process - Object of service - Notice -

Supreme Court Rules (NT), 6.10 -
Rules of the Federal Court, 7.10 -
Supreme Court Rules (Vic), 6.11.

REPRESENTATION:

Counsel:

Plaintiff: Mr A Wyvil

Solicitors:

Plaintiff: Mr J Noonan
Defendants: Ex parte

Judgment category classification: B
Judgment ID Number: mar94022
Number of pages: 6

DISTRIBUTION: LOCAL

mar94022

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 213 of 1989

BETWEEN:

NT PAK PTY LTD (IN LIQUIDATION)
Plaintiff

AND:

MAURICE ALEXANDER O'BRIEN
First Defendant

AND:

ROSSLYN LEE BYRNES
Second Defendant

AND:

PATRICIA MARY BYRNES
Third Defendant

AND:

DEPUTY COMMISSIONER OF TAXATION
Fourth Defendant

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 22 December 1994)

This is an appeal from an order of Master Coulehan refusing an application to direct that the writ be taken to have been served on the second defendant on 23 December 1990.

The plaintiff relies on Order 6.10 of the *Supreme Court Rules* which reads as follows:

> "Where for any reason a document has not been served in the manner required by or under a law in force in the Territory or by these Rules, but steps have been taken for the purpose of bringing, or which may have a tendency to bring, the document to the notice of the person to be served, the court may, by order, direct that the document be taken to have been served on that person on a date specified in the order."

The Master's findings of fact based upon the material before him have not been called in question and there is no other material before me on the appeal. There is evidence that the first defendant is the brother of the second defendant, and that the third defendant is the second defendant's mother. The writ was served on the first defendant on 23 November 1990, and on the third defendant on 21 November 1990. The affidavits of service simply disclose that the process server served the writ upon the first and the third defendants in the usual way. There is no evidence of any enquiry being made of the first defendant as to the whereabouts of the second defendant, and, the third defendant, upon being asked about it, declined to reveal where the second defendant was living or where she could be found. No steps were taken through them expressly for the purpose of bringing the writ to the notice of the second defendant or which may have a tendancy to do so. The solicitors for the plaintiff have, however, had enquiries conducted as to the whereabouts of the second defendant such as of people who might have known her, telephone book listings

and visits to land of which the second defendant is joint proprietor and which is the subject of the proceedings. A search was made of that title which discloses that the registered proprietors, being the first and second defendants, were described as being of 162 Dowling Street, Katherine. There is no evidence that any enquiry has been made at that address. There are arrears of rates due to the Litchfield Shire Council of $1,941.

The best that the enquiry agents could do, after "extensive enquiries", was to report that a person by the name of Noelene revealed that some time ago she had been told by the third defendant that the second defendant was in Japan with her children, but that she had no knowledge as to when she would be returning. Assuming that information to be correct, there was no evidence as to the reason why the second defendant went to Japan.

The Master found, and quite rightly, that no steps had been taken for the purpose of bringing the writ to the notice of the second defendant. Before the Master, and upon appeal, counsel relied upon the evidence as disclosing steps taken which may have the tendency to bring the writ to the notice of the second defendant, and for that reliance was placed upon the service of the writ upon the first and third defendants and the relationship between them and the second defendant. It was sought to be inferred that because of that service and relationship, and the fact that the first and second defendants were joint proprietors of the subject land, the proceedings would have been brought to

the notice of the second defendant by either the first or third defendants. The Master did not accept that argument and nor do I.

For a step to have a "tendency" to bring the writ to the notice of the second defendant it must have a natural or prevailing disposition to achieve that end (Macquarie Dictionary). It is not necessary that those steps have a tendency to achieve that end, the *Rule* only requiring that they "may have" such a tendency, which suggests that there must be at least a possibility that the steps taken would tend in that direction.

The rule is peculiar to the Northern Territory. It contains an extension to the concepts contained in the *Rules of the Federal Court* and of the Victorian Supreme Court from whence it would appear to have been developed. The Federal Court Rule is:

> "Where for any reason it is impracticable to serve a document in the manner set out in the Rules, but steps have been taken to bring the document to the notice of the person to be served, the court may order that the document be taken to have been served on that person on a date specified in the order." (Rule 7.10).

In Victoria, (r6.11) is:

> "Where for any reason a document has not been served in a manner required by these Rules, but the document has come to the notice of the person to be served, the document should be taken to have been served on the day it came to his notice."

The Territory rule allows an order to be made not only where steps have been taken to bring a document to the notice of a person to be served or where it can be shown that the document has come to the notice of that person, but also, where steps have been taken which may have a tendency to bring the document to the notice of that person. However, notwithstanding the scope of the Territory rule, the object of service must be borne in mind, and the authorities in that regard are brought together in the loose leaf edition of Willaims NJ., *Civil Procedure - Victoria, Vol 1* (Butterworths, 1987) p2470, para 6.01.20, as follows:

> **"Object of service**
>
> In *Hope v Hope* (1854) 4 De G M & G 328; 43 ER 534, Lord Cranworth LC stated the rationale of service of process thus: "The object of all service is of course only to give notice to the party on whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the court may feel perfectly confident that service has reached him, everything has been done that is required". Then, any later default on the part of the person served in defending his position can fairly be attributed to a decision of that person not to defend: *Ainsworth v Redd* (1990) 19 NSWLR 78 at 85. See also *Davidson v McCarten* [1953] VLR 697; *City of Camberwell v Reed* [1954] VLR 653; *Re Busytoday Ltd; Popely v Lewis* [1992] 4 All ER 61 at 65."

The wording of the Territory rule may dispense with the need for the Court to feel "perfectly confident" that service has been achieved, but it does not permit the Court to speculate on whether or not whatever has been done may tend to bring the document to the notice of the person to be served. On the material presently

available, that is all the Court could do in this case. If the second defendant went to Japan with the children (and the evidence is far from satisfactory), the circumstances of her so doing are not known, and whether she was on good terms with her brother and mother or not, cannot be determined.

The appeal is dismissed.