

rate of \$10.00 per week for each child. The Respondent applied to the District Court at Hamilton for an order increasing such rate of maintenance, such increase being opposed by the Appellant on the ground that he was not in a financial position to pay any more than \$10.00 per week for each child.

The Respondent's application first came before Family Court Judge Cartwright on the 9th day of June 1983 when it appeared that there was insufficient time to complete the hearing. The matter came before the Judge again on the 1st day of August 1983 by which time the Appellant had applied for orders suspending or cancelling maintenance payments in respect of both children on the grounds of his poor financial position, he being involved in a company called Highway Village Limited in respect of which a Receiver had been appointed on the 8th day of July 1983 and the Appellant had applied for an Unemployment Benefit. In the circumstances, the learned Family Court Judge made an order suspending the payment of maintenance for both children until the 1st day of March 1984. The company had two substantial secured debts totalling \$365,000 and additional unsecured debts, increasing its total indebtedness to \$500,000.

Furthermore, the Appellant himself had substantial personal debts, including some \$140,000 which he had borrowed from his father in addition to a mortgage on his house property of \$30,000.

The Respondent appealed from that decision to the High Court seeking an order reversing the suspension of the children's maintenance. The appeal was dismissed. Following her unsuccessful appeal, the Respondent applied again in the Family Court for an increase in respect of the maintenance

payments which had been suspended to 1 March 1984 and again the Appellant sought an order suspending maintenance payments until further order of the Court. The two applications were heard in the Family Court on the 30th day of May 1984 again by Judge Cartwright. In an oral decision following the defended hearing, the Appellant's application for the suspension of the maintenance orders was dismissed and orders were made against him for maintenance to begin immediately at the rate of \$10.00 per week for each child, such maintenance to continue at the rate until the 1st August 1984 when maintenance would begin at the rate of \$15.00 per week for each child. As the Appellant had not paid maintenance for the children since the 1st March 1984, when the suspension of the original maintenance order ceased, he was ordered to pay the arrears, after the 1st of August 1984, at the rate of \$2.00 total per week.

Since the previous hearing on the 1st August 1983, the business of Highway Village Limited had been sold, leaving a deficit to secured creditors estimated at between \$15,000 to \$20,000. As one of the secured creditors, the National Bank of New Zealand Limited, had the company debt secured by the personal guarantee of the Appellant, it lodged a Caveat against the title to his home in Plimmerton, thereby adding to the personal indebtedness of the Appellant who still owed his father the large sum of \$140,000, with interest thereon amounting to over \$8,000. His only income was from an Unemployment Benefit of \$113.00 per week. His de facto wife earned approximately \$90.00 per week. Their combined income, supporting two children of the

de facto wife, who were still at school, and two older children of the de facto wife were being supported to some lesser extent.

The evidence of the Appellant referred to various attempts he had made to find employment, without success, and he said "I have answered various advertisements in the newspaper concerning employment, but quite frankly I am placed in an unenviable position that I cannot really make any decision until I find out what the shortfall is, how much money I am going to end up owing the bank, and what I am going to do. Currently I would have to find a job paying me \$500.00 (per week) just to pay my father back".

I need not traverse in detail his various other attempts to find employment, such as in the fishing industry or as a motor vehicle dealer and otherwise.

The question as I see it is whether or not he was able to satisfy the Judge that he had made genuine attempts and every reasonable effort to find employment so that he could meet his obligation to contribute to the maintenance of his own children.

The Judge had the benefit of seeing and hearing the Appellant give evidence on three occasions and would have been able to assess the calibre of the Appellant in the work force, taking into account, of course, the extent of unemployment in New Zealand today. The learned Judge had said in her judgment of the 1st August 1983: "Mr Carmichael's evidence was carefully tested today and in particular his evidence concerning his ability to work. I accept Mr Carmichael is in a position to work, but at present his personal and company affairs are in so much turmoil that I cannot imagine that he would be in a position immediately to step into a job. I accept that he will

5.

