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**IN THE FAMILY COURT  
AT WAIHI**

**I TE KŌTI WHĀNAU  
KI WAIHĪ**

**FAM-2019-075-000104  
[2020] NZFC 4249**

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[JOY MALINA] Applicant
AND	[TED HENSLEY] Respondent

Hearing: 8 June 2020

Appearances: L Kearns for the Applicant  
G H Brant for the Respondent

Judgment: 3 July 2020

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**RESERVED JUDGMENT OF JUDGE S J COYLE  
[IN RELATION TO INTERIM MAINTENANCE]**

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[1] Ms [Malina] seeks maintenance from Mr [Hensley] under the Family Proceedings Act 1980. She and Mr [Hensley] had been in a de facto relationship for a number of years, separating on in October 2019.

[2] In February of this year Ms [Malina] applied for interim spousal maintenance, together with an application for final spousal maintenance. The hearing before me was set down to determine the issue of interim spousal maintenance only. In [48] of her affidavit of 26 January 2020 Ms [Malina] set out that she would need \$46,850.21 per month to meet her reasonable needs, based upon her previous standard of living. However, she indicated by way of interim spousal maintenance that she was prepared to accept \$15,000 per month for the next six months. However, during the hearing Ms [Malina] indicated that what she principally sought was enough by way of maintenance to cover her legal fees, and a small additional amount for her to live on. She sets out at [34] of her February 2020 affidavit that her average legal fees in the preceding four months were \$7013.91 per month. She additionally seeks \$1966.66 per month for accounting fees, and thus her legal and accounting fees amount to \$8980.57.

[3] Ms Kearns confirmed in her closing submissions that principally by way of interim spousal maintenance Ms [Malina] is seeking enough to cover her legal fees so that she is on an equal playing field with Mr [Hensley]. That submission is made on the basis that Mr [Hensley]’s father has met Mr [Hensley]’s legal fees which appear to be, to date, approximately \$81,000. In addition to these proceedings, there are also intended applications under the Property (Relationships) Act 1976 and applications under the Family Violence Act 2018.

### **Interim Maintenance Application**

[4] The Court’s jurisdiction to make an interim award of spousal maintenance is contained in s 82 of the Act. That section states:

#### **Interim maintenance**

- (1) Where an application for a maintenance order or for the variation, extension, suspension, or discharge of a maintenance order has been filed, 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, civil union partner,] [or de facto partner] ... until the final determination of the proceedings or until the order sooner ceases to be in force.

- (2) *Repealed.*
- (3) *Repealed.*
- (4) No order made under this section shall continue in force for more than 6 months after the date on which it is made.
- (5) An order made under this section may be varied, suspended, discharged, or enforced in the same manner as if it were a final order of [the Family Court].

[5] Pursuant to s 82 the test is what a Judge thinks is reasonable, with cases turning on their particular facts. An interim order lasts for six months and is a “stopgap measure designed to address any injustice or hardship which may arise between the time of substantive applications filed and the substantive hearing”.<sup>1</sup>

[6] While the discretion as to what is reasonable is a wide discretion, Ellen France J stated in *Tsoi v Hua*:<sup>2</sup>

I agree with the respondent who says that the statute is clear. In particular, there has been no change to s 61 which specifically says the Court shall apply ss 62 to 66 to cases other than s 82. The test for a grant of interim maintenance is that set out in s 82. The statutory principles set out in ss 62 to 66 are not therefore mandatory considerations. In practice, they are the sorts of things that a Court may well look at in determining whether the s 82 test is met but it is not mandatory to do so. Nor is the Court necessarily limited to considering those principles.

[7] Thus, the factors which the Court may consider in regard to interim maintenance are in part those set out in s 64 of the Act which are:

- (a) The reasonable needs of the applicant.
- (b) The ability of each party to support themselves, having regard to the division of functions within the qualifying relationship and the earning capacity of each party.

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<sup>1</sup> *L v R* FC Auckland FAM-2007-004-1465, 30 September 2008 at [14] per de Jong J.

<sup>2</sup> *Tsoi v Hua* [2006] NZFLR 560 (HC) at [19].

