JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 24/2013

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

BETWEEN	**SHARON POTTINGER (as representative of the estate of Sonia Pottinger)**	**APPLICANT**
AND	**KEITH ANDERSON**	**RESPONDENT**

Sundiata Gibbs and Miss Shanique Scott instructed by Michael Hylton and Associates for the applicant

Gayle Nelson and Miss Analisa Chapman instructed by Gayle Nelson and Co for the respondent

10, 11 June and 19 December 2013

HARRIS JA

[1] I have read in draft the judgment of my sister Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

[2] This is a matter that has had a long and unfortunate history throughout the courts. It involves a claim brought by the respondent against the applicant's mother, Sonia Pottinger, and a company, Push Music Publishing Co ('Push Music'), for breach of copyright, among other things. The application that is before this court is for permission to appeal the order of D.O. McIntosh J made on 28 February 2013 in which the learned judge dismissed an application seeking to set aside a default judgment. No formal order has been produced, but according to counsel for the applicant's note of the orders made, which was exhibited to the application for leave to appeal, and to which there appears to be no challenge from the respondent, the learned judge awarded costs in favour of the respondent, ordered that the parties were to proceed to assessment of damages on 4 July 2013 and that the applicant be granted leave to contest damages. McIntosh J also refused an oral application for leave to appeal and so the application before this court is made pursuant to rule 1.8(9) of the Court of Appeal Rules (CAR).

Background

[3] On 2 May 2007, the respondent commenced proceedings in the Supreme Court for "infringements and/or conversion of [his] copyrights in the song 'Feel Like Jumping', and for breach of moral rights in contravention of the Copyright Act as well as for breach [sic] of the tort of unlawful/wrongful interference with [his] business". The respondent sought the following reliefs:

> "1. A declaration that Andisongs Publishing is the co-publisher and owner of copyright in the lyrics and melodies comprising the song 'Feel Like Jumping';
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> 2. A full and proper account of all monies in the form of royalties, license fees or otherwise, obtained by or credited to the Defendants from their exploitation of the relevant song, recordings and Claimant's performances thereof and that the Defendants immediately pay all such monies to the Claimant;
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> 3. Damages for, including but not limited to, infringement of copyrights, conversion and unlawful interference with the Claimant's business;
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> 4. Aggravated and/or exemplary damages for infringement of copyrights."

[4] In the particulars of claim it is stated that the respondent is a composer, recording artiste, singer, actor, entertainer and songwriter "whose work comprise, inter alia, the song entitled 'Feel Like Jumping' in respect of which he was the co-author and co-owner of the copyright including moral rights with a 50% share by agreement". The action was brought against Sonia Pottinger as a "producer, manufacturer and distributor of sound recordings" and Push Music, of which Sonia Pottinger was stated to be the owner and/or director, which was "the company responsible for the production, manufacture and distribution of sound recordings". The respondent claimed that in or around 1967 and early 1968, he and Jackie Mittoo had written the lyrics and composed the melody to the song and it was recorded with the vocals of Marcia Griffiths. He claimed that he had registered the song with the Performing Right Society in the United Kingdom and at no time had he assigned or transferred his copyright in the song. He also claimed that he had not been under a contract of service or services with Sonia

Pottinger or Push Music at the time the relevant song was written, nor had he written the song for them. The song was re-recorded some 10 years later using the original artiste and with his involvement as a creative producer and arranger. In 2001, he claimed, Sonia Pottinger and Push Music entered into an agreement with Kraftwerk Productions whereby Sonia Pottinger would provide a master licence for the usage of the sound recording in an advertising campaign and she granted a synch licence to use the song without having any interest in the song. Sonia Pottinger and Push Music, it was alleged, had exploited the relevant song as if they were the lawful publishers and/or the sole owners of the copyright in the song and as if the respondent has no part or share in the copyright and/or less than his true share.

[5] An affidavit of service was filed on 9 May 2008, in which Mr Jeffrey Chang deponed that on 2 May 2008, he had attended upon certain premises with the intention of effecting service of the claim on Sonia Pottinger and Push Music, but upon being advised that they were no longer located at that address and having carried out his investigation of the premises and found no representative of either of them to accept service, he had sought to find an alternative address but had found none. Upon his return to the same premises on 6 May 2008, he located the offices of Push Music and was advised by Mr Paul Gibson, an employee of the company, that Sonia Pottinger had moved overseas and was suffering from Alzheimer's disease. Mr Gibson, however, accepted service on behalf of the applicants.

[6] On 10 December 2008, an amended application for court orders was filed. Among the orders sought were that service on Push Music constituted service on Sonia

Pottinger; that service outside of the jurisdiction on the applicant and service on Paul Gibson be permitted and that such service constituted valid service on Sonia Pottinger; that the time within which the claim should have been served be extended to 3 November 2008; and that the time for service of the claim form and the particulars be abridged. Among the grounds relied on were that Sonia Pottinger no longer resided in the jurisdiction and was not capable of accepting personal service and that the said documents had to be served on persons acting on her behalf. The application was supported by the affidavits of Analisa Chapman, attorney-at-law, and the respondent, both sworn to on 30 March 2009.

[7] In her affidavit, Miss Chapman deponed that on 2 May 2008, a legal clerk employed to the attorneys representing the respondent at the time had faxed the claim form and particulars to a facsimile number provided by the respondent as the Florida offices of Sharon Pottinger-Gibson, whom it can be surmised is one and the same person as the applicant. She further deponed that after what appeared to have been a failed attempt at faxing the documents, they were re-sent and she spoke to a lady who identified herself as Sharon Pottinger-Gibson, who acknowledged receipt of all the pages of the claim. The fax transmission cover sheet, the claim form and particulars of claim were exhibited to her affidavit.

[8] In his affidavit the respondent deponed that between 2003 and 2006 he or his representatives had been in negotiations with Push Music and Sonia Pottinger or their representatives with a view to settling the dispute, and in early 2007, as they were unable to speak to Sonia Pottinger, they were in contact with the applicant who

indicated that her mother was living with her and that she would assume her mother's place in the negotiations. He further stated that after the claim was filed, he or his representatives were in continued discussions with the applicant and other persons affiliated with Sonia Pottinger and Push Music and efforts were being made to arrive at a settlement agreement. These discussions continued until late April 2008. He stated that at all material times the applicant had represented herself as the party who would have conduct of the matter and the administration of her mother's affairs and that of Push Music, due to her mother's failing health. He stated also that shortly after the applicant's receipt of the claim, the law firm of Pelosi, Wolf, Effron and Spates, had contacted the attorneys-at-law who were acting on his behalf at the time indicating that they were in receipt of the claim and subsequently, by letter dated 18 November 2008, they wrote confirming receipt of the documents and that they represented Sonia Pottinger.

[9] The letter dated 18 November 2008, which was exhibited to the affidavit, was written by Mr John Pelosi who indicated that he was writing in response to the claim filed by the respondent. The letter stated that Sonia Pottinger had failed to render to the respondent 25% of the sum that she had received for the use of the master and synchronisation rights, which it was said, represented 50% of the publishing portion of the sync and master use payment. Mr Pelosi stated that despite the fact that the limitation period on the claim had "likely lapsed", Sonia Pottinger was desirous of paying over that amount plus interest since March 2001 in settlement of the claim. He further indicated that Sonia Pottinger was rejecting any claim by the respondent that

her rights to the master recording embodying the album "Lots of Love" by Bob Andy should revert to the respondent. This letter was copied to the applicant. Also in his affidavit the respondent stated that by the time that it was clear to him or his representatives that the representatives of Sonia Pottinger and Push Music were not going to put forward or finalise a settlement agreement, the best option for service of the claim within the time was to fax same to the applicant and to deliver same to the only known offices of Push Music.

