Trinity Term
[2017] UKSC 52
On appeal from: [2015] CSIH 61

JUDGMENT

McDonald (Respondent) *v* Newton or McDonald (Appellant) (Scotland)

before

Lady Hale, Deputy President
Lord Wilson
Lord Carnwath
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

26 July 2017

Heard on 11 May 2017

Appellant
Jonathan Mitchell QC
John Speir
(Instructed by Allan McDougall Solicitors)

Respondent
Janys M Scott QC
Kirsty Malcolm
(Instructed by Thorley Stephenson SSC)

LORD HODGE: (with whom Lady Hale, Lord Wilson, Lord Carnwath and Lord Hughes agree)

1. The Family Law (Scotland) Act 1985 ("the 1985 Act") brought about a radical reform of financial provision on divorce in Scotland. This appeal raises questions of statutory interpretation in relation to both the 1985 Act and subordinate legislation made under that Act. The appellant ("Mrs McDonald") seeks a pensions sharing order under section 8(1)(baa) of the 1985 Act on her divorce from her husband ("Mr McDonald") on the basis that his pension forms part of the matrimonial property which is taken into account in fixing financial provision. It is a central principle in the 1985 Act relating to such financial provision that "the net value of the matrimonial property" should be shared fairly between the parties to the marriage. This appeal raises the question as to what proportion of a person's pension rights falls within the definition of "matrimonial property". In particular, is it necessary that the holder of the pension rights contributed to his or her pension during the marriage in order for any part of his or her interest in the pension to be matrimonial property?

2. The facts can be stated briefly. Mr McDonald worked as a miner for British Coal. He joined the British Coal Staff Superannuation Scheme ("the scheme") on 11 December 1978 when he was aged 25 and began contributing to it. He married Mrs McDonald on 22 March 1985. Shortly afterwards, as a result of a leg injury, he was found to be unfit to continue working as a miner. His disability entitled him to retire from employment early on grounds of ill-health and to receive a pension income before his normal retiring age. When he decided to exercise that right, he was only 32 years old and had completed only six years and 243 days of pensionable service. He stopped contributing to the scheme on 10 August 1985 and has received a pension since then. As a result, between 11 December 1978 and 10 August 1985 Mr McDonald was a member of and contributor to the scheme; since then he has been a member in receipt of income benefits under the scheme.

3. Mr and Mrs McDonald ceased to cohabit on 25 September 2010. As I explain below, the date of final separation is an important date for ascertaining matrimonial property under the 1985 Act and is one of the dates referred to in that Act as "the relevant date". It is in this case "the relevant date".

4. Further, as I explain below, section 10(5) of the 1985 Act treats as matrimonial property "*the proportion of any rights or interests* of either person … in any benefits under a pension arrangement *which is referable to the period* [during the marriage but before the relevant date]" (emphasis added).

5. Subordinate legislation, which I discuss in paras 20-31 below, has provided for the valuation of a person's rights or interests in a pension arrangement by reference to what is known as the cash equivalent transfer value ("CETV"). British Coal has provided a figure for the CETV of Mr McDonald's pension rights which had accrued in the scheme on the relevant date. That value is £172,748.38. This figure reflects not only the capitalised value of the pension then in payment but also a spouse's pension payable to a surviving spouse on Mr McDonald's death. As discussed below, the subordinate legislation also provides a formula for apportioning the CETV to ascertain what part of it is matrimonial property.

6. The dispute between the parties relates to that formula. The dispute is as to whether in ascertaining the matrimonial property under the 1985 Act the court should apportion the value of Mr McDonald's pension rights (a) by reference only to the period in which he was an "active" member" of the scheme (ie from 11 December 1978 to 10 August 1985) (an active member being a person who is in pensionable service under an occupational pension scheme: Pensions Act 1995, section 124(1)) or (b) by reference to the period in which he was a member of the scheme, both when in pensionable employment and when in receipt of income benefits until the relevant date (ie from 11 December 1978 to 25 September 2010).