- (c) The responsibility of each party for the ongoing daily care of dependent children of the qualifying relationship.
- (d) The standard of living of the parties while they lived together.
- (e) Any reasonable period of education/training to be undertaken by the applicant to become self-sufficient.
- (f) Any other relevant circumstances.

[8] I adopt the approach taken by her Honour Judge Walker in *M v M* that the Court's enquiry could proceed on the following basis:<sup>3</sup>

- (a) What can be identified as the applicant's reasonable needs and means?
- (b) What is the ability of the respondent to meet those reasonable needs?
- (c) In assessing the ability of the respondent to meet those reasonable needs, can capital assets be taken into account?
- (d) Should judicial discretion be exercised to make an interim order?

**What can be identified as Ms [Malina]'s reasonable needs and means?**

[9] The first consideration is Ms [Malina]'s reasonable needs. In *Z v Z* (2) the Court of Appeal held that reasonable needs would be assessed with reference to the particular circumstances of the parties in a particular case, with the court stating:<sup>4</sup>

Obviously, "reasonable needs" is not limited to a subsistence level. Nor are reasonable needs necessarily uniform. What constitutes the reasonable needs of one person may not be sufficient to meet the needs of another.

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<sup>3</sup> *M v M* FC North Shore FAM-2006-044-2830, 20 March 2008 at [25].

<sup>4</sup> *Z v Z* (2) [1997] 2 NZLR 258 (CA), at 294-295.

[10] In *M v B* [economic disparity] the Court of Appeal considered the issue of reasonable needs with reference to a shared standard of living, with William Young P stating:<sup>5</sup>

On this basis, the wife's reasonable needs can fairly be capped by reference to the shared standard of living at or around (ie in the years immediately preceding) separation.

I also note that in the same case Hammond J commented that reasonable needs are not to be restricted only to the necessities of life and the Court should not be niggardly in its approach.<sup>6</sup>

[11] Finally, Venning J in *RK v DK* stated:<sup>7</sup>

[42] An answer could be that a high standard of living, over time, will create and instil expectations of a standard of living of that level. The standard of living may be such that, when the relationship ends, the spouse or partner may, through development of the expectations associated with that standard of living engendered during the marriage or relationship, have far greater reasonable needs than they can possibly meet from their own resources. The reasonable needs may be elevated to an extent they could not meet them, because of the higher standard of living.

[12] There appears to be acceptance by the parties that they enjoyed a high standard of living. Mr [Hensley]'s issue is that that high standard of living was financed by living beyond their means, principally by taking money out of his business, [a fishing company], and thereby increasing the amount he owed to the company through his shareholder's current account.<sup>8</sup> He argues that it is wrong to require him to incur more debt so as to allow Ms [Malina] to maintain, as he now says with the benefit of hindsight, the unrealistic and unaffordable standard of living that they enjoyed during their relationship.

[13] Ms [Malina] and Mr [Hensley] began living together in June 2000, becoming engaged in January 2002. They never married however and remained in a long-term de facto relationship, separating on 9 October 2019. Early on in their relationship Ms

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<sup>5</sup> *M v B* [economic disparity] [2006] 3 NZLR 660 (CA) at [197].

<sup>6</sup> *M v B*, above n 5, at [256]-[257].

<sup>7</sup> *RK v DK* [2011] NZFLR 468 (HC).

<sup>8</sup> As set out below, that assertion is only true in the last couple of years; prior to that his current account was in credit notwithstanding his taking drawings in excess of his shareholder salary.

[Malina] was working [in customer service]. During her pregnancy with their son [Travis], Ms [Malina] resigned from [her role] (she says at Mr [Hensley]'s insistence) and effectively worked full time for [the fishing company]. For many years now, she has worked exclusively for the company. As a consequence of the decisions both parties made, Ms [Malina] has been the primary caregiver for their son and out of the private workforce, working only for [the fishing company]. Clearly her ability to support herself now that the parties have separated is limited due to the divisions of functions within their relationship. She cannot continue to work for [the fishing company] post separation for obvious reasons.

