

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SLUHCV2010/0518

BETWEEN:

WALTER PIERRE

Claimant

and

RICHARDSON LEON

Defendant

Appearances:

Mrs. Wauneen Louis-Harris for the Claimant
Mr. Gerard R. Williams for the Defendant

2018: November 20th.

JUDGMENT

[1] **WILKINSON J.:** On 15th June 2010, Mr. Walter Pierre (Mr. Pierre) filed his claim form and statement of claim seeking by way of relief: (a) an account of all sums due from Mr. Richardson Leon (Mr. Leon) in respect of the receipt of rental income from 'the Property', (b) an order for payment by Mr. Leon of all sums found to be due from Mr. Leon to Mr. Pierre on the taking of the account, (c) the sum of \$300,000.00, (d) damages, (e) interest thereon at the rate of 6 percent per annum in consonance with article 1009A of the **Civil Code**, (f) costs, and (g) further or other relief as the Court deemed fit.

[2] By his statement of claim, Mr. Pierre alleged an agreement made in or about September 2006, and which was partly in writing and partly oral and whereby he

agreed to lend Mr. Leon the sum of \$50,000.00 for a project which involved the construction of a 10 room villa on a parcel of land owned by Mr. Leon. In return Mr. Leon was to pay Mr. Pierre \$300,000.00 within 18 months of the date of the last installment of the \$50,000.00. There was a memorandum of agreement executed on 26th September 2006, providing details of the agreement between the Parties. Mr. Pierre alleged that Mr. Leon had breached the agreement and failed to account to him in the manner requested or at all.

[3] On 14th October 2010, Mr. Pierre filed a request for entry of judgment in default of acknowledgment of service.

[4] On 11th February 2011, Mr. Pierre filed a notice of application asking the Court to determine the terms of the judgment and order the following:-

- (1) That Mr. Leon do provide to Mr. Pierre an account of all sums due from Mr. Leon to Mr. Pierre.
- (2) An order directing Mr. Leon to pay to Mr. Pierre all sums found due from Mr. Leon to Mr. Pierre on the taking of the account under (1) above.
- (3) An order directing Mr. Leon to pay to Mr. Pierre the sum of \$300,000.00.
- (4) An order directing Mr. Leon to pay to Mr. Pierre interest on the said sum of \$300,000.00 for the period commencing 14th May 2009 to the date of full payment at the rate of 6 percent per annum.
- (5) An order that Mr. Leon do pay to Mr. Pierre prescribed costs in the sum of \$45,000.00.

The grounds of the application were:-

1. Mr. Pierre and Mr. Leon entered into an agreement which was partly oral and partly written.
2. That pursuant to the oral agreement made on or about 20th September 2006, Mr. Pierre advanced to Mr. Leon the sum of \$5,500.00 on or about said date.
3. In so far as the said agreement was written, it was contained in a memorandum of agreement dated 26th September 2006.

4. Pursuant to the memorandum of agreement, Mr. Pierre advanced to Mr. Leon the sum of \$9,000.00 on the said 26th September 2006.
5. Mr. Pierre advanced to Mr. Leon the total sum of \$50,000.00 in intermittent instalments subject to the following conditions:-
 - (a) That THE PARTY OF THE SECOND PART pays to THE PARTY OF THE FIRST PART thirty per cent (30%) of the proceeds of the rental to be derived from THE PROJECT;
 - (b) That in the event that THE PARTY OF THE SECOND PART sells THE PROPERTY together with the villa erected thereon, that THE PARTY OF THE SECOND PART shall pay to THE PARTY OF THE FIRST PART the sum of THREE HUNDRED THOUSAND DOLLARS EASTERN CARIBBEAN CURRENCY (\$300,000.00) in satisfaction of the loan of the said sum of \$50,000.00.
6. That it was also a term of the agreement that:

