

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

COMMONWEALTH OF DOMINICA

DOMHCV 2016/0406

BETWEEN:-

EDISON CHENFIL JAMES

Claimant/Appellant

and

THE DIRECTOR,
DOMINICA SOCIAL SECURITY

Respondent

Appearances:

J Gildon Richards for the Claimant/Appellant
Celia M Delauney for the Respondent

2021 :June
:July 28th

**ORAL RULING
ON WRITTEN SUBMISSIONS**

[1] **Stephenson J.:** Before the court is an application to strike out the claim made by Mr James on the grounds that the Court has no jurisdiction to hear the matter in that the appeal to the Appeal Tribunal is the final decision to be obtained in the claim at hand.

[2] It is important to note the chronology of the filings made in this matter to understand and appreciate the ruling made by this court below.

Chronology & Filings

- [3] On the 16th December 2016, the appellant/claimant (Mr James) appealed a decision which he claims was injurious to him by the Social Security (Determination of Claims and Questions) Tribunal on or about the 22nd November 2016 whereby the tribunal determined that Mr James' appeal against a decision by the Director of Social Security in relation to him was statute barred. Mr James contends that the appeal to the tribunal was filed pursuant to Regulation 9 of the Social Security (Determination of Claims and Questions) Regulations.¹A fixed Date Claim was filed with an affidavit in support as is provided for by Civil Procedure Rules 2000(CPR 2000).² (emphasis mine)
- [4] Mr James cited five grounds of appeal and is seeking in the circumstances of his case that his appeal be allowed, that the decision of the Director of Social Security be quashed, the decision of the Tribunal be set aside, that there be a rehearing by the court of his claim and for an order that the Director of Social Security make the necessary upward adjustment to his social security age pension entitlement.
- [5] On 25th May 2017 an application was filed for and on behalf of the defendant pursuant to part 10.3 of CPR to extend the time within which to file and serve their defence, with affidavit in support. The affidavit in support laid out the reasons for the application for an extension as well as the fact that that Counsel for the Claimant had no objection to the extension of time being given for the defendant to file its defence. The defendant also sought relief from sanctions.
- [6] On 27th June 2017, the defendant filed its acknowledgement of service indicating thereon that the defendant intended to defend the claim.
- [7] On the same 27th June 2017, an affidavit in reply (in defence) to the claim brought against them was filed. On the 28th June 2017 at a duly convened chamber hearing when the defendant's application for an extension of time³ to file its defence and relief from sanctions came up for hearing it was ordered inter alia in the presence of both counsel acting for the parties herein, *"that the affidavit of defence filed out of time is deemed properly filed ..."*

¹ Chapter 31:01 of the Laws of the Commonwealth of Dominica Volume 6 (as stated in the Fixed Date Claim form filed on behalf of Mr James)

² See Part 8 of CPR

³ Mentioned in paragraph 5 above

[8] Upon a perusal of the Court's file it is noted that the duly signed and approved draft order is on the file and a minute of the order appears on the file jacket, however it would appear that the order was never perfected. I make reference to part 42.8 of CPR 2000 which states that "*A judgment or order takes effect from the day it is given or made, unless the court specifies that it is to take effect on a different date.*" Therefore even though the order of court was never perfected it still remains an order of court and took effect on the 28th June 2017 when granted by this court.

[9] On the 11th September 2020 the defendant then filed a notice of application ("*the application*") pursuant to part 9.7 of the Civil Procedure Rules 2000 (CPR 2000) for an order declaring that the court does not have the jurisdiction to proceed with the hearing of the fixed date claim/appeal, that the claimant has failed to comply with Part 60.2 (2)(b) CPR 2000 and in the circumstances of the case an application was made for the court to strike out the claim brought by Mr James.

[10] The stated grounds of the application were that the defendant is a Statutory Corporation and is governed by the **Social Security Act**⁴ and there is no statutory prescription in the said Act for appeals to the High Court against a decision of the Social Security Tribunal and that Mr James has failed to comply with Part 60.2(b) of CPR to state the enactment enabling the appeal. An affidavit in support of the application was sworn to by the Deputy Director of the Defendant.

[11] Mr James did not file an affidavit in response to the application. He however opposed the application and filed submissions⁵ with authorities⁶ regarding his opposition. The defendant filed submissions in support of their application⁷. Mr James filed submissions in reply to the defendant's submissions.⁸

[12] This court has reviewed all the submissions and authorities filed. Reference will be made to those submissions which were considered necessary to explain the court's conclusions. It is to be noted that failure to make specific mention of any point of submission does not mean that it has been ignored or there has been a failure to take it into account. This is my ruling.

