

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.:

This appeal arises from an application made on behalf of the Director of Maintenance Enforcement pursuant to sections 24 and 37 of the **Maintenance Enforcement Act**, S.N.S. 1994-95, c. 6. The purpose of the application was to require the former employer of Mr. Chislett to transfer the amount of his pension entitlement to the Director in satisfaction of outstanding maintenance arrears.

The parties were divorced on April 27, 1993. By the corollary relief judgment, Mrs. Chislett was given custody of the two children of the marriage and Mr. Chislett was ordered to pay child support of \$400.00 every two weeks beginning May 2, 1993.

On June 24, 1993, Mr. Chislett voluntarily quit his job, sold his assets in Nova Scotia and moved to the province of Quebec. His accumulated pension fund was secured by an order of the Family Court. It amounted to \$23,570.51 of which \$8,910.48 was locked in and \$14,660.03 was not. The evidence of the Director, supported by affidavit, was that at

the time of the application Mr. Chislett's arrears were \$30,680.38. Earlier, the Director issued a garnishment against Mr. Chislett.

On January 30, 1997, the Chambers Judge dealt with the application of the Director by a joint telephone conference with the solicitor of the Director and himself in Nova Scotia, and Mr. Chislett in Quebec. At its conclusion he gave an oral decision in which he found that the pension benefits could be attached. He ordered the non locked in amount be paid to the Director of Maintenance Enforcement of which \$10,000.00 would be paid to Mrs. Chislett on the arrears and the balance held in trust by the Director pending a determination of the exact amount of the arrears.

During the course of the telephone conference, Mr. Chislett questioned whether the arrears were in the amount claimed by the Director. The Chambers Judge encouraged Mr. Chislett to come to Nova Scotia for a hearing on that issue. He urged him to bring all his income tax returns and employment records.

The Chambers Judge set the hearing for February 13, 1997.

Notice was given to the counsel for Mrs. Chislett. The hearing was attended by Mr. Chislett, counsel for Mrs. Chislett and the solicitor of the Director. Evidence was taken and submissions made. The record reveals that although she participated in the hearing, counsel for Mrs. Chislett did not agree that it was appropriate in that proceeding for the judge to fix or forgive arrears or vary the existing order for maintenance for the two children.

Following the hearing the Chambers Judge decided to forgive a substantial portion of the arrears and suspend the existing order for child support by reducing the monthly payments. All of this is reflected in his order dated March 3, 1997, which provides:

IT IS ORDERED:

THAT arrears of maintenance under the divorce order dated April 27, 1993 and amended June 1, 1994, be fixed in the amount of sixteen thousand one hundred and forty-two dollars (\$16,142.00).

THAT the Respondent shall pay over to the Director of Maintenance Enforcement in satisfaction of part of the arrears the non locked in portion of his Michelin pension, totalling fourteen thousand six hundred sixty dollars and three cents (\$14,660.03) subject to any hold back for income tax.

THAT the locked in portion of the pension remaining shall be held as security for the continuing obligation to pay maintenance for the children.

THAT the order is suspended as of the end of February on the

following conditions:

1. The Respondent shall pay \$200.00 per month support for the two children while receiving unemployment insurance benefits, and shall pay \$400.00 per month support for the children while employed. While on unemployment insurance the Respondent shall pay to the Petitioner for the support of the daughter the sum of \$100.00 per month, and if the Respondent pays the \$75.00 per month required by the Quebec Department of Education for the educational subsidy of his son, he shall not be obligated to pay the other \$100.00. The amount of support for the daughter will increase to \$200.00 per month when employed.
2. That the existing federal garnishment in effect be reduced to the sum of \$50.00 every two weeks.

Mrs. Chislett appeals. The principal grounds of appeal advanced by her counsel are that the Chambers Judge erred in law by forgiving accumulated arrears and by amending the terms of the existing order without any application to vary having been made.

It is also alleged that by his words the Chambers Judge displayed grounds for an apprehension of bias in these proceedings. We are unanimously of the opinion that this ground is without merit.

Mr. Chislett has written the Court from Kegaska, Quebec, to say that he is financially unable to travel to Halifax for this appeal. He writes

that he is "contesting" it for a variety of reasons which mainly bear on the financial implications of the order granted by the Chambers Judge.

The Chambers Judge aptly described this as an unfortunate family situation. The principal sources of income for the children are family benefits and for Mr. Chislett, employment insurance resulting from sporadic periods of itinerant employment. The Chambers Judge was motivated by a well intended resolve to put in place the financial house of the parties.

The problem as we find it is that the only matter before the Court was the application made by the Director of Maintenance Enforcement which is described at the beginning of these reasons. The record does not reveal that there ever was an application before the Court to fix or forgive arrears or an application to vary the order for child support.

In these circumstances there were no other issues properly before the Chambers Judge.

It is our opinion that leave to appeal is granted and the appeal is

allowed. The following paragraphs of the order issued by the Chambers

Judge and dated March 3, 1997 are set aside:

THAT arrears of maintenance under the divorce order dated April 27, 1993 and amended June 1, 1994, be fixed in the amount of sixteen thousand one hundred and forty-two dollars (\$16,142.00).

...

THAT the order is suspended as of the end of February on the following conditions:

1. The Respondent shall pay \$200.00 per month support for the two children while receiving unemployment insurance benefits, and shall pay \$400.00 per month support for the children while employed. While on unemployment insurance the Respondent shall pay to the Petitioner for the support of the daughter the sum of \$100.00 per month, and if the Respondent pays the \$75.00 per month required by the Quebec Department of Education for the educational subsidy of his son, he shall not be obligated to pay the other \$100.00. The amount of support for the daughter will increase to \$200.00 per month when employed.
2. That the existing federal garnishment in effect be reduced to the sum of \$50.00 every two weeks.

The remainder of the order will not be disturbed.

No costs are awarded.

C.J.N.S.

Concurred in:

Chipman, J.A.

Cromwell, J.A.