7. The parties helpfully agreed in a joint minute that if the CETV is to be apportioned by reference to the period in which Mr McDonald was an active member of the scheme, the value of his interest in the pension benefits which was matrimonial property is £10,002. They also agreed that if the apportionment is by reference to the period of his membership of the scheme, both when in pensionable employment and also when drawing a pension, that value is £138,534.

8. Sheriff Holligan in a judgment dated 12 December 2013 concluded that the first method was the correct one: only the period of active membership was relevant. In reaching that view, he relied on the wording of a formula in the relevant subordinate legislation, the Divorce etc (Pensions) (Scotland) Regulations 2000 (SSI 2000/112) ("the 2000 Regulations"), which I discuss below. Secondly, he saw that method as being consistent with what he saw as the general principles of the 1985 Act which sought to share wealth accumulated by a spouse over the period of the marriage by treating as matrimonial property only those assets which a spouse acquired during the marriage and before the relevant date. Mrs McDonald appealed to the Inner House of the Court of Session. An Extra Division of the Inner House (Lady Smith, Lord Malcolm and Sheriff Principal Abercrombie) heard the appeal and on 11 August 2015 by majority (Lady Smith dissenting) dismissed the appeal. The majority adopted a purposive approach to the interpretation of the relevant provisions of the 1985 Act and the 2000 Regulations and in substance agreed with the sheriff's reasoning. The majority emphasised the idea that matrimonial property was, as a general rule, confined to assets acquired during the marriage and before the relevant date. They also relied on the formula in the 2000 Regulations.

9. Mrs McDonald appeals to this court. Counsel for Mr McDonald advanced arguments on similar lines to those which the Sheriff and the majority of the Inner House upheld.

10. This appeal raises questions of statutory interpretation both in relation to the 1985 Act and also the 2000 Regulations. I set out below the reasons why I would allow this appeal.

The aims of the Family Law (Scotland) Act 1985

11. The 1985 Act was enacted by the United Kingdom Parliament in response to recommendations of the Scottish Law Commission ("the Commission") in its report "Family Law: Report on Aliment and Financial Provision" (1981) (Scot Law Com No 67). The principal defects of the prior law in relation to financial provision on divorce, which the Commission identified (paras 1.5 and 1.6), were that it identified no objectives or governing principles and that the court had an inadequate range of powers. The Act seeks to remedy those problems. It deals with the first problem by setting out in section 9 the principles which the court would apply in deciding what order for financial provision it would make. Section 8(2) requires the court to make orders which are justified by the section 9 principles and which are reasonable having regard to the resources of the parties. The principle relevant to this appeal is the first which is set out in section 9(1)(a), namely that "the net value of the matrimonial property should be shared fairly between the parties to the marriage".

12. Section 10 addresses the concept of matrimonial property. Section 10(1) establishes a presumption that the fair sharing of such property under section 9(1)(a) is equal sharing unless other proportions are justified by special circumstances.

13. Although not directly relevant to this appeal, it is important to observe that the presumption of equal sharing of matrimonial property applies only to the section 9(1)(a) principle; the 1985 Act in the other sub-paragraphs of section 9(1) contains other principles which inform the court's decision-making and introduce flexibility into the award of financial provision. These principles include (i) that fair account be taken of any economic advantage derived by either party from both financial and non-financial contributions by the other and of economic disadvantage suffered in the interests of the family (section 9(1)(b)), (ii) the fair sharing of the economic burden of caring for a child of the marriage after divorce (section 9(1)(c)), (iii) financial provision for up to three years for a person who has been dependent on the financial support of the other person (section 9(1)(d)), and (iv) the need for an award of financial provision for a reasonable period to relieve a person of serious financial hardship as a result of the divorce (section 9(1)(e)). Further flexibility is introduced by the recognition in section 10(1) that there may be special circumstances for

departing from the equal sharing of matrimonial property in applying the section 9(1)(a) principle. Those circumstances include but are not confined to the circumstances which are specified in section 10(6).

14. Section 10(2) provides that the net value of matrimonial property is the value at the relevant date after deduction of debts then outstanding. Section 10(3) defines "the relevant date" as including the date when the parties ceased to cohabit, which is the date applicable in this case (para 3 above). Section 10(4) is an important provision because it establishes a norm that matrimonial property is property acquired by either or both of the parties during the marriage but before the relevant date. Section 10(4) provides:

> "Subject to subsection (5) below, in this section and section 11 of this Act 'the matrimonial property' means all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party) -
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> before the marriage for use by them as a family home or as furniture or plenishings for such home; or
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> during the marriage but before the relevant date."