⁴ Chapter 31:01 of the 1990 Revised Laws of Dominica (Now the 2017 Revised Laws of Dominica) Volume 6

⁵ Filed on the 8th October 2020

⁶ Authorities filed on the 31st December 2020

⁷ Filed on the 5th November 2020

⁸ Filed on the 15th December 2020

Challenging the Court's jurisdiction:

[13] Challenging a court's jurisdiction is said to be one of the best defences that can be mounted on behalf of a defendant, however, that challenge has to be properly made and consistent with the terms of the Procedural Rules governing the case.

[14] CPR 2000 makes provision for the procedure for disputing the court's jurisdiction. It provides:

"9.7 (1) A defendant who disputes the court's jurisdiction to try the claim may apply to the court for a declaration to that effect.

(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.

(3) An application under paragraph (1) of this Rule must be made within the period for filing a defence; the period for making an application under this Rule includes any period by which the time for filing a defence has been extended where the court has made an order, or the parties have agreed, to extend the time for filing a defence. *Rule 10.3 sets out the period for filing a defence.

(4) An application under this Rule must be supported by evidence on affidavit.

(5) A defendant who –

(a) files an acknowledgement of service; and

b) 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.

...."

[15] The application in the case at bar challenging the Court's jurisdiction was made on the 11th September 2020. The court notes Counsel Ms Delaunay's eloquent submission *"that it should be noted that between the date the appeal was filed and September 11 2020 the date of the application challenging the court's jurisdiction to hear and determine the appeal that a number of exogenous and impactful events occurred which disrupted life in general, including Hurricane Maria, which devastated the island of Dominica in September 2017 as well as the ongoing Covid 19 pandemic"*⁹

⁹ See paragraph 1.3 of the submissions filed on behalf of the defendant applicant on the 5th November 2020

[16] This in this court's respectful view does not assist the defendant's application in anyway as the application is sure to fail for the reason that the defendant in filing its defence has accepted the jurisdiction of the court to hear its application.

[17] The learning in Halsbury's laws of England on Civil Procedure¹⁰ is very clear in this regard it says:

"A defendant who wishes either to dispute the court's jurisdiction to try the claim, or to argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have. A defendant who wishes to make such an application must first file an acknowledgment of service; and he does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

Such an application must be made within 14 days after filing an acknowledgment of service, and must be supported by evidence. If the defendant files an acknowledgment of service, and if he does not make such an application within the period specified, he is to be treated as having accepted that the court has jurisdiction to try the claim."

[18] It is well established law that if a party files his or her defence he has in fact submitted to the court's jurisdiction and cannot after that fact seek to challenge the court's jurisdiction as to file ones defence in fact amounts to submitting one's self to the jurisdiction of the court.

[19] Service of a defence will normally amount to a voluntary submission to the jurisdiction of the court, such that the court can assume jurisdiction over a defendant as of right and without an exercise of discretion.

[20] In **Denfield Matthew v Caribbean Golf Lifestyle Ltd**.¹¹ the period for filing a defence was set by the Master in her Order of 24th February 2011 at 42 days after the date of service of the claim form, the Claim Form having been served on the defendant on 21st or 22nd July 2011. On the 3rd of September 2011 the defendant was treated as having accepted the court's jurisdiction in the matter. No issue was taken about the defendant's submission to the jurisdiction of the Court.

¹⁰ Halsbury's Laws of England/Civil Procedure (Volume 11 (2020), at 333. - Procedure for disputing the court's jurisdiction

¹¹ ANUHCv 201010432

[21] The judge in this case made reference to and applied Part 9.7 (1) - (5) of the Civil Procedure Rules 2000 which states:

- "9.7 (1) A defendant who disputes the court's jurisdiction to try the claim may apply to the court for a declaration to that effect.
- (2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.
- (3) An application under paragraph (1) of this Rule must be made within the period for filing a defence; the period for making an application under this Rule includes any period by which the time for filing a defence has been extended where the court has made an order, or the parties have agreed, to extend the time for filing a defence. *Rule 10.3 sets out the period for filing a defence.
- (4) An application under this Rule must be supported by evidence on affidavit.
- (5) A defendant who –
 - (a) files an acknowledgement of service; and
 - (b) 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. " ...

[22] The law and approach to be adopted by the court was examined, very clearly stated and applied by Master Glasgow in the Anguilla case of **Satay Limited et al v Martin Dinning**¹². In that case the respondents urged the court to find that, by filing an application for an extension to file a defence without reservation, the applicants waived their right to rely on or claim immunity. The applicants' argument was that CPR 9.7 itself states, that an application to dispute the court's jurisdiction can be brought during any period within which the defence can be filed or has been extended by accord or by an order of the court. Therefore in the circumstances of that case that the applicants have not waived their right to dispute the court's jurisdiction by filing an application for an extension of time to file a defence.

[23] In that case reliance was placed on **Charter Capital Limited v National Bank of Anguilla Limited**¹³ to underscore the point that a defence or other step taken in the proceedings would amount to a submission to the jurisdiction of the court and by extension, a waiver of the immunity. The applicants argued that the application having been filed within the period agreed to be extended by the parties, the application to dispute the court's jurisdiction was therefore properly before the court.

