NZLR. 2-12

IN THE HIGH COURT OF NEW ZEALAND M. 334/81

AUCKLAND REGISTRY

61

IN THE MATTER of the Matrimonial Property Act 1976

BETWEEN M WALTON

APPLICANT

A N D R WALTON

RESPONDENT

Judgment: 17 February 1984

Hearing: 2 February 1984

Counsel: R.R. Ladd for Applicant
P.J. Davison for Respondent

JUDGMENT OF CASEY J.

Mr and Mrs Walton were married in October 1945 and separated in March 1970. They are now divorced and he has remarried. There were three children and Mrs Walton continued to reside with them in the former matrimonial home at G Road, St. Heliers which is valued at $162,500. The children are now adult and all have left home. On 11th March 1981 Mrs Walton brought the present application for orders under the Matrimonial Property Act and the affidavits on both sides went into great detail about some aspects of their contributions and financial transactions during the marriage, and also covered a number of different items which are set out in the application. Although Mr Ladd submitted that s.14 should be applied to the matrimonial home, I can see no justification on the evidence for ordering other than equal sharing and the same applies to all the other matrimonial property. This partnership lasted 25 years and it is quite inappropriate to single out isolated contributions that one or other partner may have made and use it to support a plea for a departure from the equal sharing which is so manifestly the intention of the Act. I summarise my conclusions in respect

of the items listed as follows:-

1. The former matrimonial home at G Road is valued at $162,500 and is to be shared equally.

2. Mr Walton's home at Remuera was bought by him after the separation and I am satisfied that no matrimonial property was used. This is his separate property.

3. The parties accept that the furniture and chattels in the former matrimonial home are to be shared equally.

4. The furniture and chattels in belong to Mr Walton as his own separate property.

5. I am not satisfied that there are any bank accounts or similar funds to be classed as matrimonial property.

6. It is accepted that Mr Walton's Company shares are his own separate property.

7. The insurance policy of $3,000 is matrimonial property and is to be shared equally.

8. There are no building society shares.

This brings me to the real dispute between the parties, involving the Air New Zealand Superannuation Scheme of which Mr Walton was a member. He was an airline pilot and joined the scheme in the early years of their marriage. Its benefits and conditions are those set out in the Court of Appeal judgment of Haldane v. Haldane (1981) 1 NZLR 554, which set out the proper method of defining and valuing the spouses' interest. In the present case the separation occurred when Mr Walton had one year and two months to go before he would have been entitled as of a right at 50; however he elected to serve until his compulsory retiring age of 55 in May 1976, and he then commuted the whole of his pension to a lump sum of $206,889. He has spent part of this and invested the rest. Mr Ladd sought to persuade me that the circumstances differed sufficiently from those in Haldane to enable me to adopt an alternative approach based on a proportion of the amount actually received, rather than making future projections at the date of separation, as undertaken by the Court of Appeal.

I am not persuaded by his submissions. Mr Walton was not on the eve of retirement, and the members of the Court of Appeal were in the same position as I am, in knowing the amount of the lump sum in question. They refused to let that influence their decision to value the husband's rights in the scheme as they existed when the parties separated. That date was selected under s.2(2) of the Act for the obvious reasons that the value of the final entitlement was compounded by the increasingly higher contributions made by the husband after the separation, and the retirement figure was based on his average salary over the last five years of service.

I see no reason for treating this case differently from Haldane and in fact the actuaries engaged by each side approached the problem on this basis. There was little difference between their valuations at the date of separation and I do not propose to go into the esoteric calculations made for the appropriate discount factor to cover the short period of 14 months between separation and Mr Walton's 50th birthday. It is clear from the judgments of the Court of Appeal that I am not expected to make a precise mathematical calculation in these circumstances. I propose taking an intermediate figure of $67,000 as the value of Mr Walton's interest in the fund at the date they separated.

Mr Littlewood (Mrs Walton's actuary) then made an involved series of calculations to arrive at what he considered to be a present value of her half-share (on his figures $34,491) and by compounding interest at various rates from the date of separation to the date of hearing he considered her share could range from $64,253 to $140,739. The latter figure was derived by indexing Mrs Walton's entitlement to Mr Walton's salary after separation. This strikes me as virtually the equivalent of valuing her share at the date of hearing. He felt that she was entitled to be treated in this generous way because she had been out of the money for eleven years, during which time Mr Walton has had the full sum and was able to invest it and enjoy the fruits of her share. This of course overlooks the fact that he did not receive the money until some

six years after the separation and that Mrs Walton had the benefit of his share in the family home, although I acknowledge that this is coloured by his maintenance obligations over that period. Mrs Walton could have brought these proceedings much sooner. She attributed the delay of eleven years to her reluctance to take such definitive action in the hope that there might be a reconciliation. I find it difficult to accept this reason for her lack of action. Mr Walton left to join a woman with whom he had been having an affair for some time before the final split, and he has lived with her ever since, setting up their own home and marrying her after the divorce. Whatever her early hopes, Mrs Walton must have come to realise long before she started this action that the marriage was irrevocably at an end.

In Haldane the Court of Appeal felt the wife should receive interest at 5% from the date she commenced the proceedings until the judgment of the Court. However, in that case the superannuation monies had still to be paid, while Mr Walton has had the benefit of his former wife's share since he received them, presumably in mid-1976. I think I will be doing justice to the parties to allow her interest at the lower average rate for Government securities calculated by Mr Littlewood (7.6% over 13 years) from 1st July 1976 until the date of judgment, instead of his higher rate of 10.1% calculated over the past seven years. This approach allows some recognition of the benefit Mrs Walton has enjoyed from the sole use of Grampian Road. The monies due to her under this judgment will bear interest at 11% from the date hereof until actual payment. I understand the parties may now be able to settle their outstanding differences but leave is reserved to either to apply for such further orders or directions as may be required to give effect to this judgment. There will be no order for costs.

M.B. Casey J.

Solicitors:

Lovegrove Finn & Co., Auckland, for Applicant
Keegan Alexander Tedcastle & Friedlander, Auckland, for Respondent