[14] Ms [Malina] states that because of the income generated by [the fishing company], the parties enjoyed a high standard of living which included:

- (a) Dining out at restaurants three or four times a week;
- (b) The purchase of high-end appliances in their home;
- (c) The regular purchase by her of designer clothing;
- (d) Purchase of the principal family home in [the North Island] as well as a holiday home in the South Island;
- (e) The ability to fund cosmetic surgery for herself; and
- (f) The purchase of motor vehicles.

[15] Mr [Hensley] does not dispute that they had a high standard of living. He acknowledges that Ms [Malina] had cosmetic surgery and would regularly purchase designer clothing but maintains that she did so without any input from him and often behind his back. Regardless of whether he agreed with what was happening or not, it seems to me the parties had access to sufficient monies to enable them to live extremely well (albeit beyond their means more recently), and certainly at a standard of living which would be significantly higher than that enjoyed by most New Zealanders.

[16] Attached to her affidavit sworn on 26 February 2020 in support of the application for interim spousal maintenance, Ms [Malina] set out a projected monthly budget which showed her anticipated total monthly expenses of \$46,850.21 or annual expenditure of \$562,202.52. However, pursuant to her affidavit dated 29 April 2020 in terms of interim spousal maintenance Ms [Malina] indicated that she sought a payment of \$15,000 per month by way of interim spousal maintenance.<sup>9</sup> During the hearing she further modified that claim to be for a lesser amount, principally to enable her to cover her legal fees, with a small amount to meet her day to day reasonable needs. Her legal and accounting fees are on her estimate \$8,000 per month, thus, without clarifying the issue, she is seeking up to an additional \$7000 per month<sup>10</sup> by way of interim spousal maintenance.

[17] Part of the rationale for the reduction in quantum from \$46,000 per month to \$15,000 per month is her recognition that in terms of interim spousal maintenance, house maintenance costs should not be included. Indeed, pursuant to a s 21 contracting out agreement entered into between the parties Ms [Malina] accepted that Mr [Hensley] is responsible for those ongoing costs. I would have thought that if she was concerned about the issue of deferred maintenance, a remedy would more properly lie in specific performance of the s 21 agreement<sup>11</sup> rather than by way of interim spousal maintenance.

[18] The ability for an award of spousal maintenance to cover legal and accounting expenses is set out by Courtney J in *B v B*.<sup>12</sup> At [17], her Honour concluded that there was nothing objectionable about those costs being included as interim maintenance, provided they were reasonable. Her Honour referred to *A v A*,<sup>13</sup> a decision of the English High Court which provided for an allowance of a monthly amount towards legal costs. In that case Holman J held that:

... the costs of the suit itself ... are, after the provision of a roof over her head and food in her mouth, the wife's most urgent and pressing need and expense. She could manage without holidays, though I have made some provision for them. She could no doubt manage for a while without buying new clothes.

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<sup>9</sup> Affidavit of 29 April 2020 at [14].

<sup>10</sup> In addition to the \$8000 for legal and accounting costs.

<sup>11</sup> Property Relationships Act 1976, s 21L

<sup>12</sup> *B v B* [2008] NZFLR 789 (HC).

<sup>13</sup> *A v A* (Maintenance Pending Suit: Provision For Legal Fees) [2001] 1 FLR 377.

She could manage without her manicures, pedicures and yoga and keep fit classes ... But she simply cannot make any progress with the dominating issue in her life if she cannot pay her lawyers...

[19] The Court of Appeal decision *C v G* appears to have disallowed the notion of legal costs forming the basis of a “reasonable needs” claim for a maintenance order.<sup>14</sup> However, as subsequent cases have highlighted, in that case the Court of Appeal was determining issues around a final maintenance order. The current case concerns an interim order; therefore *C v G* can be distinguished. Gault J recognised this in *Able v Able*, where his Honour stated: “In any event, the key distinguishing feature of *C v G* is that the legal costs in that case were not ongoing.”<sup>15</sup>

[20] Where the legal costs are ongoing during the relevant period, I consider it reasonable for interim maintenance to include payments for legal costs, especially in a case such as this, where Ms [Malina]’s ability to be paid an income and to take monies from the company have been removed by Mr [Hensley], who has assumed total control of [the fishing company]. Justice requires the parties to be on a level playing field in terms of access to legal advice, especially where there is the ability to level the playing field by way of a spousal maintenance payment.

