12/7 NZLR X

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

M 82/82

760

BETWEEN CLAPHAM

Appellant

A N D CLAPHAM

Respondent

Hearing: 4 July 1984

Counsel: B.H.S. Neal for appellant
M.A. Courtenay for respondent

Judgment: 11 July, 1984

JUDGMENT AND REASONS FOR JUDGMENT OF SAVAGE J.

This is an appeal from an order of the District Court at Napier made on the 9th April 1981 which has an unfortunate and tangled history. On that date District Court Judge Sheehan made an order in which he continued the suspension of maintenance orders he had previously made in respect of the three children of the parties until the further application by either party but with a direction that the suspension was to be reviewed in any event no later than the 31st March 1982. To understand the issues raised in this appeal as well as the reasons for its protracted history, it is necessary for me to give a brief general survey of the matter.

The parties, who had been married, apparently separated in June 1977. At that time they lived in Timaru. A maintenance agreement was entered into at the Magistrate's Court at Timaru on the 28th June 1977 and was subsequently varied in an order made by the court on the 17th November 1977 whereby the respondent husband was ordered to pay towards the maintenance of his wife the sum of $16 per week and of his three children the sum of $8 per week for each child, making a total of $40 per week. There was also a matrimonial property agreement in terms of which the wife was to have occupation of the matrimonial home subject to her paying all the outgoings except the payments on the second mortgage which apparently amounted to some $18 per week. The respondent husband moved to Napier and the appellant wife remained in Timaru, where she entered into a relationship with another man, a Mr M. This apparently commenced about August 1979 and she is now married to him. The respondent husband fell into arrears with his payments under the court order made in November 1977 and he applied to the Magistrate's Court at Napier for a variation of the order. The appellant wife made a similar application in reply. The case was heard on the 18th March 1980, by which time the husband had also entered into a relationship with another woman, who was pregnant to him. Mr A.J. Sheehan, then a Stipendiary Magistrate, now a District Court Judge, made an order varying the maintenance payable by the husband. He cancelled the order in respect of the wife, who, as already noted, was living with Mr M and remitted arrears in

respect of her. In respect of the children he said he was of the opinion that the wife had made out her case for an increase in respect of them but was equally satisfied that at the present the husband was unable to effect payment of maintenance. He had previously noted that the parties had agreed that the matrimonial home should be sold, at which point the financial burdens of both parties would to some extent be eased. He went on to make an order increasing the maintenance for each child from $8 per week to $10 per week but further ordered that the orders were "to be suspended pending a further application to the court by either party in the expectation of course that such application will be made on the sale of the matrimonial home".

Towards the end of 1980 the matrimonial home was sold, in the event to the wife, and the husbnd received a sum in excess of $5,000, though the net figure was $4,811. The wife then applied, in terms of the order made on the 18th March 1980, to terminate the suspension of the order then made for maintenance for each of the children in the sum of $10 per week. The application was heard on the 9th April 1981 by Judge Sheehan. He heard evidence from the husband as to his present position but no evidence was called for the wife. I shll refer to the husband's evidence, which included his weekly budget, later. The judge, after giving his reasons for the course he was to follow, declined to terminate the suspension ordered previously and made an order continuing the suspension of the maintenance orders "until further application by either party but with the

suspension to be reviewed in any event no later than 31 March 1982". It is against this order continuing the suspension that the wife has appealed.

It is, however, necessary to recount the later history. A notice of appeal was filed within 28 days of the order but thereafter the appeal languished somewhat. After the 31st March 1982 the wife's solicitors made a further application to the District Court to review the matter in accordance with the terms of Judge Sheehan's order of the 9th April 1981 and also applied to have the wife's evidence taken at Timaru, which was done. Subsequent to the taking of her evidence there were communications between the solicitors and an agreement was arrived at on the 11th June 1982 which resulted in the suspension of the maintenance order being terminated and a consent order being made. The consent order was that the maintenance for each child should be fixed at $6.66, the first payment to be made on the 17th May 1982. These payments were to continue until the 9th October 1982, at which date the full amount of $10 each should be paid. The wife also sought a fixture for the hearing of the appeal, which came on for hearing on the 20th October 1982 before Jeffries J. (There appeared to be some uncertainty about the precise date but the point is immaterial.) Apparently there was some argument before Jeffries J. as to whether or not there had been an agreement reached between counsel at the time the agreement had been reached whereby the suspension was terminated that the appeal should be withdrawn. Counsel, and neither was counsel

who appeared before me, had been unable to agree as to what had been intended and Jeffries J. made a note on the file as follows:

> Adjourned by consent for counsel to carry out enquiries as to arrangements reached at time of consent order."

