



26 July 2017

PRESS SUMMARY

McDonald (Respondent) v Newton or McDonald (Appellant) (Scotland) [2017] UKSC 52
On appeal from [2015] CSIH 61

JUSTICES: Lady Hale (Deputy President), Lord Wilson, Lord Carnwath, Lord Hughes, Lord Hodge

BACKGROUND TO THE APPEAL

Mr McDonald (the respondent) worked as a miner for British Coal. He joined the British Coal Staff Superannuation Scheme on 11 December 1978 and began contributing to it. He married Mrs McDonald (the appellant) on 22 March 1985. Shortly afterwards, he retired early on grounds of ill-health and exercised his right to receive a pension income before his normal retiring age. 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.

Mrs McDonald seeks a pensions sharing order under section 8(1)(baa) of the Family Law (Scotland) Act 1985 (“the 1985 Act”) on her divorce from Mr McDonald on the basis that his pension forms part of the matrimonial property which is taken into account in fixing financial provision. This appeal raises questions of statutory interpretation both in relation to the 1985 Act and The Divorce etc. (Pensions) (Scotland) Regulations 2000 (“the 2000 Regulations”), which were made under section 10(8) of the 1985 Act as amended. 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]”. The relevant date is the final date of separation, 25 September 2010 being the relevant date in the present case when the parties ceased to cohabit.

The 2000 Regulations, which apply to occupational pension schemes and personal pension schemes of all kinds, provide for the valuation of a person’s rights or interests in a pension arrangement for the purposes of section 10(5) by reference to what is known as the cash equivalent transfer value. Regulation 4 of the 2000 Regulations contains the relevant formula: “A x B/C where – 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 zero; and C is the period of the membership of that party in the pension arrangement before the relevant date...”

The dispute between the parties relates to that formula. The words which fall to be interpreted are the words in the definition of factor C, namely “the period of membership of that party in the pension arrangement”. Mr McDonald argues that the court should apportion the value of his pension rights by reference only to the period in which he was an “active member” of the scheme, that is the period during which he was making contributions to the scheme. On that basis, the value of his interest in the pension benefits which is matrimonial property would be £10,002. Mrs McDonald argues that the cash equivalent transfer value should be apportioned by reference to the period of Mr Macdonald’s membership of the scheme, both when in pensionable employment and also when drawing a pension, that value being £138,534. An Extra Division of the Inner House dismissed Mrs McDonald’s appeal. The majority based their reasoning on the general rule found in section 10(4) of the 1985 Act, which

states matrimonial property is confined to assets acquired during the marriage but before the relevant date. They also relied on the formula in the 2000 Regulations.

JUDGMENT

The Supreme Court unanimously allows Mrs McDonald's appeal. Lord Hodge gives the judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

The "period of 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 in that period [31]. There are four reasons why "membership" should not be confined to active membership of pension scheme while the member was contributing to it [25].

First, interpreting regulation 4 as confined in such a way involves adding words which are not there. The person who drafted the 2000 Regulations was clearly aware of the different categories of membership, as can be observed from the differentiation between categories of membership in regulation 3, and chose not to differentiate in regulation 4 between classes of membership [26].

Secondly, the 2000 Regulations apply to both occupational pension schemes and personal pension schemes. The definition of "active membership" in section 124(1) of the Pensions Act 1995 makes no sense in relation to personal pension schemes. It must be assumed that Parliament intended the Regulations to operate sensibly in respect of differing pension schemes. Further, it would prove difficult to ascertain the point at which a party who has made occasional contributions to a personal pension scheme had chosen to cease to make contributions [27].

Thirdly, the reading of the word "active" or "contributing" into regulation 4 cannot be supported by referring to the focus in section 10(4) of the 1985 Act to the acquisition by the parties of assets during the marriage but before the relevant date. Section 10(5) of the 1985 Act deals specifically with pensions, and the opening words of section 10(4), which defines 'matrimonial property', state that the definition provided in section 10(4) is "subject to subsection (5) below". Parliament chose to deal with pensions differently by making a separate provision for them in section 10(5). It follows from the creation of that separate provision that the definition in section 10(4) should not be considered to apply to pensions and, therefore, the majority of the Extra Division of the Inner House erred in its reliance on it.

Fourthly, it is not persuasive that "membership" in regulation 4 must mean active membership in order to give meaning to the statement that factor B can be zero. If the person drafting the wording of factors B and C in regulation 4 intended to confine "membership" in such a way that would be remarkably indirect. There is no hint of such an intention in the words of the Regulations. Further, confining "the period of 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 of interests in benefits in personal pension schemes which bears no relationship to the relative value of the rights acquired before and during the marriage [30].

This interpretation does not mean that the value of an interest in a pension must be shared equally. Section 9(1) of the 1985 Act contains other principles which inform the court's decision-making and introduces flexibility into the award of financial provision. 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 [13, 32].

References in square brackets are to paragraphs in the judgment

NOTE This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>