[21] The anticipated relationship property proceedings are likely to be complex. There are issues around the valuation of the [the fishing company] shares which will require expert assistance, particularly with regards to the projected future impacts of the COVID-19 restrictions on the fishing industry and the subsequent impacts (if any) on the value of the [the fishing company] shares. Additionally, Ms Kearns has foreshadowed an intention to challenge the contracting out agreement, and the dispositions of what may have been relationship property to Mr [Hensley]’s trust. On the facts of this case I determine that Ms [Malina]’s reasonable needs include funds to instruct counsel. As Holdam J said in the quote from *A v A* above, Ms [Malina] simply cannot make progress with the relationship property proceedings if she cannot pay her legal advisers.

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<sup>14</sup> *C v G* [2010] NZCA 128.

<sup>15</sup> *Able v Able* [2020] NZHC 177 at [28].



[22] Ms [Malina] is living in the former family home in [the North Island]. The expenses relating to the home are paid by the company, and in essence she only needs funds to provide for her and [Travis]’s food, clothing and other essential day to day living expenses. There are a number of aspects of her projected expenditure which concern me. However, given the acknowledgement that she is principally seeking interim spousal maintenance to put her on a level playing field with Mr [Hensley] in terms of legal expenses, plus a modest amount for her day to day living expenses, I do not need to analyse her projected expenditure for the purposes of this interim hearing in any detail.

[23] I do not accept Mr [Hensley]’s criticism of Ms [Malina]’s legal fees as being unreasonable. Mr [Hensley] accepts he has already incurred legal fees of approximately \$81,000 and that these have been funded predominantly by his father who has significant wealth and monies available to him. Mr [Hensley]’s legal fees are really on a par with what is sought by Ms [Malina]. An allowance for ongoing legal costs in an amount roughly equivalent to what he has been paying puts these parties on a level playing field, which is important in terms of their ongoing progression of the litigation. Ms [Malina]’s only income is from board she receives from her adult children,<sup>16</sup> and it was quite wrong in my view for Mr [Hensley] to assert that he should be able to fund his legal fees through his father, but that Ms [Malina]’s legal advisers should have to wait the outcome of the party’s relationship property proceedings before they are paid. That principle has been recently recognised by the Court of Appeal in *Biggs v Biggs*.<sup>17</sup> While I acknowledge that was a decision relating to an interim distribution of relationship property, there was recognition that the parties should be on a level playing field in terms of their ability to fund and progress their respective litigation positions.

[24] While I accept that Ms [Malina] and Mr [Hensley] enjoyed a high standard of living, certainly when measured against the average New Zealander, I agree with Mr Brant’s submission that it would be wrong to make an interim spousal maintenance order at a level which would require Mr [Hensley] to incur debt. When that high standard of living was occasioned by the parties living beyond their means, I do not

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<sup>16</sup> \$800 per month.

<sup>17</sup> *Biggs v Biggs* [2020] NZCA 231.

accept the Court should require one party (in this case Ms [Malina]), post separation, to continue to live beyond the parties' means by the other party (Mr [Hensley]) incurring what amounts to a personal debt to comply with a maintenance order.

[25] For the purposes of this interim spousal maintenance hearing, I exercise my discretion in favour of making an interim spousal maintenance order. I fix an amount of spousal maintenance to meet Ms [Malina]'s reasonable day to day needs in the sum of \$800.00 per week.<sup>18</sup> Additionally, I fix the sum of \$8000 per month as being necessary in order to meet Ms [Malina]'s reasonable interim legal fees. That gives a total of \$11,466 per month which I determine is necessary to meet Ms [Malina]'s interim reasonable needs. Having reached that view, I now need to consider whether Mr [Hensley] is able to pay that amount, before exercising my discretion as to whether an interim order should be made, and if so, fixing an amount that he can and should pay.

