M NO 281/83

IN THE HIGH COURT OF NEW ZEALAND

WELLINGTON REGISTRY

IN THE MATTER of the Matrimonial Property Act 1976

AND

IN THE MATTER of the District Court's Act 1947

BETWEEN CALLAGHAN

Appellant (Defendant in Court below)

AND CALLAGHAN

Respondent (Applicant in Court below)

Hearing: 12 December 1983

Counsel: W V Gazley for Appellant
G J Allan for Respondent

Judgment: 10 May 1984

JUDGMENT OF JEFFRIES J

The proceedings before the court are on appeal from the District Court at Lower Hutt. In that court appellant was the defendant in an application made by his wife pursuant to the Matrimonial Property Act, 1976. In this judgment they will be referred to as appellant (husband) and respondent (wife).

The affidavits are, unfortunately, nasty and short. The couple were married in May 1972 and parties to a separation order on 20 March 1981. I was informed the actual separation was one year earlier but the evidence presented in the lower court adopted 20 March 1981 as the date of separation for the purposes of valuation pursuant to the Act and that will not be disturbed as the separation date in this court. They had two children (no details in affidavits) of their marriage and apparently respondent had had three children (no details at all) by a previous marriage. The marriage lasted almost nine years. Notwithstanding her first supporting affidavit contained just over 200 words in seven short paragraphs. Appellant has filed but one affidavit also of seven paragraphs, which uses strong language and, worst of all, is practically lacking in any information which might be of assistance to a court in reaching a just division of matrimonial property between spouses in this marriage. The learned Judge in the District Court rightly commented, with regret, on a particularly offensive paragraph concerned with the one and only matrimonial asset to be decided upon by the court, namely appellant's Ford Employees' Provident Fund entitlement. Appellant said "...[N]o doubt this is the asset to which the applicant would gleefully and greedily advance her interest." At the proper occasion there may be justification in using excess and imprudence as a tactic, but hardly when a wife seeks her lawful share from a failed marriage.

Appellant's affidavit alleged misconduct without a supporting detail. Respondent's second and last affidavit, also of seven short paragraphs, denied

misconduct, but made hardly a helpful statement toward the goal of just division. The impression one gained from reading the three affidavits was the parties were warning each other of unsaid allegations, with details known to the other, which would be used if necessary.

In the aforesaid state of the proceedings the case came before the District Court at Lower Hutt on 14 December 1982. At the hearing the single issue to be decided was the value of the entitlement which it was agreed would be shared equally. Moreover it seems this is the only asset of any real value from the marriage. No evidence was called but placed before the court was one document headed "Summary of Information in respect of Callaghan and his rights under the Employees' Provident Fund". The information came from appellant's employer and nothing contained in that document is factually disputed by the parties. The information may therefore be used freely. The other document before the court was a four page report prepared by an actuary company. It could be helpful to summarise in this judgment the documents before the court.

First, the summary of basic information obtained from the employing company in which appellant still works. Appellant joined the company work force on 23 September 1968 and the scheme on 31 July 1970. He was born on 1943 and is now aged 40 years. It is accepted the date of separation was 20 March 1981. Contributions effectively at that date were appellant $11,844.17 and employer $12,126.67 making a total

$23,970.84. The amount of $11,844.17 includes allocation of annual profits to December 31 1980, and the company's subsidy contribution includes profit allocation. The annual profits of the fund over the last 5 years have increased from 11% to 14%. The fund allocates profits to each member as at 31 December each year. Accordingly that profit plus existing accumulated figure becomes the capital figure as at 1 January for the next income year. The scheme is defined as an allocated lump-sum benefit superannuation scheme and the entitlement is a lump-sum upon resignation, death or attaining 65 years. The scheme provides no current surrender value, and no pension benefit entitlement. The benefit can only be taken as a lump sum on resignation, death or reaching retirement age. All of the employee's own contribution is paid out under those circumstances and the distribution in terms of amount and timing of the company's subsidy is at the discretion of the trustees of the scheme. On the practical exercise of the discretion the company advised over recent years the trustees of the fund have invariably exercised their discretion by paying out the total of the company's subsidy if a terminating employee has achieved 15 years' service. If service with the company is 1-15 years the company subsidy pay out has been 1/15th for each completed year of service. At 20 March 1981 appellant's salary was $18,902. He will turn 65 years on 2008 which is the earliest date on which he may retire as of right.