In August 1983, nearly a year later, the wife's counsel made an affidavit setting out his recollections of what had occurred and the reasons for them. In February 1984 the husband's counsel made an affidavit in reply. I record that after hearing Mr Neal and Mr Courtenay on the matter I directed that I was not prepared to try to determine on those affidavits whether or not there had been some agreement between counsel involving the withdrawal of the appeal and that accordingly the appeal must proceed in the ordinary way.

The position accordingly is that on this appeal the sole matter in issue is whether or not Judge Sheehan was wrong in the order he made on the 9th April 1982 in continuing the suspension of the maintenance order. That suspension in result lasted from the 9th April 1981 to the 17th May 1982, when, by consent, it was lifted and the husband commenced paying at the rate of $6.66 per week per child. The amount involved is accordingly the total of $30 per week for approximately 57 weeks, i.e. approximately $1,700. There is one final matter which I must record before turning to the merits of the appeal. The proceedings were commenced under the Domestic Proceedings Act 1968. That Act was repealed by the Family Proceedings Act 1980, though it did not come into force until

the 1st October 1981. Both counsel were agreed that this appeal fell to be determined under the Domestic Proceedings Act 1968 in accordance with the transitional provisions of s 192 of the Family Proceedings Act 1980.

I turn now to the appeal itself. It will be recalled that Judge Sheehan had on the 18th March 1980 made an order increasing the children's maintenance to $10 per week but at the same time making an order suspending payment, in effect, until the matrimonial home was sold. When the matter next came before Judge Sheehan on the 9th April 1981, he had before him evidence by the husband of his then circumstances. It appears, as already noted, that the husband had received some $4,800 as the net proceeds of the sale of the matrimonial home. He no longer had to pay the $18 per week in respect of the second mortgage on that home and his wages had increased by another $26 per week. On the other hand, it appeared that the husband had applied the $4,800 he had received in purchasing a house and in result his weekly outgoings were substantially increased as he had greater mortgage payments to meet than previously. It appeared, too, that he had sold the car he had previously had and purchsed another. His outgoings on that were substantially greater than the one he had owned at the time of the previous hearing. Judge Sheehan, after considering all the evidence, including the budget the husband produced of his weekly commitments, commented:

> The Court appreciates that Mr Clapham has in fact largely ignored the spirit, letter and intent of the court order of the 18th March 1980."

Nevertheless the judge held that because of the husband's actual commitments the suspension would be continued until a further application was made by either party but with the suepension to be reviewed no later than the 31st March 1982. In the course of his judgment the judge also said this:

> "It [the Court] appreciates of course that as a matter of public policy a person in the position of Mr Clapham who can afford to perform statutory duties should be compelled to do so to the extent he reasonably can without imposing undue hardship on himself and his second family."

The statutory duties are obviously those of maintaining his children, and a little later the judge went on to say:

> "The Court is concerned that the burden of maintaining Mr Clapham's children is thrust on to his former wife and the taxpayer but in this particular instance there seems little option."

Mr Neal for the wife referred first to s 85(2) of the Act which gives the court power to make an order varying an earlier order "... if it is of the opinion that since the making of the order the circumstances have so changed that the order ought to be varied, extended, or suspended". He then made several submissions but the main thrust of his argument can be reduced to two points: first, that the judge had been wrong to take into account in favour of the husband the added obligations that he had voluntarily incurred between the date of the first order and the hearing on the 9th April; secondly, that the judge appeared to be under the misapprehension that the

taxpayer, no doubt through the agency of the Social Welfare Department, would be providing some benefit for the children.

On the first point Mr Neal argued that it would be contrary to the public interest to allow the husband to incur voluntarily the sorts of obligations he had incurred here, which were all to his own long term advantage, at the expense of the obligation he owed his wife in respect of their children. Further he submitted that the husband's conduct was exacerbated by the fact that what he did was plainly contrary to the basis of the decision given by Judge Sheehan on the 18th March 1980, for the judge himself remarked upon it. On the second point he accepted that in appropriate circumstances the principle expressed in Newton v Newton [1973] 1 NZLR 225, that the duty of a husband to provide for his second family must not be discharged at the expense of his primary duty to maintain his first, did not wholly apply where the first family was in receipt of a social security benefit, but submitted that was not the case here. The wife was not receiving any benefit in respect of the three children and the judge appeared to be under some misapprehension in that respect. The judge appeared to think the competing interests were between the Social Welfare Department and the husband, rather than, as was the true situation, between the wife's position and the husband's position.

