


UPDATE
 RELATIONSHIP PROPERTY

The Supreme Court's approach to economic disparity claims

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THE SUPREME COURT RECENTLY CONSIDERED THE application of economic disparity under section 15 of the Property (Relationships) Act in *Scott v Williams* [2017] NZSC 185. The issue to be determined in respect of s 15 was whether the amount awarded to Ms Scott was correct.

Section 15 provides the court with the power to order compensation from relationship property in cases where, at the end of the relationship, the income and living standards of one partner are likely to be significantly higher than that of the other partner, as a result of the division of functions during the relationship.

Relevant background

Mr Williams spent most of his career as a partner in a law firm. Ms Scott was qualified as an accountant and later completed a law degree. Within a year of working as a lawyer, Ms Scott gave birth to the couple's first child and stopped working completely upon the birth of their second child, who required significant medical treatment. From this time on, Ms Scott was the primary caregiver for the children and also provided part-time accounting services to Mr Williams' law firm. Ms Scott stopped working to assist with a development on the parties' section, which did not eventuate.

During the marriage, the couple built up a substantial pool of assets. After separation, Ms Scott initially worked for an accounting firm but resigned due to the stress of the court proceedings. By the time of the hearing, Ms Scott was running her own homeware and gift business.

The main issues faced by the Supreme Court in respect of s 15 were:

- Whether a different methodology should be used in determining the section 15 claim; and
- Whether the approach taken by the Court of Appeal was correct.

Section 15 methodology

The Supreme Court held the view s 15 has been applied inconsistently in the past and courts have taken a restrictive approach in assessing the division of functions. In evaluating the correct methodology, the Supreme Court enquired into a number of various aspects of s 15, which are detailed as follows.

Presumption of causation

The causation element is the first step in a s 15 claim. It relates to the fact that the disparity in income and living standards must be caused by the division of functions within the relationship. The Supreme Court approved of the approach taken in *X v X* [*Economic disparity*] [2009] NZCA 399, [2010] 1 NZLR 601, where causation was presumed on the basis that the required division of functions existed along with a disparity in income and living standards. The Supreme Court noted such a presumption would be particularly difficult to rebut in the case of long term relationships.

Examples of ways in which the presumption could be rebutted in long-term relationships include the career partner receiving an inheritance and that being the reason for the disparity, or the non-career partner developing a debilitating illness during the relationship. In short relationships, the presumption will still apply, however, it will be easier to rebut by demonstrating the cause of the disparity is something other than the division of functions.

Quantum of compensation

After the element of causation is met, the next stage of a s 15 inquiry is the quantum of compensation. To date, there have been two approaches (which are not mutually exclusive) in assessing the quantum of s 15 compensation. The first is the diminution method, whereby the non-career partner's income-earning ability is reduced as a result of the division of functions. The second is the enhancement method, whereby the career partner's income-earning ability has been enhanced by the division of functions.

The Supreme Court extended a word of caution in stating the quantum of compensation should be just sufficient to address the

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disparity and not go so far as to reverse the disparity. This was one of the reasons the Court of Appeal in *X v X* (at [234] to [243]) halved the compensation. The approach to date appears to have created an assumption of halving based on *X v X*. The Supreme Court, however, was clear to state that halving will not always be appropriate. Halving is only appropriate if it is necessary to ensure the disparity is not reversed.

Other relevant factors

The Supreme Court also looked at what types of factors will be relevant in determining the level of compensation under s 15. Factors such as whether the division of functions existed for only part of the relationship will be relevant, as will the existence of a disparity at the commencement of the relationship.

The Supreme Court considered the situation of a non-career partner having children early in the relationship and not having the opportunity

to develop a career. While assessing the non-career partner's projected income in such a situation will be difficult due to the lack of obvious career path, that will not be a bar to compensation under s 15.

The argument that a nanny could have been hired to undertake the role of the non-career partner is one that is commonly advanced. The Supreme Court rejected the assertion that a nanny could have been hired in place of Ms Scott on the basis that it would diminish the importance of Ms Scott's contributions and fail to respect the decision made by the parties during the relationship.