The requirement in this sub-section that the property is acquired during the marriage but before the relevant date has influenced the courts below in their assessment of statutory purpose when adopting a purposive approach to the following sub-section, which establishes what part of a person's interest in a pension arrangement falls within matrimonial property. But I observe that the opening words of subsection (4) above carve out subsection (5) from that requirement.

15. Section 10(5), which is the provision in issue in this appeal, provides:

> "The proportion of any rights or interests of either person
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> under a life policy or similar arrangement; and
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> in any benefits under a pension arrangement which either person has or may have (including benefits payable in respect of the death of either person)

> which is referable to the period to which subsection (4)(b) … above refers shall be taken to form part of the matrimonial property …"

16. Section 27(1) was amended in 2000 to add a definition of a "pension arrangement" as meaning any occupational pension scheme, a personal pension scheme, a retirement annuity contract and specified annuities and insurance policies.

17. The precursor of section 10(5), as originally framed by the Commission as clause 10(4) of the draft Bill attached to its report, referred to rights or interests "under a life policy or occupational pension scheme or similar arrangement" but otherwise was to the same effect as the current section 10(5). In its commentary on the draft subsection the Commission explained the recommended provision in these terms:

> "Rights under life policies, pension funds and similar arrangements are often built up over many years. This subsection makes it clear that the proportion referable to the period from the marriage to the final separation is to be regarded as matrimonial property and subject to the same rules as any other item of matrimonial property." (see paragraph 3.73)

Paragraph 3.73 of the report stated:

> "Life insurance policies and pension schemes are important ways of saving for the future. In most marriages at least one of the spouses has rights under one or other of them. Where such rights have been acquired wholly during the period from marriage to final separation the value of these rights would constitute matrimonial property. In many cases, however, rights under life policies or pension schemes or similar arrangements will have been built up partly before and partly after the marriage. In such cases we think that only the proportion which is attributable to the period between the marriage and the final separation should be treated as matrimonial property."

Paragraph 3.77 spoke of the "sharing of savings made during the marriage, including savings made by means of life policies or retirement pension schemes". But it is not clear from those paragraphs whether the Commission sought to confine the scope of

such sharing to active saving or included savings created by the passive growth of the relevant fund or the passive accrual of pension rights by survival over time. The answer must be found in the wording of the enacted legislation.

18. The focus in section 10(5) is on the proportion of rights or interests under a pension arrangement referable to the specified period and not on the acquisition of the rights by a party to the marriage during that period. Prima facie the proportion of rights under a pension arrangement referable to a specified period would reflect the enhancement in value of the pension arrangement during that period both by the plan holder's investment of further funds in the arrangement and by the passive growth in the value of the already-acquired fund. Similarly, where there is no fund, the enhancement in the value of pension rights by survival during the specified period is referable to that period. If Parliament had intended that the proportion of the rights or interests be determined by the ratio of the part of the fund created by contributions to the arrangement during the marriage until the relevant date to the value of the total fund at that date, it could have said so.

19. Section 10(5) could nonetheless achieve a close approximation of such a result in relation to some policies and pension schemes which involve the regular payment of the similar sums year on year. But other arrangements, including personal pension schemes, may involve the payment of differing sums at irregular intervals. Thus, suppose Mr A has a personal pension scheme in which he invested £2,500 each year for ten years before his marriage. On marrying, he encountered other demands on his income and was able to pay into his pension scheme only £1,500 in year four and £1,000 in year eight of his marriage. Mr and Mrs A separated finally at the end of the tenth year of their marriage. In such a case there will have been contributions both before and after the marriage, but a time-related ratio would not remotely approximate to the ratio of pre-marriage and post-marriage contributions.