“THE PARTY OF THE SECOND PART shall pay the said sum of \$300,000.00 to THE PARTY OF THE FIRST PART within eighteen (18) months of the date of the advancement of the last instalment towards the loan of \$50,000.00 by THE PARTY OF THE FIRST PART to THE PARTY OF THE SECOND PART.”
7. Pursuant to the agreement, Mr. Pierre has paid all sums due thereunder which forms an aggregate of \$50,000.00, the last instalment paid being on 27th March 2007, and the eighteen (18) month period stipulated under the memorandum of agreement having elapsed, Mr. Leon in breach of the memorandum of agreement and has failed and or refused to pay to Mr. Pierre the following:-
 - (1) Rental of 30 percent of rental received by Mr. Leon for the periods to be identified by Mr. Leon in his account.
 - (2) The sum of \$300,000.00.
8. Mr. Pierre filed a claim against Mr. Leon on 15th day June 2010 claiming the following inter alia:-

- (1) An account of all sums due from Mr. Leon to Mr. Pierre in respect of the receipt of the rental from the PROPERTY.
 - (2) An order for payment by Mr. Leon to Mr. Pierre of all sums found to be due to Mr. Pierre.
 - (3) Payment of the sum of \$300,000.00.
 - (4) Damages.
 - (5) Interest thereon.
 - (6) Costs
9. The claim form, statement of claim and other supporting documents were served on Mr. Leon on 15th June 2010.
 10. That Mr. Leon has not filed an acknowledgement of service or a defence to the claim.
 11. Rule 12.10 (4) of **CPR 2000** ordains that default judgment where the claim is for some other remedy shall be in such form as the Court considers Mr. Pierre is entitled to on the statement of claim.

[5] Mr. Pierre's application was supported by his affidavit.

[6] On 21st March 2012, the Court read its oral decision and made the following order:

- "1. Judgment is entered for the Claimant.
2. The Defendant is to file on or before April 30th 2012, an Affidavit providing an account of all sums received as rental of the Villa developed on Block 1455B Parcel 468 from September 26th 2008 to March 21st 2012.
3. The Claimant is denied payment of \$300,000.00 there being no evidence of Sale of the Villa on Block 1455B Parcel 468 before the Court, sale being a condition of that payment.
4. The assessment of 30% of rental payable, costs and interest is adjourned to June 6th 2012.
5. The Claimant to draw and file this Order."

- [7] On 12th April 2012, Mr. Leon filed an application seeking an order that:-
- (i) Judgment in default of acknowledgment of service dated March 21st 2012 be set aside.
- The sole ground of the application was: -
- (i) That the acknowledgement of service was not filed due to a misunderstanding within the offices of the former Attorney for the Applicant/Defendant and that the Applicant/Defendant had done everything that was legally required of him in the circumstances.
- [8] The application was supported by the affidavit of Mr. Leon filed on the said 12th April 2012, and then the further affidavit of Attorney-at-law, Mr. Lorne Theophilus filed on 18th April 2012.
- [9] In his affidavit Mr. Leon deposed that on 4th April 2012, he became aware of the judgment in default of acknowledgement of service against him following a search of the High Court Registry's file by his present Attorney-at-law. He recalled having been served with the claim form on 15th June 2010 (Mr. Pierre's affidavit of service filed 10th October 2010, shows that Mr. Leon was also served with the statement of claim and other mandatory documents on the 15th June 2010).
- [10] Following service of the documents, 2 days later, 17th June 2010, Mr. Leon delivered them to his then Attorney-at-law, Mr. Lorne Theophilus of Messrs. Theophilus, Pierre and Mondesir Chambers. There he formally instructed Mr. Theophilus on the claim and paid the requested retainer of \$1000.00 for the filing of the acknowledgment of service and defence to the suit. Mr. Leon disclosed his receipt.
- [11] A few days later, Mr. Leon contacted Mr. Theophilus to enquire how everything was being managed and Mr. Theophilus told him that he had taken care of everything. Mr. Leon stayed in touch with Mr. Theophilus over the next few weeks because he was very troubled and concerned about what he describes as an outrageous claim against him. Following a period of about three months, Mr. Leon inquired of Mr.

