7/12

No Special Consideration

IN THE HIGH COURT OF NEW ZEALAND

M NO 589/83

WELLINGTON REGISTRY

1488

BETWEEN: DYKE
of Wellington, Manager

Applicant

A N D: DYKE
of Wellington, Married Woman

Respondent

Hearing: 13 July, 19 November 1984

Counsel: J R Billington for Applicant
G J Thomas for Respondent

Judgment: 23 November 1984

JUDGMENT OF JEFFRIES J.

This is an application pursuant to the Matrimonial Property Act 1976. The parties were married on the 1st of March 1969 and there are two children of the marriage, W Dyke born on 1969 and T Dyke born on 1971. The parties separated in August 1983 so the lapse of time between date of separation and the date of first hearing was relatively short. The application was filed in November 1983, and following that there was an exchange of affidavits at a pleasingly brisk pace enabling the first hearing to take place in July 1984. Because of difficulties I had, mainly with actuarial evidence and a supposed death benefit, I found it necessary to send to counsel a memorandum dated 18 July 1984. That resulted in a memorandum from Mr Billington and a second hearing on 19 November 1984.

Not surprisingly the exchange of affidavits and information have reduced the areas of dispute until now they centre principally upon a valuation of the pension scheme provided by the applicant's employer, details of which are set out hereafter, and some family chattels. There are other orders made by this judgment.

For a pension scheme asset, the final valuation figure is arrived at in an individual way for each marriage and, therefore, something needs to be said of the property of the marriage. It is agreed (with an exception dealt with below) that the property is to be divided equally between the parties. I start with the matrimonial home at 102 Martin Road, Paraparaumu. There is an agreed valuation of $79,325 from which is to be deducted the amount of mortgage, $15,500, leaving a net sum of $63,825 to be divided equally, which gives a value of $31,912.50 to each. The latter figure is agreed between the parties and will be met by a payment from respondent to applicant out of separate property of about $76,500 received by respondent from her mother's estate. The matrimonial home is by value the most important asset, and overall the total assets are those expected to be found in a marriage such as this.

There is agreement about bank accounts, life insurance (subject to an order made hereafter) and family chattels, with the exception of the following:

Inherited Reikorangi painting	$1,200
Inherited chattels	$ 390
Inherited motor vehicle	$3,450

The valuation on the inherited chattels is agreed. There is a qualification about the inherited chattels which should be recorded. The items were received from respondent's

mother's estate about 9 months before separation. The total value of chattels (excluding painting and motor vehicle) is $1,687 but only some of the chattels were unpacked and displayed, which chattels had a value of $390.00. Mr Thomas, for respondent conceded the painting and some chattels were displayed in the home, and that the motor car was used as a second family vehicle. A previously owned second family vehicle had been sold so this vehicle could be retained. It was also conceded on respondent's behalf that intermingling had taken place so they became matrimonial property, and that is not an issue for the court. Mr Thomas's argument for an unequal division of these assets was on extraordinary circumstances based on section 14 of the Act. He cited some cases where this section had been applied to give a party relief in circumstances where it appeared to be warranted. His principal argument on the facts was that it would be very unfair on the respondent to be required to share equally the value of these assets which were so clearly sourced originally and recently from separate property. I do not agree. This situation does not in my view raise the type envisaged by the language used in Martin v Martin [1979] 1 NZLR 97 C.A. I decline to make an order under section 14 of the Act.

It remains now to turn to applicant's superannuation scheme which is matrimonial property pursuant to Section 8(i) of the Matrimonial Property Act. A six page report was annexed to the affidavit of respondent which emanated from William M. Mercer-Eriksen Ltd, a firm of actuaries. The report was signed by two persons employed by that firm and one of the signatories, Mr N.T. Malley, was called to give evidence. The firm itself is retained by applicant's employer, IBM New Zealand Limited, to advise it on its pension scheme and with appropriate consents Mr Malley was able to give evidence. It is clear that possessing specialised knowledge of the scheme through working for applicant's employer enabled him to supply sufficient information to the court on this pension scheme.

Rarely does a court offer the slightest criticism about over sufficiency of information, and it does not do so in this case, but does draw attention to what I believe to be the ratio of Haldane v Haldane, [1981] 1 NZLR 554 as found in the judgment of Mr Justice Cooke at pp 557-8:

> "I think that actuarial calculations on various alternative hypotheses will be helpful, but in the end the question cannot be solved automatically by any formula and can only be answered as a properly instructed jury, alive to the spirit of the Act, would answer it."