20. As Lady Smith has recorded in her opinion (para 20), uncertainty about how to value a person's interest in a pension arrangement under section 10(5), and the delay and expense incurred in litigation as a result, including the obtaining of competing actuarial valuations using differing methods, led to the passing of subordinate legislation. The Divorce etc (Pensions) (Scotland) Regulations 1996 (SI 1996/1901), which were made under section 10(8) of the 1985 Act as amended, introduced the CETV, which I mentioned in para 5 above, as the means of valuing the benefits under a pension arrangement. The current regulations are the 2000 Regulations as amended.

21. Before examining the disputed provisions of the 2000 Regulations it is important to note the scope of those regulations. The 2000 Regulations apply to occupational pension schemes and also to personal pension schemes of all kinds.

The 2000 Regulations have also been extended to cover certain state scheme rights. Occupational pension schemes may often involve regular contributions from an employee and some, at least in the past, may have provided for such contributions only from the employer. Personal pension schemes include schemes which permit the member to make contributions when he or she chooses giving rise to the result which I have discussed in para 19 above.

22. Regulation 3 of the 2000 Regulations sets out mandatory rules for the calculation and verification of the value of any benefits under a pension arrangement for the purposes of the 1985 Act. Regulation 3 provides different rules for the calculation depending on whether, for example, the party with pension rights is a deferred member or an active member of an occupational pension scheme or a member of a personal pension scheme. There are also different rules if the pension of the party with pension rights is in payment. Beyond observing that regulation 3 provides for different classes of membership of an occupational pension scheme and also for membership of a personal pension scheme, we are not concerned with the details of the methods by which the cash equivalent of the benefits is calculated in that regulation. Mr McDonald's interest in a pension in payment has been valued in accordance with regulation 3(2)(d)(i).

23. Regulation 4 of the 2000 Regulations identifies what proportion of a person's rights and interests in such benefits forms part of the matrimonial property. It provides:

> "The value of the proportion of any rights or interests which a party has or may have in any benefits under a pension arrangement or in relevant state scheme rights as at the relevant date and which forms part of the matrimonial property by virtue of section 10(5) shall be calculated in accordance with the following formula -
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> A x B/C
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> where -
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> A is the value of these rights or interests in any benefits under the pension arrangement which is calculated, as at the relevant date, in accordance with paragraph (2) of regulation 3 above; and

> B is the period of C which falls within the period of the marriage of the parties before the relevant date and, if there is no such period, the amount shall be a zero; and
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> C is the period of the membership of that party in the pension arrangement before the relevant date."

24. This formula, as I have said, informed the view of the sheriff and the majority of the Inner House. The words which fall to be interpreted are the words in the definition of factor C above, namely "the period of the membership of that party in the pension arrangement". It is striking that factor C in the formula in regulation 4, by which the regulation 3 value is apportioned so as to identify what is matrimonial property, (i) refers to the period of membership of the party in the pension arrangement without further specification and (ii) must apply to membership of both occupational pension schemes and personal pension schemes.

25. Both Sheriff Holligan and the majority of the Extra Division treated "membership" as confined to active membership of an occupational pension scheme or membership of another scheme while the member was contributing to it. I do not agree for four reasons.

26. First, that interpretation involves adding words to regulation 4 which are not there. The person who drafted the 2000 Regulations was clearly aware of the different categories of membership which were set out in regulation 3. Regulations 3 and 4 must be read together. Regulation 4, in contrast to regulation 3, refers to membership without differentiation between classes of membership.

27. Secondly, it is clear, and is not disputed, that the 2000 Regulations apply not only to occupational pension schemes but also to personal pension schemes. The definition of "active membership" in section 124(1) of the Pensions Act 1995 (para 6 above) applies only to an occupational pension scheme and makes no sense in relation to personal pension schemes. It also, as Mr Mitchell, who appeared for Mrs McDonald, pointed out, makes no sense in relation to relevant state scheme rights to which regulation 4 also applies. It would, as Mrs Scott argued on behalf of Mr McDonald, be possible to circumvent the problem in relation to personal pension schemes by reading the definition of factor C as if it stated "the period of membership of that party in the pension arrangement when contributions are being made by or on behalf of that party". But how does one ascertain at what point before the relevant date a party who has made occasional contributions to a personal pension scheme had chosen to cease to make such contributions? It is to be assumed that Parliament intended the provisions of the Regulations to operate sensibly in relation to the differing pension schemes and state pension rights.