The actuarial company's valuation of the entitlement was placed before the court as a document and not produced from the witness box where the actuary could

have been cross examined on its parameters. I will say more of this hereafter. Rather than attempt to extrapolate its conclusions the learned Judge annexed the whole report to his judgment. As will be seen he quite clearly rejected its conclusion. With proper diffidence I will attempt extrapolation. It is explicitly stated in the report that the actuary was not working on an empty slate applying strict actuarial principles to the valuation, but attempting instead to apply the principles as he appreciated them and set out by the Court of Appeal in Haldane v Haldane [1981] 1 NZLR 554. For example he said "...[I]n determining both the nature of the asset and the value to be placed thereon no assumptions should be made based on historical experience." This clearly reflected Richardson J's judgment in Haldane at p.563 lines 48-51. He further said "...[T]he value to be ascribed ... must be ascertained in a practical way as would such a valuation made by a jury properly directed or by a Judge sitting alone." This clearly reflected Cooke J's judgment at pp.557-558. For reasons set out hereafter I have reached the view the jury approach is to be adopted but also I would think on that approach assumptions based on historical experience are not excluded. There is something to be said for taking one's actuarial calculations straight.

In deciding on the value of the congeries of contractual rights the actuary adopted the time apportionment approach. Using an interest figure of 7% p.a., the contribution rates of 10% for employee and employer, (based on a salary of $18,902 p.a.) the retirement benefit to be paid to appellant on his

retirement 27 years 3 months after separation yielded a total benefit of $70,870.84. The actuary then, for obvious reasons, needed to use a discount factor which in the absence of an economist's evidence, and without using historical evidence he adopted (with slight modification) the Second Schedule to the Estate and Gift Duties Act 1968 as .26466. The a/b of the formula was 10 7/12 over 37 10/12. The last step was to allow upon a notional bargain between appellant and trustees for the contingencies affecting the accrual of the right to the benefit 27 years and 3 months after date of separation. In arriving at a discount of 50% he said he took note of factors mentioned by Richardson and Somers JJ in Haldane at pages 565 and 571. Using this approach the share of the respondent on the formula is $1,320. I am bound to say on the information contained in the actuary's report I was unable to work out exactly how the figure of $70,870.84 was reached. I sought assistance from counsel after the hearing but Mr Gazley advised by memorandum:-

> "...[T]o answer this query is for me to provide viva voce evidence; and that evidence cannot be before your Honour on appeal. I am constrained, therefore, respectfully, to submit that the appeal must be determined on the evidence as it is before your Honour."

Mr Gazley said, in effect, this court is bound by the figure of $1,320 as it is applying Haldane.

That was the submission apparently made in the lower court also, which takes us nicely to the way it was

decided there. The learned Judge said he had reservations about adopting the actuary's report but in reality by his decision he rejected it, and its reasoning as well. He said he thought at first he should adopt a date of separation valuation of $21,949.67 arrived at by multiplying 1/15th of employer's contributions (= $808.44) by 12.5 years (total service) and adding employee contributions. However after the hearing, and before judgment, he had read Holland J's judgment in Hall v Hall (Christchurch Registry, M.137/82, 15 February 1983) which adopted a valuation as at date of hearing, but with reference to contributions as at date of separation. He therefore valued the benefit at $23,364.44 which was arrived at by appellant's contributions at date of separation (i.e. $11,844.17) but valuing employer's contributions at $11,520.27. He did this apparently (it is not set out in the judgment) by taking 1/15th of the employer's contribution of $12,126.67 at 20 March 1981 ($808.44) and using 14.5 years (to date of hearing) as the multiplier making the employer's contribution $11,520.27. It is quite clear from Haldane, for the reasons set out therein (e.g. Somers J at p.570) superannuation scheme assets are in a special category and should be valued at date of separation, save exceptional cases. This certainly was not one. As equal sharing was agreed the respondent's share by this method was fixed at $11,682.22. Mr Gazley in his submissions reached a different and higher figure ($13,400.19) he said on reading the various determinations of the District Court Judge. Also purporting to apply Hall's case the Judge imposed 10% on the half share of $11,682.22 to run from date of hearing to date of payment. He had earlier in the

judgment approved the clean break principle but it was also manifest that appellant has no assets and custody of both children of the marriage. It seems the provisions of s 31 of the Act were not considered in any way.