¹² AXAHCV2016/0051

¹³ AXAHCV2014/0036

[24] In the **Charter Capital Case**¹⁴ Master Glasgow reproduced the test which was reproduced and applied in **Global Multimedia International Ltd v ARA Media Service** by Sir Andrew Morritt C¹⁵.

This was the full exposition of Patten J in **SMAY Investments Ltd v Sachdev**¹⁶ when he said:

"In approaching the question of submission, I have in mind the following authorities. In **Astro Exitto Navagacion S.A. v. W.T. Hsu**, otherwise known, more pronounceably, as **The 'Messiniaki Tolmi'**, [1984] 1 Lloyd's Reports, 266, Lord Justice Goff (as he then was) at page 270, said this: Now a person voluntarily submits to the jurisdiction of the Court if he voluntarily recognizes, or has voluntarily recognized, that the Court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings. In particular, he makes a voluntary submission to the jurisdiction if he takes a step in the proceedings which in all the circumstances amounts to a recognition of the Court's jurisdiction in respect of the claim which is the subject matter of those proceedings. The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the Court exercising its jurisdiction in respect of such claim. Whether any particular matter, for example an application to the Court, amounts to a voluntary submission to the jurisdiction must depend upon the circumstances of the particular case. 'In **Sage v. Double A Hydraulics Ltd**, [1992] Times Law Reports, 165, Lord Justice Farquharson said (and this is a report of the judgment which is not reported in *oratio recta*): '*A useful test was whether a disinterested bystander with knowledge of the case would have regarded the acts of the Defendant, or his solicitors, as inconsistent with the making and maintaining of his challenge.*' In arriving at the view to be imputed to the disinterested bystander, it seems to me that one has to bear in mind that there will be an effective waiver, or a submission to the jurisdiction, only where the step relied upon as a waiver, or a submission to the jurisdiction, cannot be explained, except on the assumption that the party in question accepts that the court should be given jurisdiction. If the step relied upon, although consistent with the acceptance of jurisdiction, is a step which can be explained also because it was necessary or useful for some purpose other than acceptance of the jurisdiction, there will, on the authorities, be no submission. If the well-informed bystander had been left in doubt because what the defendants had done was equivocal, in the sense that it was explicable on other grounds in addition to agreement to accept the jurisdiction of the court, then the conclusion must be, on the authorities, that there would have been no submission to the jurisdiction. The representation derived from the conduct of the party said to have submitted must be capable of only one meaning."¹⁷

¹⁴ *ibid*

¹⁵ [2006] EWHC 3612 at para 27

¹⁶ [2000] 1 WLR 1973 at p.1976, quoting from Colman J in *Spargos Mining NL v Atlantic Capital Corporation* [1995]

¹⁷ [2006] EWHC 3612 at para 27

[25] In the BVI Case of **Enzo Adari –v- Edi Gay Adari**,¹⁸ Rawling JA said this, “*Waiver is based on conduct. It is my view that waiver applies in all aspects of proceedings, including the proceedings in the present case. A court could find that a party in a case has so conducted the proceedings that that party is estopped from denying that a counter-party, having acted in accordance with that conduct, is entitled to rely on that conduct in relation to the proceedings*”

[26] The learned justice of appeal found that Mrs. Adari’s conduct of those proceedings amounted to a waiver in a manner that she was estopped from asserting her right to mount a forum challenge at that stage. Likewise in the case at bar, the defendant has filed a defence, successfully applied for the defence which was filed out of time to be deemed properly filed and then thereafter sought to mount a challenge to the court’s jurisdiction.

[27] Looking at the conduct of the defendant in the case at bar objectively, this court finds that in filing their defence out of time and applying to have that defence deemed properly filed and obtaining leave as stated earlier in this ruling the defendant took an unequivocal step in submitting themselves to the jurisdiction of this court and as such they have waived their right to challenge the Court’s jurisdiction at this stage. (emphasis mine)

[28] It is therefore the finding of the court that based on the provision of Part 9.7(5) of the CPR the defendant by its conduct of filing a defence submitted itself to the jurisdiction of the court and cannot now seek to challenge the said jurisdiction. Put another way in filing the defence the defendant waived its right to challenge the jurisdiction of the court and therefore the application which they now seek to bring must be dismissed.

[29] The defendant’s application is therefore dismissed with costs to the claimant in the sum of \$1,200.00. The matter will now take its normal course.

¹⁸ (Civil Appeal no 8 of 2005)

[30] I wish to thank counsel for their submissions made in this case and to the Court's legal intern Miss Devi St Luce a final year student at the Hugh Wooding Law School for their kind assistance in this matter.

M E Birnie Stephenson
High Court Judge

BY THE COURT

[seal]

REGISTRAR