Mr Courtenay in reply submitted that obligations voluntarily incurred can nevertheless be factors properly taken into account by the court. He referred to Caron v Caruana [1975] 2 NZLR 372 and in particular to p 378, where Chilwell J.

accepted that voluntarily incurred obligations can still amount to changed circumstances under s 85 of the Act. I think Mr Courtenay is right, but in deciding whether it is appropriate or proper to take them into account it is necessary to consider the circumstances in which they are incurred and the reasons for incurring them. The judge expressed the view that he could appreciate the reasons for the husband incurring the obligations and had some sympathy for him. He said the husband had made the point that he had a new life to live and so, presumably, was justified in buying a house for his new family. The judge said he considered the husband was not neglectful or unmindful of his obligations to his children. I regret I cannot accept that view in the particular circumstances. I do not think it is an acceptable reason for excusing a father from carrying out his court ordered obligations to provide for his children to say that it would be to his advantage to purchase a house rather than rent one if it means that the additional costs involved in the purchase make it impractical to pay the court ordered maintenance for the children; and that is so even if the purchase is an advantageous one as Mr Courtenay submitted. The same point applies in relation to the additional obligations incurred in relation to the motor car the husband purchased. I think, too, that Mr Neal is right in his submission that the husband's conduct is the more unacceptable because it was done plainly in the face of the spirit and intent of the judge's decision given on the 18th March 1980. I think that the judge was probably

influenced by his apparent but incorrect view that some benefit was available to the wife in respect of the children. Mr Courtenay suggested the judge's remarks in respect of that matter were capable of some other construction but I do not accept that.

I think therefore that the judge was wrong and the appeal should be allowed. Mr Courtenay had submitted that if that was the conclusion to which I came then I should have regard to the fact that when the parties agreed in June 1982 that the suspension should be terminated they agreed that the amount of the maintenance payment should be fixed at $6.66 and not $10, at least for the next five months, and therefore the suspension should be similarly terminated as a result of the appeal. As a course that has its attractions, but I do not think I can take such subsequent events into account, even though both counsel were agreed that on an appeal the appellate court can make whatever order the District Court could have made. In my view, I must consider the matter on the basis of what was before Judge Sheehan on the 9th April 1981 and I do not know if there was evidence before him which would then have justified the order Mr Courtenay suggests. Hwever, I think the matter is not of great importance, since in my view some allowance can be made for it in the manner mentioned below. Accordingly I allow the appeal and order that the suspension of the maintenance order be treated as terminated on the 9th April 1981 and the husband accordingly became liable to pay maintenance at the rate of $10 per week for each child from that date to the 17th May 1982.

It is, perhaps, not wholly necessary for me to add what I now do, but, in view of some of the submissions made, I think it may be helpful to do so. The effect of allowing the appeal is that the husband has become liable for the maintenance over the period that the order was suspended from the 9th April 1981 and the wife can accordingly take steps to recover the sum as unpaid arrears. The husband, on the other hand, can apply to the District Court to remit, wholly or in part, the arrears if it considers it reasonable to do so. See s 85(6). What the parties choose to do is, of course, a matter for them, but if an application to remit the arrears or part of them is made the court would no doubt have regard to the husband's then circumstances, his actual capacity to pay them and all such other matters as are usually taken into account. I would make reference in this regard to three matters which the court might consider as proper matters to take into account. First, the matter of the consent order of the parties made in June 1982. Second, it appears to me that there was an unexplained delay on the part of the appellant wife in prosecuting the appeal. Had the appeal been more expeditiously pursued, it may have been that the amount of arrears that has accumulated would not have been so great; on the other hand, there may have been an adequate explanation for the delay. Third, the question of the misunderstanding between counsel referred to earlier in this judgment may have led to the husband being left with the erroneous impression that the appeal had been withdrawn and he was not therefore subject even to the contingent liability that

depended upon the result of the appeal. The effect of both the second and third points may have been to put the husband in the position that he thought he was not liable and in result is now, to some extent, in a worse position than he would have been if he had been aware of the correct position earlier.

I make no order as to costs.

Solicitors for appellant: Walton & Stubbs (Timaru)

Solicitors for respondent: Langley, Twigg & Co. (Napier)