[10] No order appears to have been made on the application and on 8 June 2009, there was a further amended notice of application for court orders in which orders were sought that the deadline for service was on or about 7 June 2008, that Sonia Pottinger and Push Music were validly served on 6 May 2006 or that service on Mrs Pottinger-Gibson was valid or that the extension of time as sought in a previous application be granted to validate service on 6 May. A further affidavit of the respondent was filed on the same day exhibiting documents showing that there was no registered office for Push Music, that the address on which service was sought to be effected on 2 May 2008 was the address on record and the property was owned by Sonia Pottinger. This application was made without notice. It was heard by Master Simmons (Ag), as she then was, who considered that the issue before her was "whether service on Mrs Pottinger-Gibson by fax on the 2nd day of May 2008 or on Mr Paul Gibson on the 6th May 2008, satisfy the requirements of Rule 5.14 of the CPR". On 8 September 2009, Master Simmons ordered that service on the applicant "is deemed to be good service on the defendants".

[11] No further action was taken in the matter until 12 April 2010 when the respondent obtained judgment in default of acknowledgment of service and defence in terms he had requested, which was for damages to be assessed, together with interest. On 26 July 2010, an acknowledgment of service was filed on behalf of Push Music and Sonia Pottinger indicating that they had not received the claim form and particulars of claim, that their names were properly stated on the claim form and that they intended to defend the claim. An application to set aside default judgment was also filed on that day. Among the grounds relied on were that Sonia Pottinger was a patient and the request for and entry of default judgment were in breach of the requirement of the Civil Procedure Rules (CPR) that the respondent apply to the court for the appointment of a next friend. In support of this application was the affidavit of Sundiata Gibbs, attorney-at-law of the firm Michael Hylton and Associates, acting on behalf of Sonia Pottinger and Push Music. He deponed that the applicant had informed the firm that Sonia Pottinger had been suffering from Alzheimer's disease since 2007 and had been unable to manage her affairs. He referred to and exhibited an affidavit sworn to by the applicant on 29 June and filed on 30 June 2009, without the exhibits.

[12] The applicant’s affidavit had actually been filed in another action in the Supreme Court. In that affidavit she indicated that for two years prior to the filing of her affidavit, her mother had been suffering failing health and that she had been seeing to the care and management of her mother's business affairs pursuant to a Power of Attorney granted to her by her mother on 9 December 2005. She stated that her mother was suffering from Alzheimer's disease and was unable to swear to an affidavit.

[13] Mr Gibb's affidavit also exhibited a copy of a certificate of next friend dated 25 June 2009 in which the applicant was appointed as next friend. Mr Gibbs also deponed that Sonia Pottinger and Push Music had a real prospect of succeeding on the claim and exhibited a copy of the draft defence. In the defence, among other things, it was admitted that the respondent wrote the lyrics and composed the melody of the song "Feel Like Jumping" with Jackie Mittoo, but curiously, it was stated that Sonia Pottinger and Push Music did not know if the song was written jointly with Jackie Mittoo. It was also admitted that the song had been re-recorded and that the respondent by virtue of being a co-composer of the song had an interest in the song. The defence asserted that neither Sonia Pottinger nor Push Music had held themselves out to be the sole owners of the copyright but that Sonia Pottinger owned the rights in the master recording. The defence also raised the issue of whether the limitation period for bringing the claim had expired.

[14] Based on a chronology prepared by counsel for the respondent, it appears that an application was filed on 17 December 2012 seeking to have the applicant appointed representative of Sonia Pottinger's estate. In her affidavit in support, the applicant stated that her mother had died on 3 November 2010 and that she had been named as an executor in her will. She deponed that from 2007 to 2010, her mother had suffered from Alzheimer's disease which had grossly impaired her memory and her ability to manage her affairs, and so she had acted as next friend in these proceedings. She further deponed that she was able to fairly and competently conduct proceedings on her mother's behalf and she had no interest adverse to it. It appears also from counsel

for the respondent's chronology that on 9 January 2013, the application was granted and Push Music's application to set aside the default judgment was struck out.

[15] On 18 February 2013, an amended application to set aside default judgment was filed in which, in addition to the grounds previously raised, the application raised the issue of the failure of the respondent to obtain permission before serving outside the jurisdiction. An affidavit sworn to by Kevin Powell, attorney-at-law of Michael Hylton and Associates was filed in support. Exhibited to the affidavit were two letters from two medical practitioners: letter dated 17 December 2012 from Dr Vincent Chin indicating that Sonia Pottinger had been under his care for "Alzheimer's Disease with Memory Disorder" since 2 July 2003, and letter dated 27 December 2012 from Dr Maldonado-Medina stating that Sonia Pottinger was "an established patient since 10/30/03 to 06/15/2010" and had been under her care for "severe Alzheimer's disease".

[16] On 21 February 2013, an affidavit sworn to by Miss Chapman was filed. Exhibited to this affidavit were three articles: (i) an article written in or around 2005, recounting an interview with Sonia Pottinger and stating that she was awarded the Order of Distinction in 2004; (ii) an article dated 10 August 2006, in which it was reported that at the Prime Minister's Independence Gala in that year, Sonia Pottinger had received an award; and (iii) an article dated 18 March 2012 in which the writer stated that the basis of the article was an interview that he had with Sonia Pottinger in 2008, among other things, and that she fell ill in late October 2010;

[17] The amended application to set aside was heard by DO McIntosh J, with the result mentioned in paragraph [2].

[18] The applicant is seeking permission to challenge the learned judge's decision on five grounds:

Ground (a)

> "The learned judge erred when he found that the Registrar is empowered to grant default judgment where the court has not granted permission to serve outside the jurisdiction."

[19] Counsel for the applicant referred to rule 5.4 of the CPR, which stipulates that except where it is permitted by part 7, a claim must be served at a place within the jurisdiction. It was submitted that this rule when read with rule 7.2, which states that a claim form may be served out of the jurisdiction only with the permission of the court, has the effect of prohibiting a claimant from serving a defendant out of the jurisdiction until a court gives permission to do so. It was further submitted that by virtue of rule 7.5(3) of the CPR, a court is prohibited from granting permission to serve a foreign defendant until it has decided whether it has the jurisdiction to try the claim. Since the respondent had served the claim out of the jurisdiction without obtaining permission, that service was irregular. Counsel also submitted that the registrar was not empowered to grant the default judgment or any other relief because the court had not yet determined that Jamaica was the proper forum for the claim and therefore it had not assumed jurisdiction over the applicant. The result of all of this, it was contended,

was that the default judgment was either of no effect or should be set aside as of right because of irregular service.

[20] Miss Chapman for the respondent submitted that the uncontroverted and uncontested affidavit evidence put forward by the respondent was that the claim was received in May by the same person who claimed to be at all material times responsible for Sonia Pottinger's affairs. Sonia Pottinger and Push Music had therefore incorrectly put forward in the acknowledgment of service that they had never received the claim. Counsel took issue with the applicant's position that the judge had found that the registrar is empowered to grant default judgment without permission to serve outside being granted. She argued that the order of Master Simmons had contemplated and approved of the relevant service out of the jurisdiction. Accordingly, at the time of the said order, there did not exist a situation where the court had not granted permission. Counsel referred to the submissions made in the court below which addressed the court's powers to validate service retrospectively, which, it was submitted, the judge would have considered from his review of the file. The learned judge would have correctly found that there was an order of the Supreme Court validating service and that the registrar had acted properly in issuing the default judgment.

Ground (b)

> "The learned judge erred when he found that the conditions for granting default judgment, set out in rule 12.4 of the CPR were satisfied."