Another commonly advanced argument by the career partner is that it is their individual attributes or characteristics that is the real cause of the disparity, not the division of functions. The Supreme Court held the view such an argument is misdirected and largely irrelevant. It will only be relevant in some limited

situations, for example, in relationships of short duration or where the income-earning partner's career is already well-established prior to the commencement of the relationship.

Factors considered by the Court of Appeal

The Supreme Court was required to consider whether the factors taken into account by the Court of Appeal in determining the quantum of compensation were relevant. The factors considered by the Court of Appeal were:

- The pool of relationship property;
- Investment income;
- Post-hearing gains from relationship property;
- The amounts of orders in other cases;
- Retirement dates of the parties.

The Supreme Court held the only factor relevant to the quantum of a s 15 claim was the retirement dates of the parties, which is relevant to the extent of determining the end

date for projected income. The Supreme Court's view was none of the other factors should have been taken into account by the Court of Appeal.

The Supreme Court noted the pool of relationship property will only be relevant in placing a limit on the amount of compensation that can be ordered. Assessing compensation on the basis of a percentage of the total net pool therefore no longer appears to be relevant.

To recognise the irrelevant factors considered by the Court of Appeal, the Supreme Court reduced the quantum of the s 15 order.

Diminution method

The first step under the diminution method is to calculate the non-career partner's actual income as compared with their projected income, based on their experience and qualifications. The end date which should be used will be the earlier out of when the non-career partner retires or when the disparity in income and living standards ceases. The Supreme Court held the view that lifestyle choices made after separation will not reduce the projected income figure.

A contingency rate is often applied to projected income to account for the possibility that level of income may not be achieved due to various contingencies. This was the approach taken in *X v X*, where a contingency rate of 35% was applied. The Supreme Court was somewhat cautious of the fact that the experts in this case appear to have used 35% as a benchmark. The Supreme Court's view was that projected income should be realistic from the outset in order that a contingency discount is not necessary. A contingency discount should only be necessary to account for matters such as sickness, death or redundancy and should be significantly less than the 35% used in *X v X*.

The Supreme Court was clear to note the discount rate applied in *X v X* was specifically determined for the circumstances of that case and should not be used as a benchmark. The Supreme Court accepted the argument that no contingency discount is applicable from the date of separation to the date of hearing if none of the contingency events have occurred.

Enhancement method

Under the enhancement method, Ms Scott's projected income was higher than Mr Williams' notional income. Given the projected income had already been taken into account under the diminution method, the Supreme Court's view was that sufficiently compensated for any disparity that had arisen.

In addition, Ms Scott's contributions were held to have been primarily in relation to Mr Williams' law firm rather than his notional income. On that basis, Ms Scott had

already received her share of Mr Williams' law firm and super profits. No further compensation should therefore be required in respect of the enhancement claim.

Summary of approach to section 15

In general terms, the following can be discerned from the Supreme Court's approach to s 15:

- In long term relationships, if a disparity in income and living standards exists along with the relevant division of functions, causation is presumed in the absence of compelling evidence to the contrary.
- Halving the projected income of the non-career partner is not to be undertaken as a matter of course and is only appropriate in ensuring the disparity is not reversed.
- The level of compensation is to be assessed at the date of separation, not the date of hearing.
- Relevant factors in assessing quantum include whether the division of functions only existed for part of the relationship and whether the disparity already existed at the commencement of the relationship.
- Arguments such as a nanny could have been hired in place of the non-career partner or the individual attributes of the career partner being the real cause of the disparity will be of limited relevance.
- The contingency rate used in *X v X* is too high and a lower rate should ordinarily be applied.
- No contingency discount should be applied between the date of separation and the hearing date if none of the contingency events have occurred.
- The pool of relationship property is only relevant in placing a cap on the quantum of s 15 compensation.
- The amounts of orders in other cases will be of no relevance as each case is specific to its own facts.
- The retirement dates of the parties will be relevant in determining the period of time for which the projected income of the non-career partner should apply.
- There is no one method, formula or approach that can be applied as it will depend on the individual circumstances of each relationship. ■

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