#### **What is Mr [Hensley]'s ability to pay spousal maintenance?**

[26] The last annual accounts for [the fishing company] in evidence before the Court is for the year ending 31 March 2019; there is a [fishing company] Profit and Loss statement for the financial year ending 31 March 2020, but only up to 31 January 2020. Following the conclusion of the evidence but before the release of this reserved judgment, Mr Brant sought to "produce" as evidence the final [fishing company] annual accounts for the year ending 31 March 2020.<sup>19</sup> Given that Ms Kearns objected to that evidence being filed after the evidence in the hearing had concluded, Mr Brant no longer sought to have those accounts included as part of the evidence in this hearing. For the year ending 31 March 2019 Mr [Hensley]'s current account was overdrawn by \$200,270. That is Mr [Hensley] drew out of the company \$200,270 more than he was entitled to; whilst he had a shareholder salary of \$160,000, he took out \$416,095.

[27] For the year ending 31 March 2018 he had a shareholder salary of \$350,000 and took out drawings of \$243,209, therefore his current account was in credit of

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<sup>18</sup> Or \$3466.66 per month.

<sup>19</sup> Contrary to s 98 of the Evidence Act 2006.

\$55,825.00. For the year ending 31 March 2017 he had a nominated salary of \$302,952.00 but drew \$468,128.00. What is clear from the company accounts<sup>20</sup> is that for the financial years 2013, 2014, 2015, 2016, 2017 and 2018, while his current account was in credit, he would regularly draw in excess of his shareholder salary. But from 2019 onwards his current account moved into deficit. I am unclear why that was on the evidence before me. The [fishing company] Balance Sheet to 31 January 2020 shows that Mr [Hensley]'s current account deficit has increased from \$220,000.00 to \$351,711.00.<sup>21</sup>

[28] Ms Kearns argument is that following separation Mr [Hensley] has been able to operate the company at a loss because of a post separation increase in the quota lease fees; an increase that she submits has been artificially inflated by Mr [Hensley]'s father. [The fishing company] does not own fishing quota; it leases quota from Mr [Hensley]'s father. Ms Kearns asserts that Mr [Hensley] Snr, wanting to assist his son, has inflated the quota lease payments post separation to decrease the profitability of [the fishing company]. The end of year accounts for [the fishing company] show that the quota lease payments to the end of 31 January 2020 was \$1,185,282; for the year ending 31 March 2019 it was \$896,085, and for the year ending 31 March 2018 it was \$173,913. The issue I have with Ms Kearns' submission is that Ms [Malina] sets out in her affidavit in support of her application for interim spousal maintenance that the parties separated on 9 October 2019. Thus, in the year prior to separation, the lease payments had increased from \$173,913 in 2018 to \$896,085 for the year ending 31 March 2019. I therefore do not accept Ms Kearns submission that the lease payments had been significantly increased by Mr [Hensley] Snr following the party's separation. The evidence of Mr [Hensley] is that across the board, quota lease fees had increased in recent years.

[29] Furthermore, I am not prepared to make a finding in this hearing that Mr [Hensley]'s father has deliberately increased the quota lease fees to decrease the profitability of the company to help his son in his relationship property dispute with Ms [Malina]. While that may well be the case, the Court would require evidence of that proposition, and, I would have thought, cross-examination of Mr [Hensley]'s

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<sup>20</sup> Exhibited to Mr [Hensley]'s affidavit of 23 March 2020.

<sup>21</sup> Mr [Hensley]'s affidavit of 23 March 2020, Exhibit "M".

father so that he can answer the allegation against him. There would also need to be independent evidence as to whether quota lease fees have, in recent years, increased across the board as Mr [Hensley] is asserting.

[30] Additionally, Mr [Hensley]’s evidence is that following the COVID-19 lockdown, there are no longer any profits to be made in the fishing industry and he expects [the fishing company] for the current financial year<sup>22</sup> to have a significant reduction in income. Such is the downturn, that Mr [Hensley] is currently working as a fisherman for [another fishing company], a company owned by a friend; [the second fishing company] uses the boat owned by [the respondent’s fishing company]. His evidence is that he is making no money by fishing with [the second fishing company]. He gave an example of a recent fishing trip in which they caught 11 bins of Parore/Black Snapper but only netted \$50 for each fisherman.<sup>23</sup> He gave the example of the price for kahawai reducing post COVID-19 from \$5 a kilogram to \$1.20 a kilogram;<sup>24</sup> once the expenses of operating the business and running the boat are factored in it is simply in his evidence uneconomic to even take the boat out to sea to catch any fish. As Mr [Hensley] stated,<sup>25</sup>

“...I haven’t been fishing because I live in [the North Island] and it’s seven hours’ drive just to go to work and back, let alone a 10 to 15 hour day and the process, since it’s COVID, five dollars a kilo down to a dollar 20 and the lease is 85 cents. I’m making 30 cents a kilo. Well that doesn’t even pay the fuel. That’s why I haven’t been working.”