28. Thirdly, I do not think that one can support the reading of the word "active" or "contributing" into the phrase in question by referring to the focus in section 10(4) of the 1985 Act on the acquisition by the parties of assets during the marriage but before the relevant date. As I have said (para 14 above), the opening words of section 10(4) carve subsection (5) out of the section 10(4) definition of matrimonial property. Parliament chose to deal with pension rights differently by making discrete provision for them.

29. It is important in that regard to recall that in section 10(4)(a) of the 1985 Act there is included in matrimonial property all property acquired before the marriage for use as a family home or as furniture or plenishings for such a home. Thus even within section 10(4) there is no unqualified principle that property must have been acquired during the marriage and before the relevant date. Indeed, the asset which will often be the most valuable asset within the matrimonial property is excluded from the section 10(4)(b) regime. Further, assets acquired during the marriage by way of gift or inheritance from third parties are excluded from the matrimonial property. It is thus difficult to detect a general principle confining matrimonial property to assets acquired during the marriage to support the purposive interpretation which the majority of the Extra Division has favoured.

30. Fourthly, I am not persuaded by the argument that "membership" in regulation 4 must mean active membership of an occupational pension scheme (or contributing membership of other schemes) and cannot extend to all types of membership in order to give meaning to the statement in the statutory formula that factor B can be zero. This argument has featured at every stage of this case and was accepted by the sheriff and the majority of the Extra Division. Suggestions have been made as to how factor B (the period of C which falls within the period of the marriage before the relevant date) could be zero when factor C is a positive number. Mr Mitchell suggested that where parties separated on the day of their marriage, there would be no period of marriage before the relevant date; if a spouse had a pre-existing pension arrangement factor C would be a positive figure and factor B would be zero. Lady Smith gave the circumstance of a pension arrangement entered into on the date of separation as an example of when B would be zero. But in her example both B and C would be zero; there would be no interest in the benefits of a pension arrangement to value. It is not possible to tell precisely which circumstance was in the mind of the person who drafted regulation 4 when he or she provided for the possibility that factor B could be zero. But that does not matter. If the person drafting the wording of factors B and C intended it to confine "membership" to "active" membership that would involve egregious circumlocution. There is no hint of such an intention in the words of the Regulations. If it were necessary to go further, I observe that there is no such hint in the explanatory note to the 2000 Regulations, to which the court can have regard to ascertain the context of the provision and the mischief which it addresses as aids to purposive interpretation: *R v Environment Secretary, Ex p Spath Holme Ltd* [2001] 2 AC 349, 397-398 per Lord Nicholls of

Birkenhead; *Comhairle nan Eilean Siar v Scottish Ministers* 2013 SC 548, para 47 per Lady Smith, para 62 per Lord Brodie. The explanatory note states:

> "Regulation 4 provides for the apportionment of the value of such benefits. Provision is made apportioning the value of the benefits in accordance with the period of time the party in the pension arrangement has been in both the pension arrangement and in the marriage as a proportion of the period of time that person has been in the pension arrangement." (regulation 4)

If regulation 4 were circumlocution for the period of active membership of an occupational pension scheme or, more generally, the period when contributions were being made towards a pension, I would have expected that to be flagged up in the explanatory note. In any event, as I have said (para 19 above), confining "the period of the membership" to the period when contributions were made and apportioning the value of the rights or interests in the benefits by reference to time, as section 10(5) requires, may often create an apportionment of the rights or interests in benefits in personal pension schemes which bears no relationship to the relative value of the rights acquired before and during the marriage.

31. I am therefore persuaded that "period of the membership" in regulation 4 of the 2000 Regulations refers to the period of the person's membership of the pension arrangement, whether or not contributions are being made to that arrangement in that period.

32. That does not mean, of course, that the value of an interest in a pension arrangement must be shared equally. As I said in para 13 above, there are safeguards within the 1985 Act which temper its prescriptiveness.

Conclusion

33. I would allow the appeal and remit the case to the sheriff at Edinburgh to proceed accordingly.