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[SQUARE BRACKETS]

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**IN THE FAMILY COURT
AT AUCKLAND**

**I TE KŌTI WHĀNAU
KI TĀMAKI MAKĀURAU**

**FAM-2021-004-000193
[2022] NZFC 858**

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[NURFATIHA KAMARUZAMAN] Applicant
AND	[SRICHARAN NETHARSHAN] Respondent

Hearing: 21 January 2022

Appearances: C Braybrook for the Applicant
J Shaw for the Respondent

Judgment: 2 February 2022

RESERVED JUDGMENT OF JUDGE D AB BURNS
**[In relation to application for second interim spousal maintenance pursuant to
s 82 of the Family Proceedings Act 1980]**

- [1] The applicant and respondent were married in Malaysia on [date deleted] 2006.
- [2] The parties separated on [date deleted] 2019 approximately 2 years 2 months ago.
- [3] The respondent is in the process of preparing marriage dissolution proceedings.

[4] The parties are the parents of two children namely [Jananee Netharshan] born [date deleted] 2008 (aged 13) and [Abira Netharshan] born [date deleted] 2012 (aged 9).

[5] Substantive relationship property proceedings were commenced by the applicant in 2020. The PRA proceedings are yet to be determined by the Court.

[6] The respondent is hopeful that the PRA proceedings can be settled outside of the Court hearing. The two major assets of the parties are the former family home situated in [suburb deleted] which is subject to a mortgage and the shares in a construction company known as [name deleted].

[7] The applicant also filed proceedings under s 82 of the Family Proceedings Act 1980 (“the Act”) and her first application was heard before Judge McHardy at the Auckland Family Court on 2 June 2021. His Honour issued a reserved judgment on 18 June 2021 and ordered the respondent to pay interim spousal maintenance in the amount of \$900 per week for a period of six months.

[8] The parties were unable to resolve the ongoing question of spousal maintenance. As a result the applicant has brought a second application for interim spousal maintenance and seeks maintenance to be paid at the same rate as ordered by Judge McHardy for a further six months.

[9] The second application is opposed.

Applicant’s case

[10] A summary of the case for the applicant is inter alia as follows:

- She has said in the affidavit in support of her second application that her circumstances remain essentially unchanged since the Court hearing in June 2021. She acknowledges continuing to receive a benefit but her lawyer argues that it should not be taken into account.

- She sets out in her evidence that her expenses exceed \$1200 per week. She also says that she has taken steps to become financially independent however Covid-19 has delayed completion of her further education.
- She does not accept the evidence of the respondent that he has experienced significant decrease in revenue which has impacted on his income.
- She does not accept that he is not able to afford to pay her spousal maintenance. She refers to the financial statements recently provided by the respondent in disclosure which shows that the financial situation is the same as at the end of March 2021 as disclosed in his evidence in relation to the first hearing.
- She refers to the observations made by Judge McHardy that the financial evidence provided by the respondent to the Court in relation to the first hearing was unsatisfactory. She contends that the financial information provided by him continues to be unsatisfactory.
- She does not accept the reliability of a valuation report conducted by Lynch & Associates.
- She does not accept the contention that the respondent's income is significantly less than previously considered.
- She says that no weight should be put on that report because it is based on evidence provided by the respondent alone and agrees with Judge McHardy that the respondent does not have a history of providing credible and reliable information to properly base a decision upon.
- She points to notes contained in the report itself where Lynch & Associates Limited have determined the special purpose financial statements contained the following significant errors:
 - (i) profit and loss and balance sheet do not include accounts receivable of \$265,925 GST inclusive as at 31 March 2021.

- (ii) the \$265,925 accounts receivable is owing from invoices dated between 26 July 2020 to 15 March 2021 in respect of Downey Construction Limited and Total Infrastructure Limited.
- (iii) the result of this material revenue is understated and current assets are understated by \$265,925 for accounts receivable. The current liabilities are understated by \$67,747 for income tax payable and 28% on GST exclusive accounts receivable. GST is understated for GST on accounts receivable and retained income is understated.

[11] The applicant further contends that the special purpose financial statements corrected for the material errors of accounts receivable as of 31 March 2021, the company has significant cashflow problems as at 31 March 2021.

[12] The applicant referred to the further disclosure that she had sought from the respondent. She said that this disclosure had been declined. She questions the reliability of the accounts.

[13] She further argues that there is a discrepancy between the report and the respondent's position in respect of the report. She observes the report has noted a material error (referred to above) and then noted that the financial statements have been corrected for this material error. However the respondent has noted to counsel that Lynch & Associates used the financial statements as prepared by the respondent's registered tax agent, not financial statements prepared by Lynch & Associates. Information was sought from the respondent as to whether Lynch & Associates used the correct financial statements prepared by them as opposed to the tax agent. She questions whether the accounts have been prepared in accordance with the relevant standards.