[21] Mr Gibbs argued that the learned judge was obliged to set aside the default judgment which had been entered because two conditions for entry of such judgment under rule 12.4 had not been satisfied, that is, the time for filing the acknowledgment of service had not expired and the court had not granted permission to file default judgment. In relation to the former condition, it was argued that rule 9.3 which specifies the periods for the filing of an acknowledgment of service does not apply to service out of the jurisdiction. Rule 7.5(4) governs that situation, it was argued, and that rule provides that the order granting permission to serve out of the jurisdiction "must state the periods" for the filing of the acknowledgment of service. It was submitted that rule 7.5(4), 7.5(5) and 7.5(6) provide for the court to fix the period within which an overseas defendant must respond to a claim. The defendant, it was argued, is bound by the timeline stipulated in the judge's order giving permission to serve out of the jurisdiction and until the judge makes that order, there is no period within which the defendant must file an acknowledgment of service. In this case, it was submitted, no permission had been granted and no order made specifying the period for filing the acknowledgment of service with the result that there being no period fixed by the court, the period for filing the acknowledgment of service could not have expired entitling the respondent to apply for default judgment. Therefore, the learned judge ought to have set aside the default judgment.

[22] It was submitted on behalf of the respondent that submissions made on his behalf before the learned judge had been made pursuant to rule 13.3 on the basis that the applicant did not have a real prospect of defending the claim and had not put

forward a good or in fact any explanation for failure to file an acknowledgment of service or a defence as there had been no proper affidavit of merit and grounds of defence. The applicant, it was argued, had not submitted or challenged any of those submissions or the finding of the judge that the defence had no prospect of success. It was further submitted that at all material times, the CPR affixed the respective deadlines for filing an acknowledgment of service and unless the court provided otherwise, those deadlines would have applied to this matter and would have been the point of reference for the court. It was submitted that the deadlines that are stipulated under rule 7.5, which states the relevant time periods for filing an acknowledgment of service in relation to service outside of the jurisdiction, did not cease to have effect simply because there was not an order of the court confirming same. It was submitted that a period of 556 days had elapsed between service on the applicant and the entry of the default judgment. Therefore, regardless of which deadline was applied, that is, 14 days pursuant to rule 9.3 or 28 days pursuant to rule 7.5, the period for filing the acknowledgment of service would have long expired before the application for default judgment.

[23] Counsel argued further that rule 7.5(4) would have no application in respect of retroactive validation of service out of the jurisdiction. Counsel relied on **Nesheim v Kosa** [2006] EWHC 2710 in support of this submission pointing to dictum of the court that the grant of retrospective permission is neither expressly permitted nor expressly prohibited and that in the absence of any special rules as to the discretion pertaining to the grant of retrospective permission, the court is free to exercise such discretion

broadly in accordance with the overriding objective. It was submitted that what was relevant for the purposes of rule 12.4 was that the registrar when entering default judgment was bound by the periods stipulated in the CPR unless the court ordered otherwise. As such, the respondent was entitled as of right to an entry of default judgment in respect of both acknowledgment of service and defence. It was pointed out that the default judgment was given in default of failure to file an acknowledgment of service and defence, yet the applicant had taken no issue with the default judgment being entered in respect of failure to file a defence. Therefore, the default judgment in relation to failure to file a defence would still apply, it was argued.

Grounds (c) and (d)

> "The learned judge erred when he found that the Claimant did not need permission to apply for default judgment despite the 1st Defendant being a patient.
>
> "The learned judge erred when he found that the Default judgment took effect despite there being no next friend appointed on behalf of the 1st Defendant in accordance with Part 23 of the CPR."

[24] Mr Gibbs argued that the request for default judgment was of no effect because the respondent had failed to appoint a next friend on behalf of Sonia Pottinger, who, it was submitted, was a patient within the meaning of the Mental Health Act (the Act). He argued that the evidence before the court was that Sonia Pottinger had suffered from Alzheimer's disease and could not manage her own affairs. He pointed to the letters written by the two medical doctors, the applicant's affidavit evidence that her mother had been suffering from Alzheimer's disease from 2007; the evidence of the process

server; and the respondent's affidavit in relation to him conducting business with the applicant due to Sonia Pottinger's failing health. He argued that that evidence supported the conclusion that the applicant suffered from a "mental disorder" within the meaning of the Act. The relevant time concerning the determination of the state of mind of Sonia Pottinger would have been at the time of the default judgment in 2010, and the evidence demonstrated that at that time Sonia Pottinger was a patient and incapable of managing her own affairs, it was submitted. Relying on Halsbury's Laws of England Vol 11 (2009) 5th edn paras 1-1108, counsel submitted that the court can also take judicial notice of the effect of Alzheimer's disease and it was a notorious fact that the disease affects memory. Reference was made to rule 23.3(2) and rule 23.8(3), the effect of which is that before commencing a claim or taking any step in a claim, a claimant must apply for an order appointing a next friend, and rule 23.3(8), which states that any step taken before a patient has a next friend is of no effect unless the court orders otherwise. Both the respondent's request for default judgment and his application for service to be declared valid were steps in the proceedings without the appointment of a next friend, it was argued. This, it was submitted, is another reason the respondent's application for alternative service is of no effect with the result that the default judgment had to be set aside for irregular service.

[25] It was argued on behalf of the respondent that there was no evidence or no sufficient evidence before the court for it to find that Sonia Pottinger was a 'patient' in accordance with the CPR. It was submitted that only a qualified medical practitioner could have made a determination as to whether a person is suffering from a mental

disorder within the meaning of the Act. At all material times, including while Sonia Pottinger was alive, during the course of the claim and while the application to set aside was pending, Sonia Pottinger would have had the opportunity to provide cogent medical evidence to support the assertion that she suffered from a mental disorder as defined by the Act. It was not until two years after the application to set aside was first filed that it was felt that it was necessary to provide the letters exhibited to Mr Powell's affidavit and this was only after the application had come on for hearing before King J and he had remarked that there was no medical evidence before the court in accordance with the Act. The letters did not go into detail about the nature and effect of the disease nor did they state the date when Sonia Pottinger was last examined and whether Sonia Pottinger was of unsound mind within the definition of the Act. It was submitted that the evidence of any medical practitioner on this issue should have been in the appropriate form, that is, on affidavit. It was submitted further that the application in respect of this issue should have complied with sections 6(3) and 7 of the Act in that it should have been supported by two medical certificates in the prescribed form containing certain information in accordance with the Act.

[26] Miss Chapman further argued that a mere statement from the applicant as to Sonia Pottinger's mental health was not sufficient as she was not a qualified medical practitioner capable of making a determination as to whether her mother's mental condition rendered her of 'unsound mind' within the definition of 'patient'. Even if the applicant expected the court to have drawn on its common knowledge of the nature of the disease, then the respondent should have the benefit of the ‘common knowledge’

that a diagnosis of the condition does not automatically mean that an individual is of unsound mind or cannot be lucid for many years as there are many stages in respect of the condition of the disease.

[27] Reference was made to the applicant's evidence that her mother had granted her a Power of Attorney in 2005. Counsel argued that a person has to be of sound mind in order to execute a Power of Attorney. Therefore, despite the letters speaking to Sonia Pottinger suffering from "severe Alzheimer's" since 2003, she had clearly not been of unsound mind in 2005. Further, the letters from the medical professionals were in conflict with the initial evidence of the applicant that Sonia Pottinger had been suffering from the disease from 2007. It was also submitted that a Power of Attorney ceases to be valid when the donor loses mental capacity and the applicant had been operating under same in the suit that she had brought as next friend on behalf of Sonia Pottinger in 2009. Therefore, Sonia Pottinger would have had to be of sound mind for the Power of Attorney to have effect from 2007 onwards. Counsel also relied on the articles that had been exhibited to her affidavit in the court below to further support her submissions on this point. The burden of proof remained with the applicant and she had failed to produce sufficient evidence to discharge this, it was submitted. Counsel also pointed out that if the applicant was of the view that Sonia Pottinger was a patient within the Act, she could have put herself forward as next friend as she did in the other suit.