Section 8(i) of the Matrimonial Property Act is the authority for inclusion of benefits of superannuation schemes into matrimonial property. At the level of what is embraced by the section there is practically no dispute. Cooke J in Haldane at p.556, line 40:-

> "But I do not think that the wording and evident purpose of s 8(i) leave any doubt about what the general principle must be. If contingent superannuation benefits have been earned to a significant extent by work before the separation, they should normally be brought into account even although the member spouse's retirement may be many years ahead. The problem is one of valuation."

About the problem of valuation the statute gives no specifics. The authority for the lower courts is Haldane. Perhaps reflecting the complexity and diversity of the problem of valuing benefits the headnote of the case, other than as mentioned above, states three propositions two of which concern date of valuation (much lesser issue than the valuation question itself), and the third is merely a caution on a relatively minor point. However the court is obliged to search a case beyond its headnote to obtain its true guidance. The court takes note, in applying Haldane, Cooke J's comment at p.557

after describing generally the scheme, "Obviously it is a highly attractive scheme." The other two Judges made similar comments. It is a pity in a way the first major case before the Court of Appeal was on such a scheme for airline pilots. Any proposition about valuation of superannuation benefits must always possess the quality of being limited by the essentially conditional nature of the proposition. One cannot assert or deny without a qualification.

Bearing in mind the foregoing remarks I have reached the view, with respect, the following statement of Cooke J in Haldane represents its ratio for the courts to follow:-

> "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."

As far as I am able to judge no other general statement in any of the judgments as firmly guides the courts as that one. It encourages the use by the courts of expert opinion. It warns and cautions against formula solutions, but does not exclude them where and when appropriate. By invoking the properly instructed jury approach the Court of Appeal expects the lower courts to sit notionally with a jury of ordinary people from the community who apply the standards of the reasonable man. Commonsense, together with the prevailing view of

conventional justice in ordinary lives applied with willingness to compromise and adjust to the particular circumstances, are to be the lodestars of the court. Further, the unavoidable implication of the jury approach is that actuarial and expert opinion is to be applied insofar as a jury would be able comfortably and confidently to use it. That curtails the extensive use and application of formulas requiring knowledge of interest figures, discount factors and discounts for contingencies affecting future accrual rights. Valuation must not be a way around equal sharing because that is the single outstanding feature of the Act. I think this is an instance where silence is significant. The legislature in enacting s 8(i) in the terms which it did, without any specifics concerning valuation, must have expected the courts to apply commonsense judgment, aided, but not dominated, by experts. One needs only to observe the special provisions of s 31 to know the draughtsmen, and legislature, understood the possible difficulties of meeting a liability of this nature, with the benefit still in the future, which in turn reflects the uncertainties of valuation. Finally, after more than seven years of the Act in which the public, lawyers and courts have all felt its impact, that experience - or spirit - is to be the backdrop to the decision. After all deciding on what is a fair valuation is comparable in difficulty with many other decisions under the Act, or for that matter, with adequate maintenance and support, or how to compensate for a testamentary promise. Appeal rights keep decisions firmly in the realm of objective fairness. I suspect why it is thought so difficult is because superannuation schemes, of all property rights, come closest to formula calculation

and the panoply of the actuary and accountant. It is in the individual case when the task is a just division of matrimonial property at a marriage's end the deficiencies of a strict actuarial approach are exposed. The jury approach is formless, trusting and wiser than a formula.

Mr Gazley mounted a powerful attack on the decision of the lower court mobilised around two basic propositions. First, that the District Court Judge was wrong to treat the figure to the credit of the applicant in the Ford Employees' Provident Fund as itself matrimonial property that could be divided between the parties. Under this heading Mr Gazley emphasised it was a valuation of the rights in the lump sum scheme not to be approached simply by examination of contributions and accrual of employer's subsidies. See Haldane Richardson J. p.561, lines 29-37; Somers J. p.569, lines 30-44. Secondly, as already indicated, he was wrong in failing to apply Haldane v Haldane. The second proposition follows from the first, if it is a correct proposition. This court has reached the firm conclusion it is correct and the approach to valuation of the asset in the lower court was wrong in law. The Judge rejected the actuarial valuation purportedly based upon Haldane and replaced it with the simplistic approach of treating the employers' contribution to which appellant had no property right (but could realistically expect a discretionary exercise in his favour) as straight, concrete, matrimonial property. He did likewise with appellant's contributions by treating them as in the same category as say a credit of $11,844 in a banking account and not as something to which he has rights at either resignation, death or 65 years. I can