The court is expected to use actuarial evidence to guide it rather than to decide for it. That is the view that this court adopted in Callaghan v Callaghan (Unreported, Wellington Registry, M 281/83, 10 May 1984).

Bearing in mind the foregoing I now turn to set out some of the basic information concerning the IBM pension scheme, known as the IBM New Zealand Retirement Plan, as extrapolated from Mr Malley's report.

> "Superannuation Plan Benefits
> A member's normal retirement date is the last day of the month in which he attains age 65.
>
> The annual pension payable to a member who retires from the service of IBM New Zealand Limited on his normal retirement date is equal to the sum of:
> (a) 1 1/2% of the total salary received by him after 31 March 1981; and,
> (b) 1 1/2% of the average annual salary received by him during the five year period ending on 31 March 1981, multiplied by the number of years of his service with IBM prior to that date (counting complete months proportionately).

There is a proviso that if the sum of (a) plus (b) plus the single person's rate of National Superannuation benefit exceeds the member's final salary then the member's annual pension calculated as above would be reduced by the amount of such excess.

Early retirement may take place within 10 years of a member's normal retirement date provided IBM gives its consent and provided that the member has at least 15 years' service with IBM. The pension is calculated as stated above and then reduced by 1/4% for each complete month between the date of early retirement and the date of normal retirement.

If a member leaves the service of IBM then he will be eligible to receive a withdrawal benefit provided that he has at least 15 years' service with IBM. The withdrawal benefit takes the form of a pension which is calculated in the same way as his normal retirement pension and payable from his normal retirement date. As an alternative, a pension could be payable from the first day of the month following that in which the member attains age 60: in this event the annual amount of the pension would be 15% less than that payable from his normal retirement date.

If a member were to die in service no benefit is payable under the Plan.

Mr Dyke's Personal Details:

Date of Birth	17 September 1946
Date joined scheme	5 March 1968
Date of Marriage	1 March 1968 (sic)
Date of Separation	August 1983
Normal Retirement Date	30 September 2011

Salary History:	
Year ending 31 March 1977	$10,969
" " " " 1978	$13,154
" " " " 1979	$15,052
" " " " 1980	$18,707
" " " " 1981	$21,410
" " " " 1982	$25,975
" " " " 1983	$31,121
Salary earned between 1 April 1983 and 31 August 1983	$13,875
Salary as at 31 August 1983	$33,300 p.a."

Assuming an unchanged salary from the date of separation to the normal retirement date Mercer-Eriksen calculated that Mr Dyke's normal retirement pension would be $18,184.56 p.a. The report then turned to the calculation of the present value of that pension and listed the various contingencies such as income tax, duration of payment of pension, rate of interest and commutation. Taking all the above factors into consideration, the valuation of those benefits was calculated in the written report as at 31 August 1983 of retirement benefit as at 30 September 2011, assuming Mr Dyke survives to that date at $73,403.00.

The report then proceeded to take account of such contingencies as possible early retirement, withdrawal and death and they are set out fairly fully in the report and expanded upon in the evidence given by Mr Malley from the witness box. Perhaps something should be said of each. Some benefits accrue if Mr Dyke chooses to retire in the 10 year period before normal retirement date on 30 September 2011. Such contingency was averaged out at $70,697. On withdrawal a similar calculation was made and that averaged out to $35,004.00. It was clearly Mr Malley's view that granting the

vicissitudes of life the historical experience of the company was that for a person who has been employed as long as Mr Dyke and has reached the age he has reached, the likelihood of leaving the service of IBM was very small indeed. He colourfully described the fringe benefits granted as part of the company's velvet trap. I understood Mr Malley's reference to fringe benefits simply as support for his view employees are not likely to leave IBM's service before retirement. In Mr Dyke's most recent affidavit he seeks to persuade the court he could well leave IBM, but the reasons he gave are equally forceful in support of the contention he is likely to remain with IBM. Obviously the option of early retirement (starting after 15 years' service) might have greater appeal, but the full benefit under that option cannot begin until the next century. Taking all those aforesaid matters, including the percentage likelihood of remaining in the service of IBM, into consideration, Mr Malley's value attributable to the marriage at the date of separation was calculated at $18,102, of which Mrs Dyke would be entitled to half.