Ground (e)

> "The learned judge erred when he found that the section [sic] 5.13, which provides for alternative service, applies to service outside the jurisdiction."

[28] Counsel submitted that Master Simmons' order did not cure the failure to obtain permission as her decision seemed to have been based on rule 5.13, which deals with alternative service and this rule requires different considerations from rule 7.3 which concerns jurisdictional issues. More importantly, it was argued, rule 5.13 only applies to service within the jurisdiction. He argued that part 7 specifically governs service out of the jurisdiction and prescribes the methods of service in relation to a foreign defendant. To support this latter submission, reliance was placed on **Oleksandr Zabudkin v Itkin & Ors** claim no BVIHC (COM) 2011/0001, delivered 21 July 2011 and the dictum of Bannister J (Ag) that in the absence of some enabling power, substituted service is not permitted upon a foreign defendant unless he was in the jurisdiction when the claim is issued, and, Mr Gibbs submitted, rule 5.13 does not contain any enabling power that would permit service out of the jurisdiction.

[29] Finally on this point, it was argued that the fact that Master Simmons' order validating service was not appealed was of no moment because the court has the power to set aside an endorsement made under rule 5.13 indicating that alternative service was a satisfactory method of bringing the claim form to the attention of Sonia Pottinger and Push Music.

[30] Miss Chapman submitted that at no time was an application to set aside service pursuant to rule 5.13(6), which allows the court to set aside the endorsement on alternative service, properly placed before the court. Therefore, it was argued, the applicant could not have a good prospect of succeeding on an issue that had not been before the judge. Even if such an application had been made before the judge, the service would have been set aside only if the court was satisfied that the service was unlikely to bring the contents of the claim to the attention of Sonia Pottinger and Push Music, and the court would have appreciated that the evidence was that the applicant had never contested that the documents had come to her and her mother's attention. It was submitted that **Oleksandr** does not assist the applicant. Unlike in this case, the defendant in that case had formally contested service and had not submitted to the jurisdiction of the court. Further, it was submitted, the interpretation given to the rule relating to methods of service out of the jurisdiction was incorrect. The use of the word 'general' in the heading "Methods of service – general provisions" suggested that the purpose of that section was to set out general methods of service outside the jurisdiction and not the only methods. The court therefore had the discretion to order other methods of service, provided that the method that was ordered was not against the law of the country. In any event, it was submitted, the section does not deal with retrospective permission.

[31] It was also submitted that at no point was an application filed to set aside service on the basis that such service out of the jurisdiction, was not permitted by the rules or that the claim was not a proper one for the court's jurisdiction. As no such

application was made, the applicant was deemed to have accepted service, which would therefore not have been in issue at the time of the hearing. Miss Chapman argued that any issue that the applicant had with service was a jurisdictional issue. However, as well over the time for the filing of the defence had passed and no application had been filed disputing jurisdiction under rule 9.6(3) and (4), pursuant to rule 9.6(5)(b) the applicant would be treated as having accepted that the court has jurisdiction to try the claim. Further, by filing the acknowledgment of service and not raising the matter of any perceived irregularity of service by way of challenge to the court's jurisdiction under rule 9.6, the applicant would have waived any such irregularity or jurisdictional issue and submitted unconditionally to the jurisdiction of the court.

Analysis

[32] In my view, the proposed appeal raises the following issues:

1. (a) Whether a decision of the court having been given that service of the claim on the applicant was good service, the proper course would have been to apply to set aside or appeal that decision.

   (b) What is the effect of the decision validating service having remained extant in light of the fact that there was no application to set aside or appeal it or order setting it aside at the time of the hearing to set aside the default judgment?

2. (a) Whether permission to serve outside the jurisdiction may be granted retrospectively

(b) What is the effect of the letter written by the attorneys-at-law on behalf Sonia Pottinger and the fact that no step was taken to challenge jurisdiction?

3. Whether the evidence adduced (medical and otherwise) was sufficient to establish that Sonia Pottinger was a patient within the meaning of the Mental Health Act.

4. Whether it was necessary for a next friend to be appointed and as a consequence, permission obtained from the court before the entry of the judgment.

[33] As this is an application for permission to appeal, it is not necessary to embark on a full analysis or to arrive at a concluded view on any of these issues (**Hunt v Peasegood** (2000) Times, 20 October). It is sufficient to consider only whether the issues raised have a "real chance of success" on appeal (rule 1.8(9) CAR), which means that the applicant should have more than a fanciful prospect of succeeding on these issues. This court has held that for leave to appeal to be granted, the applicant must show that he has a real, and not fanciful, chance of success in the proposed appeal (**Donovan Foote v Capital and Credit Merchant Bank** [2012] JMCA App 14; **William Clarke v Gwenetta Clarke** [2012] JMCA App 2).

Issue 1(a) and (b)

1. (a) Whether a decision of the court having been given that service of the claim on the applicant was good service, the proper course would have been to apply to set aside or appeal that decision;

   (b) What is the effect of the decision validating service having remained extant in light of the fact that there was no application to set aside or appeal it or order setting it aside at the time of the hearing to set aside the default judgment?

[34] As the application for validation of the service was made without notice, it was not necessary for the applicant to have appealed that order. Instead she was entitled to apply to set it aside (**Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies** (1991) 28 JLR 198). In my view, the fact that default judgment against Push Music was set aside did not change the fact that when the matter went before McIntosh J the order of Master Simmons was one that had been made without notice Sonia Pottinger. The learned Master stated that the application was being considered pursuant to rule 5.14. She did not indicate that she was considering the application under rule 5.13 or part 7. That did not, however, alter the validity or effect of the order. The order of the court was valid until set aside and had to be obeyed (see **Chuck v Cameron** 1846 Vol 47 ER 820; **Hadkinson v Hadkinson** [1952] 2 All ER 567; and **Bastion Holdings Ltd v Bardi** SCCA No 14/2003, delivered 29 July 2005). As was rightly submitted by counsel for the respondent, no application was made to set aside that order and so at the date of the filing of the request for default judgment, there was, for the purposes of the default judgment, an order to the effect that service on the applicant was good.

[35] Although the applicant did not state the relevant rule of the CPR upon which the application to set aside the default judgment was based and the learned judge did not provide reasons for his decision, counsel for the respondent has indicated that the arguments on behalf of the respondent were based on rule 13.3, which assumes that service was valid. She further stated that these arguments were not challenged by the applicant. It seems therefore that the learned judge treated the application as one being pursued under rule 13.3 where it was necessary for the applicant to show the merits of the defence, explain the failure to file an acknowledgment of service and defence and explain the delay in applying to set aside the judgment. However, the question which arises is whether, the order of Master Simmons, being one that was made without notice, it was open to the learned judge at the hearing between both parties to consider whether the order had been correctly made in light of the fact that the amended application raised the issue of the validity of the service. A relevant question on appeal therefore would be, as has been raised by ground of appeal (b), whether the judge was correct in these circumstances to dismiss the application on the basis that the condition set out in rule 12.4 of the CPR with respect to service had been satisfied and further, whether he ought not to have considered the application under rule 13.2.