find no basis for departing from Haldane and adopting other than a date of separation valuation. Imposing an interest rate of 10% on respondent's half from date of hearing to date of payment was only consistent with half of $23,364.44 sitting in a current account in a bank. The weekly interest bill imposed on appellant is $22.46 to be met out of tax paid wages. He is a working man in early middle age faced with raising alone a 10 year old son and a 6 year old daughter. He lives in rented accommodation and has few assets. He is relatively poor. Without a doubt the appeal must be allowed, and this court now decide what is the proper valuation.

It is appropriate here to cross to respondent's counsel's argument on appeal. He presented written submissions which were principally concerned, in proportionate terms, with attacking the actuarial report. He broke down the attack into general and specific criticisms with the latter quite precise and apparently grounded in contrary actuarial opinion. I raised with counsel that these specific points had not been put to the actuary for his answers and the possibility of calling him later to be cross examined in this court was considered at the hearing. Such a course could be costly, as Mr Gazley pointed out. I have decided against that because the view I take of Haldane enables this court not to accept the actuarial calculation.

Coming now to the proper valuation the following represents some of the factors which a jury, I hope properly instructed, would weigh in the balance. Contingent superannuation benefits were earned to a

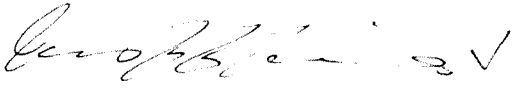
significant extent before separation at a cost to the flow of matrimonial property. At 20 March 1981 appellant's contribution stood at $11,844, most of it paid during the marriage up to separation. That would not be the hard cash contribution of appellant because it includes allocation of annual profits. At separation appellant was earning $18,902 p.a. There is no evidence of prospects but he is a foreman and rates a company motor vehicle. In the normal course his salary and prospects should increase. However it must be explicitly stated there is no evidence of terms of service, specific capabilities of appellant, evidence of his health, or personal wishes and ambitions. Life itself is untidy and incomplete. Appellant's sum has attracted benefits from the employer which, given discretions and the 15 year rule, are of real value. More value will be added in the future to what existed at separation but how much depends on the vicissitudes of life, and future personal choices. An order under s 31 offers one possible remedy but it is against the clean break principle which operates throughout the Act. There is no evidence of misconduct before the court and equal sharing is accepted. Appellant has custody of the two children of the marriage and respondent pays maintenance to him. See s 26(1) of the Act. Acknowledging all the various possibilities, the odds, this court thinks favour termination at retirement rather than resignation or death. As at today, if it were to be 65 years, that is over 24 years away. Three times the duration of the actual marriage. However, after 23 September 1983, being the 15th anniversary of joining the employer's services, on resignation, appellant would in all except the most unusual circumstances, receive the

full employer's subsidy. That right is of definite value to the appellant and it cannot be trivialised. Dismissal, for whatever reason, is a contingency. I admit to difficulty in obtaining any real value from the willing but not anxious seller/buyer concept with employer/employee superannuation schemes. It is remote from insurer/insured and surrender value. As an analogue the market concept seems to add nothing. Mr Allan made the point by asking the rhetorical question: would appellant accept $2,640 for his superannuation rights? Apparently it can safely be said this asset was the only one of real value at separation possessed by the family. In the circumstances of this particular superannuation scheme asset in this marriage I have reached the view as at 20 March 1981 the value of the asset was $9,000 to be divided equally between the parties. No interest is imposed at this point.

By the decision on this appeal appellant owes respondent $4,500. However he does not have, as far as the court is aware, that sum or sufficient assets on which to borrow it. As the younger child is 6 years and older 10 years and respondent is paying $20 each week for maintenance there appears to be room for negotiation in this area if the parties are so minded. If this suggestion is not acceptable the parties are to arrange to apply to the court for a further fixture within three

months when an order pursuant to s 31 of the Act will be considered, and any other issue counsel might wish to raise.

I make no order for costs.



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