[31] There is some money in his crayfish quota (fished by [the fishing company]) but that is significantly reduced because of the inability, as a consequence of COVID-19, to export significant quantities of crayfish. I had no independent evidence in this interim hearing as to whether that is going to be a long- or short-term issue for the fishing industry in light of the wider economic fallout from COVID-19.

[32] It is clear to me that Mr [Hensley] and Ms [Malina] have for some years lived very well, and, in the more recent years, beyond their means. Ms [Malina] benefited from Mr [Hensley]’s decision to draw more out of the company than he was entitled

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<sup>22</sup> Beginning 1 April 2020.

<sup>23</sup> Notes of Evidence, p 44, lines 3 – 8.

<sup>24</sup> Notes of Evidence, p 45, lines 1-5.

<sup>25</sup> Notes of Evidence, p 62, lines 21 – 25.

to. From the Profit and Loss account for the year ending 31 January 2020, it is clear that Mr [Hensley] is continuing to live beyond his means given that his shareholder account has increased, with him now owing the company \$351,711.

[33] When cross examined by Ms Kearns, it became apparent that Mr [Hensley] has recently had access to more monies than he originally admitted. Mr [Hensley] now has a Ms [Swanson] employed to oversee [the fishing company]’s accounts and operations. She transferred \$40,000 from [the fishing company] to her account; Mr [Hensley] says to protect him if Ms [Malina] froze the company accounts. Additionally, \$28,000 of the monies received by Mr [Hensley] from [the second fishing company] was transferred into Mr [Hensley]’s girlfriend’s account. Finally, Mr [Hensley] cashed in some of his Bonus Bonds and used the money to pay some of his legal fees. I share Ms Kearns’ concerns that these payments were not admitted by Mr [Hensley] in what Ms Kearns described as the ‘confession’ affidavit filed after Ms [Malina] analysed the accounts and queried the payments. Mr [Hensley] has also been able to borrow money from his father<sup>26</sup> from time to time.

[34] A payment to Ms [Malina] of monthly maintenance of \$11,466 amounts to an annual figure of \$137,592. It is my assessment, when looking at all the financial information as to recent income and expenses, that Mr [Hensley] does not have means at present to pay Ms [Malina] interim maintenance in that sum. An option is to require him to pay that amount, simply noting that it will accrue as a debt owed by him and eventually be paid to Ms [Malina] as part of the relationship property settlement. However, that assumes that Ms [Malina] will be successful in overturning the contracting out agreement, and it assumes that the company has value. Given that it is currently technically insolvent on a notional liquidation basis, and that Mr [Hensley] owes a debt to the company in excess of \$350,000.00, it cannot be said with any certainty Mr [Hensley] would have the monies from which to pay Ms [Malina].

[35] Thus, notwithstanding the monies that Mr [Hensley] has received from [the second fishing company] and [his own fishing company], it is my conclusion that Mr [Hensley] does not have the means to pay interim spousal maintenance in the sum of

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<sup>26</sup> Notes of Evidence, p 57, lines 16 – 24.

\$11,466 per month given the apparent collapse in the fishing industry as a result of COVID-19. I am aware that any award is an interim award, and that the application for final and future maintenance is as yet to be determined by the Court. There will obviously be more information available to the Court including evidence of the long-term viability of the fishing industry and/or his company in light of the COVID-19 implications.