find work and indeed he will have to find work within the very near future if he is not going to become personally bankrupt on top of all his other financial problems.... in all the circumstances of this particular case, I want to state quite clearly that I accept that the two children need more assistance from their father financially, but I am also of the view that he is not at the present time in a position to commit himself to providing such assistance.... I must be utterly realistic about Mr Carmichael's present circumstances. I believe that he will and must obtain a job in the near future but at the present time it would be unrealistic of me to require him either to increase or indeed to pay the existing maintenance and I propose to suspend payment of maintenance for the two children from today's date until the 1st of March 1984. I had given serious consideration to deciding whether or not as at that date to fix an increased sum of maintenance for S and T "so that there was no longer any need for the parties to come back to Court to argue whether or not there should be an increase. I think it would be unrealistic of me to take such a course while Mr Carmichael's present circumstances are so unpredictable. I have fixed a period of some seven months from now because I believe that Mr Carmichael will need that period of time within which to clarify his earning potential and to get back on his feet again so that he can start providing a realistic sum of maintenance for S and T.

By the 1st of March 1984 I expect Mr Carmichael to be in a position not only to resume maintenance at the rate of \$10.00 per week for each of the two children, but to look

realistically at increasing that sum. But I do not in any way wish to tie the hands of any Judge who might have to deal with this matter as from that date. I simply want to make the message abundantly clear to Mr Carmichael that he is being given a chance to sort out his own affairs, but that is not to say that S and T in the long term are to suffer financially."

It was ten months later that the matter came before the Judge again. By this time the company business had been sold and the Appellant was no longer involved with it. In fact he said "The least I am involved with it the better". He was therefore free to seek other employment and in that period of ten months he had applied for six jobs. When asked what he had done with his time, he said "I have helped a friend of mine build a boat." and when asked if he was being paid for that, he said "No. I have been an active man all my life. I can't just sit down and do nothing. I tried that for a month so I just helped friends or potter around in my boat shed."

The answers to questions in cross-examination must be considered in the light of his evidence in chief already quoted in which he said "....I cannot really make any decision until I find out what the shortfall is...." On reading his evidence, I am left with the impression that the Appellant was not making a genuine effort to find employment and simply hoped to have maintenance payments for his children further suspended.

However, it was the learned District Court Judge who had the opportunity to see and hear the Appellant and I have no doubt

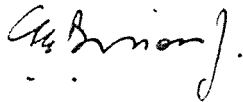
that she is well justified in reaching her conclusion which she expressed as follows:

"I find that Mr Carmichael, on the evidence I have heard today, has not made sufficient effort over the last seven (sic) months since my judgment to find work which would produce an income higher than \$113.00 per week. I take the view that he has concentrated all his employment seeking on the type of work which might enable him to begin to restore his personal fortunes but has ignored his obligations to the children of his former marriage as clearly set out by me in my initial judgment. I consider from an analysis of his previous experience and of his recent qualifications in the fishing industry that he has a potential earning capacity greater than \$113.00 per week and that is a matter I am obliged to take into account so far as Section 72 is concerned.... I gave Mr Carmichael a period of grace as a result of my judgment last year to enable him to put himself in a position where he could contribute to the children's maintenance. He has not done that in my view.... In any event, it seems to me that the time has now come where he must contribute to the children's maintenance."

The learned District Court Judge addressed herself to the statutory requirements in considering a maintenance application and I have no occasion to find that her decision was wrong in fact or in law. Mr Jerram did question the order providing for maintenance to increase from the 1st of August 1984 when the circumstances of the Appellant at that time were not presently known at the time the order was made. However, just as the learned District Court Judge in 1983 had suspended

maintenance payments for a period to enable the appellant to sort out his financial affairs, he is now being given some further relief by maintenance payments being limited to only \$10.00 per week for each child from his current income and then taking into account his earning potential, a further period of two months is allowed for him to find work so as to pay maintenance at the higher rate of \$15.00 per week per child which is still a small contribution from him towards outgoings totalling \$11,208 per annum paid by the Respondent for the children's needs. In effect, the Appellant is being given a concession for a further two months, making a total concession over a period of twelve months so that he has been given every opportunity to so arrange his affairs as to be able to meet an obligation to contribute towards the support of his own two children and it is well time he did so.

The appeal is dismissed. Submissions can, if necessary, be made on costs. In the meantime they are reserved.



Solicitors for Appellant: Messrs McKinnon, Garbett and Company,
Hamilton

Solicitors for Respondent: Messrs Stace, Hammond, Grace and
Partners, Hamilton