Theophilus why everything was taking so long and he was informed that it was not unusual for matters to drag on in the Court. Mr. Leon subsequently confirmed Mr. Theophilus' statement through an employee of the High Court. Mr. Leon said that on hearing this, he began to feel a little bit more relaxed and relieved.

[12] Approximately 1 year later, and following the general elections in November 2011, in Saint Lucia, in December 2011, Mr. Leon contacted Mr. Theophilus. He said that he was very agitated as it was now almost 1 1/2 years since he had instructed Mr. Theophilus in the claim and there had been no hearing date. He congratulated Mr. Theophilus on his victory at the polls. On inquiry of Mr. Theophilus about the status of the claim, he was informed that neither Mr. Theophilus nor his staff had received any information about a hearing date before the Court. Mr. Theophilus also informed him that it was necessary for him to pass on Mr. Leon's file to another attorney-at-law in chamber, Mr. Leslie Mondesir because Mr. Theophilus would no longer be in a position to personally handle any legal work. According to Mr. Leon, he reluctantly accepted Mr. Theophilus' recommendation as he was not too familiar with Mr. Mondesir.

[13] Towards the end of March 2012, Mr. Leon having not heard from Mr. Theophilus' chambers and coupled with the fact of learning that the matter had been called in his absence, he visited chambers and met with Mr. Mondesir. Mr. Mondesir informed him that he was unable to represent him because he was representing Mr. Pierre in another suit. Mr. Mondesir promised to call him shortly.

[14] On 2nd April, 2012, Mr. Leon was informed by a mutual friend of Mr. Pierre and himself, "One Andy" that the matter had been called in court a few days prior while he was absent. Mr. Leon said that he took immediate steps to consult a new attorney-at-law to handle the claim, Mr. Gerard R. Williams. On or about 4th April 2012, Mr. Williams contacted him and informed him that he had conducted a search that day of the High Court Registry and that a judgment had been entered in the suit against him following a request filed on 14th October 2010. He was also informed by

Mr. Williams that neither an acknowledgement of service nor defence was on the Court's file. Mr. Leon immediately instructed Mr. Williams to file an application to set aside the default judgment against him.

- [15] Mr. Leon says that he was subsequently informed by Mr. Theophilus that he accepted responsibility for the acknowledgment and defence not being filed and this was due to "an acute miscommunication and misunderstanding" among the staff members of his Chambers.
- [16] Mr. Leon states that he has a good defence to the claim and that the agreement while instrumental, it together with the surrounding events tells a far different story than that presented by Mr. Pierre. A copy of the draft defence was exhibited.
- [17] Mr. Leon was informed by Mr. Williams that on 11th February 2011 an application was filed wherein Mr. Pierre sought to have determined the terms of the judgment and that it was yet to be heard. He had no knowledge of this application as it had not been served on him. He was further informed that an order was made on the application on 2nd April 2012, and by the order it was demanded that he carry out certain actions.
- [18] Mr. Leon's former attorney-at-law, Mr. Lorne Theophilus on 18th April 2012, filed an affidavit in support of Mr. Leon's application to set aside the default judgment. Therein he stated that he was one of the principals in the firm of Messrs. Theophilus, Pierre and Mondesir Chambers. He knew Mr. Leon, as he was one of his former clients.
- [19] According to Mr. Theophilus, on or about 17th June 2010, Mr. Leon visited him in chambers and produced a claim form and supporting documents issued out of the High Court. He received \$1,000.00 as a retainer to commence drafting and filing of the acknowledgement of service and defence. He prepared the acknowledgement of service and defence for filing. He then handed the documents over to his staff for

filing at the High Court Registry and thereafter assumed that his instructions had been carried out.