[14] She also observes that the financial statements are incomplete and that there are no accounts receivable contained in any of the financial reports provided by the respondent.

[15] She further argues the respondent has not provided evidence showing what has occurred with the \$265,925 discrepancy in the company's assets (being the amount the assets are understated by). The applicant has received no clarification as to whether the invoice has been paid and if so if it had been paid to meet any company debts (thereby reducing the liability of the company). She therefore contends that no weight should be given to the Lynch & Associates financial report through no fault of the accountancy firm but contending the report is based on flawed financial statements. I also observe that the financial statements show a marked variation. The 2020 account show a gross income of \$2,075,759. Following year to 21 March 2021 shows a huge reduction to \$535,515. The 2018 year shows \$381,856 and the 2019 year \$748,795. The purported reduction appears to have been made at a time when the Court can take judicial notice that the construction industry in New Zealand is undergoing a major boom and there is a significant shortfall of skilled people in the industry. Despite good financial times the company has said to by the respondent to have had experienced a market reduction. I have read the affidavits of the respondent and do not see him providing a credible explanation as to why there has been a significant reduction. I observe the respondent does refer to the Covid-19 framework restrictions but I am aware that construction companies were are only required to lockdown for four weeks and most have been fully at work since. Also construction companies were able to claim the wage subsidy for any employees that were not able to work. This does not seem to provide a satisfactory explanation for the reduction.

[16] Accordingly the applicant asserts that the respondent is in a position to pay and has manipulated his accounts. I also observe that in the first evidence provided in support of the first application the respondent had brought a number of significant assets which indicated a good cashflow at the time.

Respondent's case

[17] Ms Shaw summarised her client's case in her written submissions and I set out paragraphs 17-27 inclusive of those submissions:

17. It is the Respondent's position that there is no reason why the Applicant cannot obtain work given the parties' eldest daughter turns 14 years [soon] and is legally able to care for her younger sister. If the Applicant does not wish to work full time, it is open to her to work

part time hours around the children's schooling. The Applicant's decision regarding this does not create an obligation on the Respondent to pay spousal maintenance, as she is able to meet her own reasonable needs, but is choosing not to.

18. The Respondent has offered to make voluntary payments to the Applicant of \$300 per week until end of January 2022. This offer has been put forward on the basis that:
 - (a) The Applicant can return to fulltime work from the end of January 2022; and
 - (b) The Respondent can only afford \$300 per week.
19. The Respondent complied with the Interim Order. He paid \$900 per week to the Applicant for 6 months (being a total of \$22,500). The Respondent also paid the Applicant \$1,951.80 per month in child support (being a total of \$11,710.80). The total amount paid by the Respondent to the Applicant in the previous 6 months is \$34,210.
20. From 1 June 2021 to 15 December 2021, the Respondent received income totalling \$56,415.87 from the following sources:
 - (a) Wages of \$18,492.27;
 - (b) Emergency bill payments transferred from the Respondent's business account of \$16,000;
 - (c) Wage subsidy of \$12,873.60; and
 - (d) Rental income of \$9,050;Total: \$56,415.87.
21. Of the \$56,415 received by the Respondent in the six month period, \$34,210 was paid to the Applicant leaving the Respondent with \$22,205 to meet his own needs, including the fortnightly mortgage repayments of \$1,482.28.

[Construction company]

22. The Respondent is the sole director and shareholder of [the construction company], which is one of the two primary relationship property assets (together with the family home).
23. The Respondent engaged an independent valuer, Lynch & Associates, in November 2021 to prepare an independent business valuation (Business Valuation). The Business Valuation evidences:
 - (a) [The construction company]'s value as at 31 October 2021 was \$54,000;
 - (b) Approximately \$137,000 is currently owed to Inland Revenue;

- (c) [The construction company] has significant cashflow constraints, is unable to pay its debts as they become due and is likely insolvent;
- (d) The company and Respondent are at risk of debt recovery action and prosecution for significant overdue debt and breaches of tax law (late filing);
- (e) The wage subsidy received from the government (as a result of a reduction of revenue of at least 40% due to Covid-19) (wage subsidy) has been a key source of income for [the construction company] (and in turn, the Respondent) over the last few months;
- (f) the wage subsidy has now come to an end;
- (g) [The construction company]'s future is uncertain.