[36] An argument in relation to the validity of the service which would have to be considered is whether serving by fax was a valid method of service outside the jurisdiction. Rule 7.8(1) provides that where a claim is to be served out of the jurisdiction, it **may** be served according to certain methods listed in the rule. An

important question to decide would be whether the word **may** is to be interpreted as meaning "must" with the effect that the methods of service allowed would be confined to those set out in that rule. It is of significance that those provisions, although stated to be general, are contained within the section of the CPR which deals specifically with service out of the jurisdiction. This may be an argument in support of the position that service is confined to the methods set out in this particular part of the CPR. There is also the view articulated by Bannister J (Ag) in **Oleksandr** to be considered. Against this, however, one would have to consider that although one of the methods specified is that service may be effected in accordance with the law of the country in which the claim is to be served, yet rule 7.8(2) provides that nothing in part 7 or in any court order authorizes anything to be done, in relation to service, which is against the law of the country. The question would arise as to whether there was any evidence that service by fax was in accordance with the law of Florida. It would have to be considered whether the interpretation as contended for by the applicant would render rule 7.8(2) otiose or of no effect. These are certainly issues to be considered on appeal and the applicant's arguments in relation thereto are not fanciful but have a realistic prospect of success.

[37] Another issue for the court's consideration would be whether the period for filing the acknowledgment of service had expired because no permission having been sought, there was no order granting permission and specifying the period for filing the acknowledgment. The merit of this position would have to be considered in the light of the fact that rule 7.5(5) specifies certain periods for filing an acknowledgment of

service for places for which service has to be outside of the jurisdiction, and it would necessarily follow that these would be places for which permission would have to be obtained in order to serve. The question would therefore arise as to the purpose of rule 7.5(5) in light of the presumption that parliament does not waste words.

[38] The respondent has pointed out that the judgment was also entered in respect of the failure to file a defence. However, this court has held in **B & J Equipment v Joseph Nanco** [2013] JMCA Civ 2 that upon a request for judgment in default of defence, a claimant is not required to prove service of the claim form and the particulars where an acknowledgment of service was filed. The merit of this argument would have to be considered against the background of the time of the filing of the acknowledgment of service. In this case, the acknowledgment of service was filed after the request for and entry of judgment although it was not in compliance with rule 9.3(4). However, the application to set aside the default judgment had been filed on the same day on which the acknowledgment of service had been filed, and in its grounds it challenged the court's exercise of its jurisdiction. This argument could ultimately provide the basis for a successful challenge to the issue of jurisdiction on appeal.

[39] It would be for this court on appeal to consider the effect of these issues on the validity of the order of Master Simmons.

Issue 2(a) and (b)

(a) Whether permission to serve outside the jurisdiction may be granted retrospectively

(b) What is the effect of the letter written by the attorneys-at-law on behalf of Sonia Pottinger and the fact that no step was taken at that point to challenge jurisdiction?

[40] The language of the CPR is clear that a claim form may be served out of the jurisdiction only where the court gives permission for this to be done. A court in determining whether to grant the permission must consider whether the claim is one which falls within rule 7.3 and 7.4, and whether the jurisdiction in which the claim is filed is the proper forum for the action to be brought. This, it would seem, makes it desirable for permission to be obtained prior to service, and the applicant's argument in relation thereto has a realistic chance of success on appeal. However, in the light of the fact that this is not expressly made a requirement, it is arguable whether the court in the exercise of its discretion may grant the permission retrospectively and treat the matter of permission as being *nunc pro tunc,* where it is of the view that had permission been applied for, based on the circumstances it would have been satisfied that the claim is one that satisfies the requirements of part 7. It would be for this court on appeal to consider whether it would be persuaded by the reasoning of Briggs J in **Nesheim v Kosa** that the retrospective permission is a "remedy for a defect which, applying ordinary considerations in furtherance of the overriding objective … can be used, if appropriate, provided it is not used as a means of evading [the provisions relating to extending the validity of the claim form])".

[41] In the event that this court decides that a court is empowered with the discretion to grant permission retrospectively, a relevant consideration in determining

whether the exercise of the discretion should be in favour of the grant, would be the effect of the letter written by Mr Pelosi and the fact that no application was filed disputing Jamaica as being the proper forum. A further matter for this court's consideration would be whether the Master not having made mention of part 7, it would be open to the court to infer that she had addressed her mind to the relevant provisions thereunder and further to conclude that the Master was not obviously and palpably wrong in the exercise of her discretion to validate service. In the event that it is concluded that Master Simmons did not address her mind to part 7, this court would also have to address its mind to whether in those circumstances it would be empowered to grant permission retrospectively and whether there is sufficient evidence upon which such permission could be granted particularly since the applicant has not submitted that the respondent could not meet the criteria for the grant of permission under part 7. Additionally, even if the court were to find that permission could be granted retrospectively, as stated previously, the respondents would still have to cross the hurdle of showing that service by fax is an acceptable method of service. These are considerations relevant to ground of appeal (a), which, in my view, has a realistic prospect of success on appeal.

Issues 3 and 4

3. Whether the evidence adduced (medical and otherwise) was sufficient to establish that the applicant was a patient within the meaning of the CPR.
4. Whether it was necessary for a next friend to be appointed and as a consequence, permission obtained from the court before the entry of the judgment.

[42] Part 23 of the CPR provides that "patient" is to be given the meaning ascribed to it in the Mental Health Act. Section 2 of the Act provides that a patient is one suffering from or is suspected to be suffering from a mental disorder. "Mental disorder" is defined as:

> "(a) a substantial disorder of thought, perception, orientation or memory which grossly impairs a person's behavior, judgment, capacity to recognize reality or ability to meet the demands of life which renders a person to be of unsound mind; or
>
> (b) mental retardation where such a condition is associated with abnormally aggressive or seriously irresponsible behavior, …"

From the section, it may be said that in making the determination of whether a person is a patient and for the purpose of litigation, one who is in need of a next friend to protect his/her interest, it is not sufficient that there is suspected or found to be a disorder of thought or perception, orientation or memory: the nature of this disorder must be so substantial as to grossly impair the behavior, judgment and capacity to recognize as to render the relevant person as being of an unsound mind. Such a condition is one that affects the mental health of a person and it may follow that any argument that a particular health issue or condition falls within that description would invite some medical evidence upon which such an assessment can be made. In this case, there were medical certificates in respect of Alzheimer's disease and so, on appeal, it would have to be considered what weight should be given to the information contained therein, particularly in circumstances where there appears to be conflicting evidence as to the mental capacity of Sonia Pottinger and the respondent is contending

that there are varying stages of the disease which affect the extent of the mental capacity of the person suffering from the disease. And so, it may well be that there could be a finding that the information establishes the existence of Alzheimer's disease, but that it does not provide a sufficient basis upon which to conclude that Sonia Pottinger was of unsound mind for the purposes of part 23.

[43] It is significant that the section also provides that a person may be regarded as a patient where he **is suspected** to be suffering from a mental disorder that renders him to be of unsound mind. This, it would seem to me, raises questions as to the nature of the evidence that is required for there to be an assessment as to whether a person is suspected of suffering such a mental disorder. It is arguable that the evidence would be at a lower threshold than where it is to be concluded that the person **is** suffering from a mental disorder which renders him to be of unsound mind. Would this assessment admit evidence from persons who are not medical practitioners? Must their assessment have its basis on medical evidence? Was the evidence upon which the applicant relied sufficient to meet this threshold of being suspected of being of unsound mind. In my view, a court could well find that there was sufficient evidence that Sonia Pottinger was suspected to be of unsound mind and therefore that the judgment could only have been entered with permission. The applicant therefore has a realistic prospect of succeeding on this issue.