- [20] Mr. Theophilus said that he was expecting the matter to be brought to the attention of his Chambers, believing that the documents were filed by his office. On 4th April 2012, when he was informed by Mr. Williams that a default judgment had been entered against Mr. Leon, he replied that it could not be since he had filed an acknowledgement of service and defence on behalf of Mr. Leon.
- [21] Upon carrying out investigations at his Chambers, Mr. Theophilus discovered to his horror that the documents were never passed on for filing by his secretary due to a misunderstanding and miscommunication between them. He regretted the unfortunate event.
- [22] Approximately three years later, on 16th April 2015, Mr. Theophilus filed a supplemental affidavit in support of Mr. Leon's application. Therein, he said that he made the supplemental affidavit in view of the Court's decision against Mr. Leon's application to set aside the default judgment in SLUHCV2010/0517. He said that most notably was the Court's finding that he did not go further in explaining the nature of the "miscommunication" and "misunderstanding" between his staff and himself leading to the acknowledgment of service not being filed on behalf of Mr. Leon.
- [23] Mr. Theophilus deposed that he was stating the matters set out in his affidavit with a view of clarifying the extent of the communication and it was being presented to the best of his knowledge and memory. He said that upon having been instructed by Mr. Leon in relation to the date of service and particulars for his defence on or about the 17th June 2010, he proceeded to have the acknowledgement of service prepared by his secretary, Ms. Leona Charles in accordance with the instructions received from Mr. Leon. The acknowledgement of service was prepared in accordance with the instructions and returned to his desk for signature the following

day. The acknowledgement of service was signed by him on Mr. Leon's behalf. He disclosed the acknowledgement of service of SLUHCV2010/0517 (the other suit) and not for the present suit.

[24] According to Mr. Theophilus, after signing the acknowledgement of service, he passed it back to his secretary along with other documents that were before him for processing and which included filing of the acknowledgement of service at the High Court Registry.

[25] He said that as noted prior, the particulars for the defence were received and recorded based on the instructions of Mr. Leon.

[26] Mr. Theophilus said that he wished only to clarify and correct his previous statement contained in his first affidavit filed 18th April 2012, wherein he stated that the defence was also filed. While the defence was completed in draft form, it would not have been presented for filing in light of the acknowledgement of service which was already being processed for filing. Further, the defence was not due for filing seeing that Mr. Leon had been served on 15th June 2010.

[27] Mr. Theophilus said that as it relates to the acknowledgement of service, his specific instructions to his staff were that the acknowledgement of service was to be filed and as noted in his affidavit of 18th April 2012, he only found out that it was not filed after judgment had been entered against Mr. Leon.

[28] According to Mr. Theophilus, it was later determined in his chambers that instead of filing the acknowledgement of service at the High Court Registry, it was filed away by his office clerk in Mr. Leon's client File.

[29] At approximately three years after Mr. Leon's application was filed, on 15th April 2015, Ms. Leona Charles, a legal secretary who was assigned to Mr. Theophilus in his chambers, filed an affidavit to support Mr. Leon's application.

- [30] According to Ms. Charles, she was assigned specifically to work with Mr. Theophilus and her duties included assisting with all secretarial matters going and coming from the chambers. Mr. Leon was known to her since he had conducted business with the chambers prior. She was also familiar with the suit since Mr. Leon initially approached Mr. Theophilus after being served with Mr. Pierre's claim.
- [31] Ms. Charles was aware of Mr. Leon's application seeking an order to set aside the judgment in default of acknowledgment of service. She read the affidavits of Mr. Leon and Mr. Theophilus. She understood that Mr. Theophilus sought to explain that the acknowledgement of service was not filed due to a miscommunication and misunderstanding between his staff and himself.
- [32] Ms. Charles said that based on her knowledge about the matter, she wished to explain the nature of the "misunderstanding" and "miscommunication." Her explanation was that on or about the 17th June, 2010, Mr. Leon met with Mr. Theophilus in chambers with regards to the suit. She believes that it was the following day that Mr. Theophilus passed onto her the details with which the acknowledgement of service was to be prepared. On that very afternoon, she prepared the acknowledgement of service, printed it and there was left blank the part where Mr. Theophilus was to sign. As she would customarily do, all documents for signature were left on Mr. Theophilus desk in the afternoon for his signature.
- [33] The following morning, Mr. Theophilus handed her the acknowledgement of service for onward transmission to the filing clerk for filing. Ms. Diana Edwards was the chambers filing clerk. Ms. Edwards' responsibilities included filing all Court documents and the in-house filing. Ms. Edwards was no longer employed with the chambers as she had migrated to the United States of America.
- [34] According to Ms. Charles, that same morning she received the acknowledgement of service, she delivered it together with other documents to Ms. Edwards for filing.