**Should I exercise my discretion and make an interim maintenance order?**

[36] There are aspects of Ms [Malina]'s evidence which concern me. For example, in her affidavit she refers to the significant income received by the company, and yet she appeared to have no appreciation of the equally significant expenses that are necessary to run a fishing business. This is surprising given that her evidence is that she was inextricably involved in the running and financial operations of [the fishing company]. The affidavits that have been filed for this hearing include evidence which covers the family violence, relationship property and spousal maintenance applications. Ms [Malina] is critical, in the context of the family violence proceedings, of Mr [Hensley]'s attempts to repossess the [motor vehicle], which she describes as her car. However, that car is owned by the company and Ms [Malina]'s assertions of ownership are simply not true. It also seems to me that she is seeking, in her original application for interim spousal maintenance, an amount in excess of what the parties received by way of annual income each year. I suspect that at the final hearing there will be significant challenge to the reasonableness of her apparent needs as they do appear to be somewhat inflated and unrealistic.

[37] As set out above, I am also concerned at Mr [Hensley]'s ability to pay any award of interim maintenance. However, in the absence of any other independent and/or unequivocal evidence as to the likely effects of COVID-19 on his ability to earn income through the company, I can only go by the Profit and Loss statement. For the year ending 31 January 2020 [the fishing company] had a loss of \$484,695. That can be contrasted with the previous year where the company made a small profit (around \$5000), which occurred with Mr [Hensley] taking significant drawings from the company. It is unclear whether Mr [Hensley] was still able to take a salary/drawings from the business up to 31 January 2020, and beyond. Additionally, it is quite clear

that his father is prepared to help him out with legal fees and from time to time, loans; therefore, Mr [Hensley] has available potential financial resources via his father. I am not satisfied however that the current income from the company and the discretionary resources available from his father would enable him to pay \$11,466 per month.

[38] I fix by way of an interim spousal maintenance award the sum of \$4,000 per month. While I would have liked to make an award of at least \$8000 per month, I am constrained by the evidence which shows that as at 31 January 2020 [the fishing company] operated a loss just shy of \$500,000. I may have been assisted if there had been an agreement for Mr Brant to 'produce' the final accounts for the year ending 31 March 2020, as that would have shown the actual profit/loss and whether Mr [Hensley] took any drawings out of the company. But he clearly still had access to funds given the increase in his current account deficit. Furthermore, Mr [Hensley] is not claiming that he is now destitute, so I can reasonable infer that he has had access to some funds from which he can pay his living expenses.

[39] What portion of the \$4000 Ms [Malina] uses to pay legal fees and what portion is for her reasonable needs is for her to decide. That is an amount which will enable her to meet her reasonable needs in terms of her day to day living expenses and make a contribution towards her outstanding legal fees. I am conscious that the award I am making is an interim award, and it may be that pursuant to a final spousal maintenance order that this amount is significantly increased in the future. Furthermore, in six months' time I anticipate the relationship property proceedings are unlikely to be resolved, and thus legal costs will be an ongoing cost which may fall for consideration in relation to a decision about the final spousal maintenance.

## **Orders**

[40] Against that background and for those reasons I make the following orders:

- (a) I make an order pursuant to s 82 of the Family Proceedings Act 1980 that Mr [Hensley] is to pay Ms [Malina] an interim spousal maintenance sum of \$4,000 per month.

- (b) The first payment is to be made on 15 July 2020 and thereafter on the 15<sup>th</sup> of each month for the months of August, September, October, November and December.

[41] Given that this is an interim order it lasts for six months. Accordingly, the registrar will need to ensure that the hearing to determine the final spousal maintenance order is to be set down within that six-month period for determination. To that end I make the following directions:

- (a) Both parties are to file any further updating affidavit evidence. That evidence is to be filed and served no later than 31 July 2020:
  - (i) In relation to Ms [Malina] that should set out exactly what her current reasonable needs are and what it is she seeks by way of a final maintenance order.
  - (ii) In relation to Mr [Hensley] it is to set out evidence around the likely and anticipated impacts of COVID-19 on the income of the company, as well as the production of the company accounts for the year ending 31 March 2020 and his actual income from his current employment.
- (b) Thereafter the registrar is to allocate a pre-hearing conference in August to make directions to set the matter down for a hearing before Christmas 2020.

S J Coyle  
Family Court Judge