[44] On the other hand, the court would also have to weigh any conclusion reached in relation to these issues against the fact that the language of rule 23.3(4) allows the court a discretion in relation to the effect of an order that has been obtained against a

patient where the patient was not represented by a next friend. The rule provides that the order obtained in such circumstances has no effect, unless otherwise stated. In considering the exercise of a discretion under this rule, the court could possibly take into account the facts that the applicant: had been acting on her mother's behalf throughout the years, including the period after the filing of the claim; had been appointed next friend in another suit; had indicated in her affidavit that she had been acting as next friend in these proceedings and had no interest adverse to her mother's; had been appointed representative of her mother's estate in this suit (although after entry of default judgment); and, as submitted by counsel for the respondent, could have been appointed as next friend in the instant suit. Against this background, the pertinent questions would be whether the discretion allowed by this rule could be said to be improperly exercised where the default judgment is allowed to stand in these circumstances and further, whether the overriding objective and the interests of justice would be served by setting aside the judgment on this basis.

[45] I am mindful that this court is constrained by the fact that it will be reviewing the exercise of a discretion in circumstances where, according to counsel for the respondent, the learned judge, in refusing the application, was of the view that the application was a waste of time, and the respondent has been waiting several years to get a judgment. I am also aware of the limited function of an appellate court when considering matters such as these where the decision is based upon the exercise of a discretion by a lower court (see **Hadmor Productions Ltd v Hamilton & Others** [1982] 1 All ER 1042). Nonetheless, based upon the issues canvassed above, it cannot

be said that the applicant does not have a realistic prospect of success on appeal. In those circumstances, there is a basis upon which the exercise of the judge's discretion may be disturbed particularly since no reasons were provided. In the light of this, I would grant permission to appeal.

LAWRENCE-BESWICK JA (Ag) (Dissenting)

[45] I have had the privilege of reading the draft judgment of my learned sister, Phillips JA but regrettably I am not able to agree with her.

[46] On 12 April 2010 a default judgment was entered in favour of Mr Keith Anderson against Ms Sonia Pottinger and Push Records. They, thereafter, on 26 July 2010 applied to set aside that judgment. On 28 February 2013 an amended application to set aside the judgment was dismissed by McIntosh J who also refused to grant leave to appeal that dismissal and who made orders to facilitate the early hearing of the assessment of damages on 4 July 2013. This is now an application by Ms Sharon Pottinger (as representative of the estate Sonia Pottinger) for permission to appeal the order of McIntosh J.

Real chance of success of appeal

[47] Rule 1.8(9) of the Court of Appeal Rules (CAR) governs the circumstances under which the court will give such permission. It provides:

> "(9) The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[48] The learned judge did not provide reasons**,** whether written or oral, for dismissing the amended application to set aside the default judgment. I shall therefore examine the evidence that was before him in order to determine if it provided him with the proper basis in law to refuse to set aside the default judgment. Permission to appeal that decision will be given only if the learned judge did not have a proper basis to refuse the application, in which event there would be a real chance of success of the appeal.

Setting aside of default judgment - rule 13.3 (Civil Procedure Rules (CPR))

[49] Counsel agreed that submissions had been made to the learned judge concerning the setting aside of the default judgment, based on rule 13 of the CPR which specifies the criterion for setting aside a default judgment. Rule 13.3 (1) of the CPR provides that:

> "The court may set aside ... a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim."

Part 12 is concerned with default judgments, that is, judgments obtained without trial. The circumstances in which they can be obtained are specified in rule 12.1(1) which provides that a claimant may obtain judgment without trial where a defendant:

> "a. has failed to file an acknowledgment of service giving notice of intention to defend in accordance with Part 9; or

b. has failed to file a defence in accordance with Part 10."

The judgment which was obtained in this matter was in default of the filing of an acknowledgment of service and of a defence.

[50] Rule 13.3(2) of the CPR mandates that in considering whether or not to set aside a default judgment the court must consider whether the defendant has:

"a. applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.

b. given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be."

[51] Here the original notice of application to set aside the default judgment had been filed on 26 July 2010 and set out as its grounds that the defendants had a real prospect of successfully defending the claim because:

(1) the claim was filed outside of the relevant limitation period and

(2) the first defendant Sonia Pottinger was a patient for the purposes of the CPR at the date of entry of judgment, and had no "next friend". Any proceedings taken against her would therefore have been of no effect unless the court otherwise ordered.

The notice was amended and it is the amended notice of application filed on 5 February 2013 which is the subject of this application. It included the grounds of the original

notice and also additional grounds, expanding on the purportedly improper procedure by which the judgment was obtained.

Application to the court as soon as is reasonably practicable – rule 13.3(2)(a) CPR

[52] Here the default judgment was entered on 12 April 2010 and the judgment was served on Ms Sonia Pottinger in Florida on 25 June 2010 (according to partial chronology prepared by counsel for the respondent and affidavit of Dothlin Johnson filed on 29 July 2010). The application to set it aside was filed approximately one month later, on 26 July 2010. In the circumstances of this case there would be a real prospect of success of arguing on appeal that the application had been filed as soon as had been reasonably practicable. However, this is but one factor that would have had to be considered by the learned judge. He ought to have also considered whether there was a good explanation for failing to file the acknowledgment of service and the defence (rule 13.3(2) CPR).

Good explanation for failing to file required documents - rule 13.3(2)(b) CPR

[53] There was no evidence before the learned judge giving the reason Sonia Pottinger had failed to file an acknowledgment of service and defence until 2010. Instead, the affidavit supporting the application to set aside the judgment highlighted the purported errors that had been made by counsel for Mr Anderson in filing the claim.

[54] Rule 13.3(2)(b) of the CPR directs that in considering whether to set aside a default judgment, the court must consider whether the defendant has given a good explanation for the failure to file the required documents. The absence of any good

explanation in this matter, and indeed the absence of any explanation whatsoever could properly cause the learned judge to conclude that Ms Sharon Pottinger was not eligible for the grant of the court's discretion to set aside the default judgment.

Service of claim form and particulars of claim

[55] In my view, there is no credible challenge to the assertion that the documents had been served and had come to the attention of the parties. The evidence shows that the parties were aware of the dispute and had tried for years to come to a settlement without the cost of litigating. In his affidavit filed 30 March 2009, Mr Anderson stated that between 2003 and 2006 there were several discussions and meetings between the parties and their representatives to reach a settlement concerning the unresolved issues between them. Ms Sonia Pottinger's daughter, Ms Sharon Pottinger, represented her mother in the discussions from 2007.

[56] When no settlement was reached, a claim form and particulars of claim were filed on 2 May 2007. They were sent by fax to the office of Ms Sharon Pottinger in the USA on 2 May 2008 and they were also served in Jamaica on 6 May 2008 on Mr Paul Gibson, who identified himself as an employee of Push Music, and who accepted service on behalf of it. On 8 September 2009, the learned Master deemed the service on Ms Sharon Pottinger on 2 May 2008 to be good service on Miss Sonia Pottinger and on Push Music. She did not deem the service on Mr Paul Gibson as good. This order was made ex parte and has never been challenged. There is no evidence of any application to set it aside or for permission to appeal its correctness.

[57] There is further evidence that in a letter dated 18 November 2008, attorneys-at-law from New York wrote to Mr Anderson's attorneys-at-law indicating that they represented Ms Sonia Pottinger and Push Music. They confirmed that they had received the claim filed on behalf of Mr Anderson and proposed a settlement. There was no mention of any incapacity of Ms Sonia Pottinger. Prior to that letter, those attorneys-at-law had communicated orally with Mr Anderson's previous attorneys-at-law, in this regard.

[58] The original application to set aside the default judgment, filed on 26 July 2010, was supported by an affidavit of attorney-at-law, Mr Sundiata Gibbs, filed that same day. In it Mr Gibbs made no assertion that the documents had not been served on the defendants. In the amended application to set aside the default judgment, filed on 5 February 2013, the supporting affidavit was from attorney-at-law, Mr Kevin Powell, and similarly made no reference to the documents not having been served. There is no assertion that the parties were not aware of the existence and contents of the claim form and of the particulars of claim. The validity of the service is what is being challenged.