- [35] It was not until an investigation was carried out that it was discovered that Ms. Edwards had filed the acknowledgment of service in Mr. Leon's file instead of in the High Court Registry. She said that "miscommunication" and/or "misunderstanding" must have arisen when conveying her instructions to Ms. Edwards with respect to the filing of the acknowledgement of service at the High Court Registry.
- [36] Ms. Charles said that based on her working experience with Ms. Edwards, she diligently performed her duties and so she was convinced that Ms. Edwards must have misunderstood her instructions with respect to filing the acknowledgement of service. Alternatively, there must have been some miscommunication between them leading to the error of placing the documents in Mr. Leon's client's file instead of filing them in the High Court Registry.
- [37] On 21st April 2015, Mr. Pierre filed an affidavit in reply. He deposed that Mr. Leon had made a similar application to the present one i.e. to set aside the default judgment in SLUHCV2015/0517 (same Parties, different subject matter). Both SLUHCV 2015/01517 and SLUHCV2015/0518 came up for hearing at the same time but the file for SLUHCV 2015/0518 was missing. On 3rd September 2013, the Court dismissed the application in SLUHCV2010/0517. He disclosed a copy of the transcript of the judgment. Mr. Leon thereafter appealed the Court's decision, and his appeal was dismissed. He disclosed a copy of the Court of appeal's order.

The Law

[38] **CPR 2000** Rule 13 governs Mr. Leon's application. Rule 13 provides:

"Cases where the Court may set aside or vary default judgment

13.3(1) If Rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –

- (a) Applies to the court as soon as reasonably practicable after finding out that the judgment had been entered;
- (b) Gives a good explanation for the failure to file an acknowledgment of service or a defence as the same case may be; and
- (c) He has a real prospect of successfully defending the claim.

(2) In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances.

(3) Where this Rule gives the court power to set aside a judgment, the court may vary it."

Findings and Analysis

[39] It is correct that Mr. Leon had identical applications and identical affidavits in support seeking an order setting aside default judgments in SLUHCV2010/0517 and SLUHCV2010/0518. It is correct that in SLUHCV2010/0517 the Court ruled denying Mr. Leon's application and which ruling was upheld at the Court of Appeal.

[40] Counsel for Mr. Pierre objected to Ms. Charles' affidavit filed 15th April 2015, and Mr. Theophilus' affidavit filed on 16th April 2015, on the ground that there was inordinate delay in filing them and she asked for them to be expunged from the record. The Court's position is that there being no order preventing the filing of the affidavits, the Court had two choices: firstly, to recognize that there was short service and adjourn the matter, or secondly, bearing in mind that Mr. Pierre had filed an affidavit on 21st April 2015, to proceed to hear the application. The Court on review of the affidavits of both Parties proceeded to hear the application.

[41] On review of the application, the Court is of the view that Rule 13.2 which prescribes a mandatory setting aside of a default judgment does not apply. Mr. Leon does not argue that he complied with any of the conditions of Rule 12.4 and so the default

judgment was wrongly entered. The Court proceeds on the basis that the default judgment was correctly entered.