Reduction to Respondent's Income

- 24. Given [the construction company]'s current financial state, the Respondent's income has reduced since the Interim Order was made and will continue to reduce further. In the previous 6 months he has taken wages of \$18,492.2712 and has been reliant on the wage subsidy, which came to an end in December 2021. His total income from salary, wages and the government assisted wage subsidy in the previous 52 weeks totals \$58,356.
- 25. When Lynch and Associates prepared the Business Valuation and undertook a forecasting exercise they calculated that the Respondent could take a salary of \$78,000 gross per annum, and that he could not put any further personal spending through the business. This is a decrease in excess of \$20,000 per annum, and from the net salary, the Respondent must pay the Applicant \$23,412 for child support.
- 26. The Respondent's expenses significantly outweigh his income. The Respondent's annual expenses were \$99,934 when Judge McHardy made the Interim Order, and they have increase to \$147,796 for the previous 12 months. The Respondent's day to day living expenses have remained largely the same, however he has also incurred maintenance payments of \$23,400 and legal and accounting fees (including over \$14,000 to Lynch & Associates to value [the construction company]).
- 27. The maintenance payment of \$900 per week are clearly not sustainable on an income of \$78,000, particularly when over \$23,000 is paid to the Applicant for child support. Given the precarious situation with [the construction company] regarding the debt to Inland Revenue, any further maintenance order would increase the likelihood of [the construction company] being liquidated. Given it is one of the primary relationship property assets, this would adversely affect both parties.

The law

[18] The law is well settled in this area and Ms Braybrook summarised it in paragraphs 8-17 of her submissions which I set out as follows:

8. The purpose of interim maintenance orders are to protect the position of the party who does not have means to meet their reasonable needs pending the determination of a substantive proceeding.
9. Under s 82 of the Family Proceedings Act 1980, any District Court Judge may make an order directing the Respondent to pay such periodical sum as the District Court Judge thinks reasonable towards the future maintenance of the Respondent's spouse until final determination of the proceedings or until the order sooner ceases to be in force.
10. These periodic orders last for six months and can be varied, suspended, discharged or enforced as if it was a final order in the Family Court. In *Beric v Chaplain [Maintenance]*, Judge McHardy confirmed that interim maintenance must be periodic.
11. There are no express statutory criteria the Court must follow when assessing whether to make an interim spousal maintenance order. The Court has an "unfettered discretion". The making of an interim order will depend on all the circumstances of the particular case. The Court must do what it thinks just.
12. When assessing whether to make an interim maintenance order, the Court should examine the reasonable needs of the Applicant over the period of the proposed interim order. Reasonable needs include payments toward appropriate accommodation and utilities; groceries and day-to-day living costs; an allowance for entertainment costs; and house maintenance. If there is a reasonable need, the Court should examine the means available to the applicant to meet those needs. "Means" encompasses any sums the applicant might expect to earn during the term of the interim order and any funds available to the applicant during that period. The applicant's means should be reasonably assured.
13. The Court should also assess the respondent's reasonable means to meet any shortfall or interim maintenance order if made. A respondent's actual and direct income, whilst important, is "not determinative for assessing his earning capacity". Alongside actual income, the earning capacity of the respondent should also be the focus of the Court.
14. The principles expressed under ss 62 to 66 of the Family Proceedings Act 1980 are not mandatory considerations but provide useful guidance to the Court in its determination of an application.
15. In the recent decision of *McDowell v McDowell*, relying on *RKFT v DPLH*, Judge Maude set out the principles to be applied as follows:

- a. It is intended to protect an applicant who has inadequate means until a substantive order can be made in regard to spousal maintenance.
- b. There are no special conditions or criteria that must be applied by the court.
- c. The court has an unfettered discretion to decide whether to:
 - i. Make an award; and
 - ii. Determine the amount.

That discretion must be exercised in a way that is just.
- d. Whether an order is made will depend on the circumstances of the case.
- e. The court will pay regard to the needs of the applicant over the period for which the order will subsist and the means available to meet those needs.
- f. The court will also consider the standard of living of the parties prior to separation.

16. When determining spousal maintenance applications, the Court can only have regard to the spouses' needs, not that of their children. The requirement under the Family Proceedings Act is to maintain the "other party", not the children. *Kumar v Kumar* noted.

...the costs of maintaining the children were to be removed from the assessment of reasonable needs for the spouse. It goes further than that of course and that is that there should be an allowance in general household expenses for a portion of that to be attributed towards the children who occupy the home together with the parent.

17. The Court of Appeal has held that monies received from Work and Income New Zealand ("WINZ") are discretionary and should not be taken into account as income received by the applicant. Section 62 of the Family Proceedings Act 1980 ("the Act") expressly provides that the domestic benefit is irrelevant. Furthermore, s 388 of the Social Security Act 2018 states that payment of a benefit does not restrict or otherwise minimise the liability imposed by the Act to pay maintenance or for the court's power to make a maintenance order.