Alternative method of service - rule 5.13 of the CPR

[59] Counsel for the applicant Ms Pottinger, submitted that the learned judge, in refusing to set aside the default judgment had impliedly accepted the service of the documents as good and had therefore erred in finding that rule 5.13 of the CPR which provides for alternative service, applies to service outside of the jurisdiction. However,

there is no indication that the applicant had earlier made an application to set aside the alternative service or that counsel had argued that issue before the learned judge. The grounds filed in support of the amended application which was heard by the learned judge did not include that. The evidence before the court showed that Ms Sonia Pottinger was or was likely to have been in a position to ascertain the contents of the documents, which is the purpose of the alternative service. Indeed, the letter from the attorneys-at-law in New York, USA (paragraph [13] above), confirmed that the parties had received the claim form. Any argument that the default judgment ought to have been set aside because of improper alternative service would not have been meritorious and could properly have been rejected by the learned judge. In any event the learned Master, in September 2009 deemed the service in May 2008 to have been good and that decision had not been challenged. Any appeal based on the application of rule 5.13 of the CPR would not have a real prospect of success.

Service outside of the jurisdiction – rule 7.2 of the CPR

[60] Similarly, the applicant, Ms Pottinger, did not apply to set aside service of the documents on the basis that they had been served outside of the jurisdiction. This issue was raised as a ground to set aside the default judgment. At that stage, the service on the defendants had already been deemed to be good by the order of the learned Master and the order had not been challenged. In any event, rule 7.7 provides that service outside of the jurisdiction may be set aside where it is not permitted by the rules, the case is not a proper one for the court's jurisdiction or the claimant does not have a reasonable prospect of success. This service did not fall into any of these

categories. The fact that service was effected outside of the jurisdiction was not an issue at the time of the hearing to set aside the default judgment. Any appeal in that regard would, in my view, be improper and would not have a real chance of success.

Time limit for filing of acknowledgment of service – rule 7.5 of the CPR

[61] Counsel for Ms Pottinger argued that in considering the time when the acknowledgment of service was filed, there must be consideration given to the fact that there had been no order of the court stipulating the time within which it and the defence should be filed. The absence of the order meant, he submitted, that these documents could be filed at any time whatsoever. I cannot accept that argument as it would in my view, make a mockery of the system of justice. Indeed, the claim form which is exhibited as being the one that was filed and served in this suit, contains the standard printed instruction that the defendant on whom the claim is served, should complete the form of acknowledgment of service "and deliver to the registry... so that they receive it within FOURTEEN days of service of this Claim Form on you". It is true that because the defendants were served abroad they ought to have been afforded additional time to file the document and that additional time should have been specified in the order if they had obtained one. However, in my view, without that particular order, limiting the time for filing the documents, there could be arguments that the day for delivery of the documents to the registry should be either 14 days after service, as per the claim form, or 28 days after service for the acknowledgment of service and 56 days after service for the defence (Rule 7.5(5) CPR). In my view, it cannot be a limitless time. In any event, the acknowledgment of service was not filed until 26 July

2010, over two years after the claim form and the particulars had been served on 2 May 2008. The interpretation of the rules must be tempered with reason and with due regard to their purpose. It is not reasonable to wait over two years for an acknowledgment of service. Interestingly, during this period of inactivity in this matter, Ms Sharon Pottinger was pursuing proceedings in 2009 in another claim in which she claimed certain remedies on behalf of Ms Sonia Pottinger. Any argument on appeal, based on the limitless time for filing of an acknowledgment of service, is fanciful.

Challenge to jurisdiction – rule 9.6 of the CPR

[62] The gravamen of many of the arguments of counsel for Ms Pottinger is that the court lacked jurisdiction to enter the default judgment because of errors in the service of the documents on behalf of Mr Anderson. Rule 9.6 of the CPR provides the opportunity for a defendant to apply to the court for a declaration that the court should not exercise its jurisdiction. Ms Pottinger did not make such an application and when the amended application to set aside the default judgment was being heard, the time for challenge to the jurisdiction had long expired. Rule 9.6(5) of the CPR provides that a defendant who files an acknowledgment of service and does not make an application under this rule within the period for filing a defence, is treated as having accepted that the court has jurisdiction to try the claim. In the circumstances, therefore, the learned judge in considering the amended application to set aside the default judgment would not have had a legal basis to consider a challenge by Ms Pottinger to jurisdiction. An appeal based on the jurisdiction of the court would therefore not have a real chance of success.

Mental health – rule 23 of the CPR

[63] Another of the grounds supporting the amended application to set aside the default judgment is that Ms Sonia Pottinger was, at the date of entry of judgment on 12 April 2010, a patient, for the purposes of the CPR and therefore a "next friend" ought to have been appointed to represent her in the suit. In requesting the entry of a default judgment in the proceedings concerning a patient, without seeking to have such a person appointed, Mr Anderson breached the rules and the default judgment entered was therefore of no effect and should be set aside. One of the questions which the learned judge would have had to have considered therefore is whether the entry of the default judgment had breached the rules in this regard.

[64] Rule 2.4 of the CPR provides that "patient" means a person who by reason of mental disorder within the meaning of the Mental Health Act is incapable of managing his or her own affairs. The definition of mental disorder in section 2 of the Mental Health Act includes "a substantial disorder of thought, perception, orientation or memory which grossly impairs a person's behaviour, judgment, capacity to recognize reality or ability to meet the demands of life which renders a person to be of unsound mind".

[65] In an affidavit filed 17 December 2012, Ms Sharon Pottinger, stated that Ms Sonia Pottinger, between 2007 and her death, suffered from Alzheimer's disease which grossly impaired her memory and her ability to manage her affairs. There is no evidence of Ms Pottinger's competence to diagnose Alzheimer's disease nor to

accurately assess the nature and extent of any mental disorder which Ms. Sonia Pottinger may have had, in order to determine if the latter were of unsound mind and falling within the definition of "patient" by law.

[66] However, two letters were exhibited, to the affidavit of Mr Powell which were purportedly written by doctors. One dated 17 December 2012, was purportedly from Vincent C Chin MD, FAAFP, family practitioner, whose address was in Florida. It indicated that Ms Pottinger was under his care for Alzheimer's disease with memory disorder since 2 July 2003 and that she was taking prescribed medications for the condition. The second letter dated 27 December 2012, purported to be from Anabelle Maldonado-Medina, MD, also from Florida. This letterhead stated that she was "board certified in Neurology". In the letter is the information that Ms Pottinger was an "established patient since 10/30/03 to 06/15/2010" and that she was under her care for severe Alzheimer's disease, but it does not state if she had the disease from "10/30/03" or if not, from when.

[67] There was no verification of the authorship of the letters or acceptable certification/confirmation that these letters did in fact issue from medical doctors qualified to render an opinion about mental disorders. Further, there was no evidence that the doctors understood that the letters were to be used in court proceedings and that they had a duty to help the court impartially (CPR rule 32.3(1)). Neither was there evidence as to the doctors' opinions as to whether the severity of any disease from which Ms Sonia Pottinger may have been suffering, was such as would classify her as a patient under the Mental Health Act. There is no evidence of the basis for the doctors'

opinions as expressed in the letters. Indeed, there was no evidence that the person who they had treated was the erstwhile claimant in this matter.