- [42] The default judgment having been correctly entered, the Court now proceeds to see if Mr. Leon has satisfied the compulsory and conjunctive requirements of Rule 13.3 to enable the Court to set aside the default judgment.
- [43] Rule 13.3 conjunctive requirements require Mr. Leon to satisfy the Court that (a) he has filed his application as soon as reasonably practicable after finding out about the judgment, (b) he has given the Court a satisfactory explanation for his failure to file his acknowledgment of service, and (c) he has a real prospect of successfully defending the claim.
- [44] As regards the first hurdle, Mr. Leon says that it was only on 2nd April 2012, that through a mutual friend of the Parties, “One Andy” he learnt that the case had been “called” in the court in his absence. Two days later he contacted his present attorney-at-law, Mr. Williams to handle the matter for him. On 4th April 2012, Mr. Williams informed of the default judgment entered against him. He immediately filed an application to set aside the default judgment.
- [45] On review of the file, the Court observes that although its order was dated and so made on 21st March 2012, it was not filed and entered until 2nd April 2012.
- [46] There was no evidence on the Court’s file of service on Mr. Leon of a copy of the Court’s draft order made 21st March 2012 or the order as entered on 2nd April 2012.
- [47] Without service of the order, the Court accepts that the earliest Mr. Leon would have known that something happened in the case, maybe not specifically about the judgment, as he does not say this, was through the Parties’ mutual friend “One Andy” on 2nd April 2012. Two days later, on 4th April 2012, he moved to retain his

new attorney, Mr. Williams and within 10 days of hearing from “One Andy”, on 12th April 2012, his application was filed.

[48] Pursuant to Rule 42.6, unless the Court directs otherwise, the court office must serve every judgment or order. The default judgment while requiring Mr. Pierre to draw and file the order did not order him to serve the order. It was therefore the burden on the court office to serve.

[49] The starting point therefore appears to be 2nd April 2012, when “One Andy” told Mr. Leon that the case had been called in his absence. Within two days, 4th April 2012, on a search being carried out by Mr. Williams, Mr. Leon became aware of the default judgment. On the 9th day after finding out about the default judgment, the application was filed. The issue for the Court is whether the period of nine days was “as soon as reasonably practicable after finding out about the judgment”?

[50] The nine days would have included the date of the 4th when the default judgment was discovered, the 12th when the application was filed, and it would also have included two days of a weekend. The Court believes that in all of those circumstances, that the it can accept that the application was filed as soon as reasonably practicable. Mr. Leon has crossed the first hurdle.

[51] This brings the Court to Mr. Leon’s second hurdle, has the Court received a satisfactory reason for the failure to file the acknowledgment of service.

[52] The Court observes that after service of the claim form, statement of case and supporting documents on 15th June 2010, Mr. Leon says that in the early days after he retained Mr. Theophilus and paid the requested retainer he followed up with Mr. Theophilus for the status of the case and was always assured by Mr. Theophilus that all was taken care of. At three months, he once again made inquiry of Mr. Theophilus who informed him that it was not unusual for court matters to take so

long. Mr. Theophilus' statement to him was confirmed by an employee of the Court. This all appeared to have happened during 2010.

- [53] Mr. Leon next appears to have paid attention to his matter at December 2011, now approximately 11/2 years after service, when he contacted Mr. Theophilus. He was told that there was still no hearing date for his matter and that his file would be passed onto Mr. Mondesir as Mr. Theophilus would no longer be able to personally handle legal work. At March 2012, approximately three months later, Mr. Leon met with Mr. Mondesir in Chambers. Mr. Mondesir informed him that he had a conflict of interest as he was representing Mr. Pierre in another matter.
- [54] As Counsel for Mr. Pierre observes, even though at December 2011, Mr. Leon is made aware that Mr. Mondesir was taking over his case, there was no contact between them for three months. Mr. Leon does not say why there was such delay.
- [55] It appears that Mr. Leon was next prompted to act and retain Mr. Williams only after hearing on 2nd April 2012, that the case had been called. He then on 4th April 2012 retained Mr. Williams. Within two days, Mr. Williams was able to confirm that there was entered a default judgment against him.
- [56] While this case is not on all fours with the facts in **Grenada Civil Case No. 0084 or 1999 Kenton Collison St. Bernard v. The Attorney General of Grenada et al**, the principle as stated by Barrow J could well apply. Barrow J reminds us that litigation belongs to the client and not the lawyer, that the client needs at all times to be involved in the litigation and that a litigant who, as in that case, neglected to tell his lawyer how to reach him would likely end up in breach of a primary obligation that rest on him rather than on his lawyer.