[19] I accept there is essentially agreement between counsel as to the legal test that applies in this case and I accept Ms Braybrook's submissions.

Judgment

[20] I order the respondent to pay interim spousal maintenance for a period of six months from the date of the application at the rate of \$900 per week. I make the order for the following reasons:

- (a) I accept that the applicant's circumstances remain unchanged and her needs remain the same as considered by Judge McHardy in the hearing before him and as assessed in his reserved judgment. I am satisfied that the quantum ordered by Judge McHardy remains appropriate;
- (b) I am satisfied that the respondent is able to pay this amount. I am not satisfied that the evidence provided by the respondent as to his financial circumstances is reliable. I observe that the opinion obtained from Lynch & Associates is based on the accounts that were prepared by a person who was not a chartered accountant. I am persuaded that that person is not required to comply with the standards of chartered accountants. The accounts are not audited. The accounts show significant variability over the last two or three years. The assessment by the IRD and the arrears of tax assessed would indicate that the income of the company is higher than disclosed. Otherwise the taxation liability would not be so high. On looking at the financial information I am concerned that the respondent may have manipulated the financial situation to endeavour to persuade the Court that no spousal maintenance should be ordered. The Court has a wide unfettered discretion to order interim spousal maintenance. I am satisfied that authority is available to justify a second spousal maintenance application. I consider a further six months need has been established. I indicate however that the applicant may struggle to persuade the Court to make a final spousal maintenance order after that time. The parties would have been apart for well over 2 years by then and with the advancing ages of the children the applicant have to provide a significant explanation as to why she was not able to work in paid employment after a period of a further six months. I consider a further

six months is sufficient time for her to adjust to the separation and re-orientate her life and be in a position to be self-supporting. I am satisfied that she has provided an explanation as to why she is not in that position as at the date of the hearing before me but I give an indication that she will need to use her best endeavours to obtain employment in the next six months;

- (c) The purchase of an expensive motor vehicle and other property by the respondent indicates to me that he is able to re-arrange and re-prioritise his financial spending if he so chooses. I consider that he has a range of options available to him and the type of employment that he has chosen with the company being in the construction industry means that he has potential significant income available to him should he choose to take on the necessary contractual work that generates that income. He has the freedom to choose how much work he takes on and I am satisfied that he has the ability and the skills to take on more work which would enable him to earn the income to be able to pay the spousal maintenance. The fluctuating gross incomes as demonstrated in the accounts clearly prove that contention;
- (d) The respondent is living in the former family home and is therefore having the use of the applicant's capital. This frees him up from paying rent to a landlord and I consider that he is financially better off as a result. I consider that he is \$200-\$300 pw better off as a result and that assists him in meeting his obligation to the applicant. Also the respondent has the use of the capital entitlement that the applicant has in the company and this also places him in a better financial position to meet the ongoing spousal maintenance;
- (e) Once the parties finalise their relationship property divisions this should also have an impact on the ability of the applicant to seek further spousal maintenance. This may require the home to be sold so that the applicant can receive her capital entitlement;

- (f) I accept the submissions made by Ms Braybrook in terms of the criticisms of the income report by Lynch & Associates which I have referred to in this judgment. I consider those criticisms are well-founded and persuaded me to place little reliance on the accounts. This is not a criticism of Lynch & Associates and their methodology but the opinion is only as good as the underlying financial accounts which form the basis of that opinion. Those financial accounts were not prepared by Lynch & Associates and the Court has no evidence from the person or persons who prepared those accounts and their qualifications and experience. The Court has no evidence to be able to satisfy itself that the accounts are reliable. Judge McHardy having satisfied himself that the first application for interim spousal maintenance should be granted. The only basis for a change is the assertion by the respondent that his financial situation has deteriorated along with that of the company. Once that assertion is rejected the remaining situation remains unchanged and I concur with Judge McHardy that the financial accounts presented to the Court are unreliable and not persuasive. Ms Shaw acknowledged in her oral submissions that the case hinged on the Court's assessment of the Lynch and Associates report. She submitted that if accepted her client would be successful, but if not, the situation would be the same as before Judge McHardy. I find the report is not reliable because the underlying accounts on which the report is based are flawed as submitted by Ms Braybrook. As a result the applicant is successful. In addition I order costs on a 2B basis in favour of the applicant.

Judge DA Burns

Family Court Judge | Kaiwhakawā o te Kōti Whānau

Date of authentication | Rā motuhēhēnga: 02/02/2022