[68] It is of interest that Ms Sharon Pottinger has referred to being authorized to conduct business for Ms Sonia Pottinger based on the latter having signed a Power of Attorney on 9 December 2005. In order for such a document to be valid, Ms Sonia Pottinger must be assumed to have been fully cognizant of what she was signing at that time in 2005, and not to be suffering from a mental disorder. However, the exhibited letters referred to Ms Sonia Pottinger being treated for Alzheimer's disease from 2003.

[69] Ms Sharon Pottinger filed a certificate of next friend on 30 June 2009 in a different claim before the court, certifying that she can fairly and competently conduct proceedings on behalf of Ms Sonia Pottinger, a patient, and that she has no interest adverse to her. Ms Sonia Pottinger was the claimant in that suit. Mr Keith Anderson was not named as a party in that suit. Ms Sharon Pottinger did not file such a certificate in this matter where Ms Sonia Pottinger was a defendant, even though she has maintained that she represented Ms Sonia Pottinger's interests. Exhibited to the further affidavit of Keith Anderson filed March 30, 2009 were copies of e-mails from 2007 and 2009 indicating that the parties, including Ms Sharon Pottinger, were interested in negotiating an agreement without extended litigation. In my view, there is no evidence which the learned judge could have considered to determine if Ms Pottinger were indeed a patient requiring the appointment of a "next friend" with provisions for the protection of the patient. Both letters allegedly from doctors, on

which Ms Pottinger relies, bear dates of 2012. There is no evidence that when Mr Anderson requested the entry of the default judgment in 2010, he knew or at least ought reasonably to have known that Ms Pottinger was a patient within the meaning of the rules. There is indeed evidence that Ms Sharon Pottinger put herself forward as representing her mother in some negotiations but there was no clear reliable information that would alert Mr Anderson to the purported extent of any disorder Ms Sonia Pottinger may have had which would have rendered her to be of unsound mind and a patient under the rules.

[70] In my view, where a defendant ought properly to be described as a patient under the rules, the onus is on him or his representative to inform the claimant of any special circumstance which surrounds him, especially where that circumstance is not obvious, and where knowledge of its existence rests within the bosom of the defendant. Were it otherwise, the consequence would be that a claimant could be required to ascertain the status of a defendant, whether he be a patient, a minor or many other special category, before requesting a default judgment. The rules do not provide a method for requiring the defendant to provide such information requested by the claimant or for any time limit to be observed for the defendant to provide it.

[71] The unacceptable result of a failure to inform the claimant of the special circumstance would be that a defendant could remain silent, allow the claimant to expend time and resources to obtain a default judgment, and only then disclose his personal special circumstance, requiring time consuming and costly applications thereafter to regularize the process.

[72] In my view, the learned judge had no evidence before him supporting the assertion that Ms Sonia Pottinger was a patient within the rules and requiring special attention. The argument that permission should have been sought before the judgment was entered, is, in my view, fanciful, and clearly flies in the face of the overriding objective of the rules governing the application, which is to deal with the cases justly. The learned judge did not have a basis to set aside the default judgment in reliance on Ms Sonia Pottinger being a patient. It follows therefore that an appeal in this regard would not have a real chance of success.

Conditions to be satisfied – judgment for failure to file acknowledgment of service - rule 12.4 CPR

[73] The amended application to set aside the judgment which was heard by the learned judge, referred to 13 grounds. Those grounds did not include any challenge that there was still time to file an acknowledgment of service as the time permitted had not expired. They did however, contain a challenge to the entry of the judgment without obtaining permission when Ms Pottinger was a patient. However, counsel for Ms Pottinger has submitted that two conditions under rule 12.4 had not been satisfied: 1) the time for filing an acknowledgment of service had not expired; and 2) the court had not granted permission for Mr Anderson to file the default judgment against Ms Sonia Pottinger, a patient. The learned judge would have properly held that there was no need for permission to be given before the default judgment was entered as there was no evidence which the learned judge could have considered to determine if Ms Sonia Pottinger were indeed a patient, as has been discussed above (paras [19] to [28]) Similarly, the learned judge could properly find that the other condition had also been

met, namely, that the time for filing the acknowledgment had expired, as also discussed above (para 17).

[74] In my view, the learned judge would have had a firm basis in law for regarding the conditions of rule 12.4 as having been met to allow entry of the judgment in default of acknowledgment of service. Any argument on appeal in this regard, would not have a real chance of success.

Judgment for failure to file defence - rule 12.5 CPR

[75] The judgment which is the subject of this application was entered not only in default of filing an acknowledgment of service but also in default of filing a defence. There was no challenge raised before the learned judge concerning the correctness of the entry of the judgment in default of defence. The learned judge was correct therefore in not ordering the setting aside of the judgment and an appeal in this regard would not have a real chance of success.

Conclusion

[76] The learned judge did not give reasons for refusing the application to set aside the default judgment. That has deprived us of the benefit of his reasoning as to how he came to that decision. However, I have considered the evidence that was before the judge and I have drawn inferences as to what should have guided his thought processes. It is fair to assume that the fact that the learned judge did not set aside the default judgment must mean that he formed the view that there was no basis in law to set it aside. I have considered all the elements of the law which he would have had to

consider in order to properly determine if he should order that the judgment be set aside. After addressing his mind to the considerations for setting aside the default judgment the learned judge would have been correct to conclude that the defendant did not have a real prospect of successfully defending the claim. He had ample basis in law to refuse to set aside the default judgment. An appeal in this regard would not have a real chance of success.

[77] Of some interest is the fact that the correctness of the entry of this default judgment was previously examined on 9 January 2013 by another judge, Pusey J, on the application of Ms Sonia Pottinger and of Push Music, to set it aside. That learned judge sought to regularize the status of the deceased defendant by making an order allowing Ms Sharon Pottinger-Gibson to represent the estate of Ms Sonia Pottinger in the proceedings. In that same judgment the learned judge made an order refusing to set aside the default judgment as against Push Music. The inference from that is that Pusey J had adjudged the same default judgment to have been properly entered as against Push Music.

[78] The learned Pusey J on that application would have had to have considered the service of documents on the then defendants and would have had to rely on the 2009 judgment of the learned Master where she had deemed service of the claim form on Ms Sonia Pottinger and Push Music as being good service. This instant application for permission to appeal is based in large part on a challenge to the correctness and validity of the service of these documents, that is, a challenge to the learned Master's

order that their service was good. In effect therefore, this application indirectly includes permission to appeal that original order of the learned Master or to set it aside.

[79] Any application to appeal the learned Master's order from 2009, or to set it aside, would have had to have been filed within the times prescribed by the CAR (rule 1.11), OR the CPR (rule 11.16(2). There has been no such application to appeal or set it aside and the time for any such application is far spent.

[80] Indeed, when on 9 January 2013, Pusey J struck out Push Music's application to set aside the default judgment, he would have accepted the correctness of the learned Master's order deeming the service of the documents as being good. The correctness of Pusey J's judgment has itself also not been appealed.

[81] In my view, an appeal of the judgment of McIntosh J does not have a real chance of success because of the reasons detailed above. The CPR must be obeyed, because the rules are expected to bring certainty and uniformity to civil proceedings. Nonetheless, they must be applied with purposiveness and with due regard to their overriding objective, which includes ensuring that cases are dealt with expeditiously and fairly. The purpose of the filing of an acknowledgment of service is to acknowledge that the contents of the documents commencing proceedings have come to the attention of the defendant. He will then have the opportunity to contest the suit in a fair and timely manner. Ms Pottinger has been afforded that opportunity. In the circumstances of this matter, I would refuse permission to appeal the order dismissing the application to set aside the default judgment.

HARRIS JA

ORDER

By a majority (Lawrence-Beswick JA (Ag) dissenting)

1. The application for permission to appeal the order of D.O. McIntosh J made on 28 February 2013 is granted.

2. There should be no order as to costs.