- [57] Here there were simply gaps in Mr. Leon's following up of his case. He followed up in one instance over the course of one year. Perhaps if Mr. Leon was following up his case a little closer, any defect in filing the acknowledgement of service might have been caught earlier.
- [58] Mr. Theophilus says that the failure to file the acknowledgment of service is his. In his first affidavit Mr. Theophilus states that he prepared the acknowledgment of service and he handed the documents to his staff for filing in the High Court Registry. On learning of the failure to file the acknowledgment of service, he states that the documents were never passed on for filing by his secretary due to a misunderstanding and miscommunication between them – presumably, he means his secretary, Ms. Charles and himself.
- [59] As the Court stated in SLUHCV2010/0517, it is not prepared to accept such wide and vague statements as “misunderstanding” and “miscommunication” without more. Mr. Theophilus says that he made his supplemental affidavit to clarify this statement.
- [60] Ms. Charles, who was Mr. Theophilus secretary on the other hand, does not perceive there was any “misunderstanding” or “miscommunication” between herself and Mr. Theophilus. She is clear, she received instructions on how to complete the acknowledgment of service, she completed it overnight on Mr. Theophilus' desk for signature, and the following day he gave it to her for filing in the High Court Registry together with some other documents for filing. She in turn passed the acknowledgment of service onto Ms. Edwards for filing.
- [61] Ms. Charles says that there appears to have been a misunderstanding and miscommunication between Ms. Edwards, the filing clerk and herself and so the document ended up in the client's file of Mr. Leon instead of being filed in the Registry.

- [62] Ms. Charles' statement in relation to Ms. Edwards is conjecture about the mind of Ms. Edwards. It is for Ms. Edwards to say what was told to her, what she understood was to happen with the documents, and whether she now found there to have been a misunderstanding and miscommunication.
- [63] The Court is therefore not assisted by the evidence of Mr. Theophilus or that of Ms. Charles as they contradict each other.
- [64] At this juncture, the Court on weighing the evidence on its consideration of the 2nd hurdle, whether there was a good explanation for the failure to file the acknowledgment of service, finds that there was none. Mr. Leon failed to be vigilant about his case, allowing a lapse of one year, and Mr. Theophilus and Ms. Charles could not seem to get it right as to between whom the miscommunication and misunderstanding occurred.
- [65] In passing the Court observes that in relation to when the Court may consider the failure of a party's attorney-at-law, such is only found in relation to an application for relief from sanctions under Rule 26.8 (3) and which provides that in considering whether to grant relief, the Court must have regard to –
- a) The effect which the granting of relief or not would have on each party;
 - b) The interests of the administration of justice;
 - c) Whether the failure to comply has been or can be remedied within a reasonable time;
 - d) **Whether the failure to comply was due to the party or the party's legal practitioner; and**
 - e) Whether the trial date or any likely trial date can still be met if relief is granted.
- Other than this, there is no general provision in **CPR 2000** for the failure of an attorney-at-law to do something in relation to the case. Cases such as *The Commonwealth of Dominica, HCVAP 2008/003 Vena McDougal v. Reno Romain* seem to support the position.

[66] Mr. Leon's application will be struck out.

[67] **Court's Order**

1. The application is struck out.
2. Costs to Mr. Pierre in the sum of \$800.00 and same is payable within 21 days of delivery of this decision.

**Rosalyn E. Wilkinson
High Court Judge**

By the Court

Registrar