Mr Billington concedes that the claim of the respondent to share in the superannuation scheme arises by reason of his employment since marriage. There are no contributions made to the scheme by the employee and his observation that apparently no court has been called upon to order payment from a scheme in respect of which the spouse had not made "contributions", and for which there is no "surrender value" at date of separation, is apparently correct. As far as the employee is concerned this is a non-contributory scheme which means no matrimonial assets have been used in acquiring its benefits. At first this point may seem to favour the applicant as there has been no expenditure of matrimonial assets on membership of the scheme. However, on reflection there is no compelling reason why that should be so as the spirit of the Act is equal sharing which embraces good fortune.

Mr Billington on behalf of the applicant cross-examined Mr Malley largely upon the lines that his valuation emphasised

that Mr Dyke would remain with IBM and that he had over-estimated the accrual of benefits from date of separation to realisation of the asset. Mr Billington had obtained an actuary's report from Mr B.G. Higgins and he placed that before the court. He was not called to give evidence at the first hearing, but was at the second. Mr Higgins stated the present value of applicant's contingent pension entitlements at the date of separation lies in a range from $8,236 to $17,335, which upper figure he described as optimistic because it took account of inflation, discretionary upgrading and promotion. In the course of the total actuarial evidence and calculation before the court many differences emerged, but in the final analysis they seemed to be refinements rather than conflicts. That the actuaries were not basically far apart is evidenced by the fact the top of Mr Higgins' range was very close to Mr Malley's valuation.

There is an issue referred to earlier in this judgment and it is whether there is a death benefit included in the actual pension scheme itself. It was principally this issue which had been left in a somewhat confused state at the conclusion of the first hearing that necessitated the request for clarification contained in the memorandum sent by me to counsel. The original calculations of Mr Malley contained in his written report of 19 March 1984 were amended at the first hearing to raise his valuation of the pension scheme entitlement at the date of separation from $18,102 to $24,003 on account of a death benefit. Factually, at least, the death benefit matter has been clarified. It is agreed that the pension scheme itself does not contain a death benefit. Mr Malley explained in a letter subsequent to the first hearing placed before the court this situation is not uncommon among pension schemes set up in New Zealand by American multi-national companies. Apparently the pension schemes set up in New Zealand by New Zealand companies usually provide for a substantial payment to be made by their pension schemes upon

the death of a member. In this case IBM have a separate group life policy which provides for the payment of a lump sum of $66,600 on the death of Mr Dyke.

Mr Thomas conceded in argument the death benefit could not be directly valued as part of the pension scheme but is matrimonial property pursuant to Section 8(h). Even if this submission were accepted, which I think is arguable, he did not contend it should be the subject of a special valuation. Mr Thomas seemed to acknowledge that it was a fringe benefit in the same class as the fringe benefits flowing to the applicant as part of his overall remuneration package which is competitive and tax effective. As Mr Malley said it is no longer relevant to consider that the services of an executive of a multi-national company can be obtained and retained by the payment of a salary.

I confirm the death benefit is excluded from the calculation of the value of the pension scheme and that is not in dispute now. At the most the existence of the fringe benefits, of which the death benefit is one, could be a weighting factor in the final valuation of the pension scheme.

Applying the jury approach the final decision is to be made in the circumstances of the particular pension scheme asset in the particular marriage. The court is left with the impression the pension scheme is an asset of distinct value and, therefore, should be at the upper end of Mr Higgins' range. I have reached the view that as at August 1983 the value of the asset was $15,000 to be divided equally between the parties. Mr Billington's further submission on behalf of his client was that an order should be made pursuant to Section 31 of the Act postponing payment of the valuation. That is against the clean break principle referred to in several cases, but in addition would be unfair to the respondent who is to meet her liability immediately in regard to the matrimonial home.

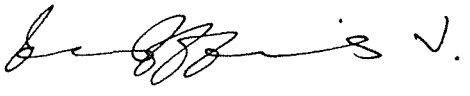
I end the judgment with the following orders:

1. By consent the respondent is to pay to the applicant $31,912.50 being half agreed valuation for the home and settlment to be effected one month from date of judgment.

2. The pension scheme has a value of $15,000 and the respondent's share is therefore $7,500 to be met at the date of settlement of the matrimonial home.

3. Leave to apply further is reserved to both parties in respect of the life insurance policies jointly owned, and the policies in the children's names and on any other outstanding matter upon which agreement cannot be reached.

4. There will be no order for costs.



Solicitors for Applicant: Stacey Smith Holmes & Billington

Solicitors for Respondent: Gibson Sheat