

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SHIRLEY MARIE McGRATH

Plaintiff
(Respondent)

- and -

ALEXANDER MacDONALD HOLMES

Defendant
(Petitioner)

REASONS FOR JUDGMENT

1 These reasons deal with two issues which remained subsequent to trial |
prejudgment interest and costs.

2 In this consolidated court action relief was claimed by the parties pursuant
to the *Divorce Act*, R.S.C. 1985 (2nd Supp.) ch.3 and the *Matrimonial Property Act*,
R.S.N.W.T. 1988, ch. M-6. The trial was held in April 1994. In his reasons for judgment
the trial judge, following his decision on the substantive matters in dispute, stated:

"I make no disposition as to prejudgment interest, since that issue
was not argued on the basis of the foregoing findings and the
foregoing disposition as to spousal support. Counsel are at liberty
to seek an appointment to make submissions on that issue, should
it be necessary.

Costs may be spoken to on the same basis."

3 In January 1995 the wife appealed (successfully) to the Court of Appeal a
portion of the trial judge's decision on the substantive matters.

4 The parties have now presented their written submissions on the remaining
issues of prejudgment interest and costs. For personal reasons relating to conflict of
interest, and in view of the fact that his appointment to this Court ceased as of April 8,
1996, the trial judge understandably excused himself from further judicial involvement
with this file. This explains why it is the writer who now renders decision on these two
remaining issues.

5 A brief summary of the factual background, and the litigation itself, is
necessary. The parties (whom I shall, for clarity, refer to as the husband and the wife,
even though they are now divorced) co-habited as man and wife for a period of nine years
- from January 1983 to January 1992. They were married in August 1985.

6 Following the separation in January 1992 the wife, in July 1992,
commenced an action pursuant to the *Matrimonial Property Act* claiming an equitable
division of matrimonial property. The husband defended the action and filed a
counterclaim in which he (essentially) also sought an equitable division of matrimonial
property. In addition, the husband in December 1992 commenced a divorce action. In
his divorce petition he sought a divorce judgment, spousal support and division of
matrimonial property.

7 In May 1993 by court order the two court actions were consolidated, the

request for a divorce judgment was severed, and a divorce judgment issued.

8 The major item of matrimonial property in dispute was the matrimonial home at Prelude Lake.

9 In March 1993 the parties themselves resolved a number of disputed property issues, agreeing on the division and allocation of certain assets as well as their values. One of these was the Prelude Lake property. It was agreed that the wife's interest in that asset was valued at \$30,000.

10 At the time of trial in April 1994, the husband sought:

- a) credit for the residual value (stated to be \$44,700) of his investment in the wife's university education.
- b) reimbursement for 50% of the total joint debt which remained outstanding at the time of separation (approximately \$4,500).
- c) spousal support from the date of separation to the year 2000, in specified amounts.

11 At the time of trial, the wife sought:

- d) credit for her 50% shares in the parties' joint business enterprise which shares she had turned over to the husband following separation.
- e) credit for the fact that the husband had paid off a pre-

cohabitation debt of \$13,000 from their joint resources during the cohabitation/marriage.

- f) payment for rent for her share of the Prelude Lake property after the separation in January 1992.

12 At trial, success was divided. In reasons filed June 6, 1994, the trial judge dismissed the husband's claim (a) above and the wife's claims (e) and (f) above. While he granted the husband's claim (b) above and the wife's claim (d) above, these two items essentially (except for \$88.00) offset each other. The trial judge granted the husband's claim (c) above for spousal support. He granted a lump sum of \$17,500 for spousal support to the date of judgment and \$500 monthly thereafter to the year 1999. He specifically provided that the \$17,500 could be deducted from the \$30,000 owing to the wife for her share of the Prelude Lake property under the March 1993 matrimonial property agreement. Finally, as indicated above, he invited counsel to make submissions on prejudgment interest and costs should that be necessary.

13 The wife appealed that part of the judgment which ordered her to pay spousal support to the husband. She was successful on the appeal, and the portion of the trial judgment directing her to pay a lump sum and periodic spousal maintenance was struck.

14 With respect to costs, the usual rule is that the successful litigant is entitled to his or her costs of the litigation. The Court however has a discretion to deprive the

successful party of his/her costs where valid grounds exist for doing so.

15 In the present case there were two "areas" of dispute at the trial)
matrimonial property issues and spousal support. In general terms, success was divided
on matrimonial property issues (it being remembered that the parties themselves had
already established the wife's entitlement to a \$30,000 interest in the Prelude Lake
property). On spousal support, the wife was (ultimately) successful. In all of the circum-
stances, I see no reason or grounds for depriving her of costs for her (partial) success. I
would therefore exercise my discretion by awarding to the wife one-half of her party and
party costs (including disbursements) taxed according to column 4 of Schedule I of the
1979 Rules.

16 In his reasons for judgment, the trial judge specifically invited counsel to
make submissions with respect to prejudgment interest. He therefore by implication held
that it was then open to the plaintiff wife to seek prejudgment interest notwithstanding
the absence of any mention of such a claim in the prayer for relief contained in the
statement of claim filed herein. I accordingly view that issue (i.e. whether failure to claim
prejudgment interest in the statement of claim precludes the granting of such relief) as
res judicata in the present case and I make no finding with respect to the conflicting
authorities cited by counsel: *Jefford v. Gee* [1970] 2 Q.B. 130 (C.A.) and *Riches v.*
Westminster Bank [1943] 2 All E.R. 725 (C.A.) for the plaintiff wife versus *Stoner v.*
Canadian Natural Resources Ltd. (1987) 55 Alta. L.R. (2d) 238 for the husband.

17 Prejudgment interest is awarded to a successful plaintiff on the basis that

the defendant has kept the plaintiff out of his or her money which ought to have been paid to him/her, and that the defendant has had the use of that money himself.

18 In the present case the parties themselves agreed on March 3, 1993 that the wife was entitled to \$30,000 for her interest in the Prelude Lake property. Formal judgment was entered in that amount on July 14, 1994.

19 From March 3, 1993 the husband had the use of the wife's \$30,000, and he kept that money from her. On the evidence presented, there is no reason for the Court to disallow the prejudgment interest that the wife is otherwise entitled to pursuant to the provisions of s.55 of the *Judicature Act*, R.S.N.W.T. 1988, ch. J-1, as amended by S.N.W.T. 1995, ch. 5. In the circumstances of this case, however, it would not be appropriate to grant her interest from the date of separation, in January 1992, but rather from March 3, 1993, the date on which her \$30,000 interest was clearly identified separate and apart from, and unmingled with, other property issues. Accordingly, the wife shall have prejudgment interest on the \$30,000 from March 3, 1993, calculated in accordance with the foregoing statute.

The disposition of these two remaining issues will therefore be as stated in the within reasons

J.E. Richard
J.S.C.

Yellowknife, Northwest Territories
June 12, 1996

Counsel for the Plaintiff (Respondent): Adrian C. Wright
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