

Aitken & Aitken [2023] FedCFamC1A 69

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A Full Court consideration of the role of the Court in drafting binding orders, and an appeal against a 'buy out' order in the face of an application to sell the relevant entity.

Facts

The parties were married for 28 years from 1990 to 2018. At the time of trial, they had three adult children. During their marriage, and through their equal efforts, the parties amassed wealth in the sum of approximately \$80 million.

The parties agreed it was just and equitable that their respective interests in property be adjusted such as to affect an overall equal division of their assets. They disagreed on the value ascribed to certain property, how the Court should take into consideration taxation issues, and most relevantly, the value and identification of the parties' interests in the company 'D Pty Ltd'.

D Pty Ltd was valued by JJ Group on 4 March 2022 at \$45,514,742. It was acknowledged the valuation did not include some cash at bank, and issues of indebtedness including potential taxation liabilities for Fringe Benefits Tax and Capital Gains Tax in the event of the business being sold.

At trial, the husband contended that D Pty Ltd be sold and the proceeds divided equally between the parties. Alternately, the wife contended that the husband purchase her interest in the company for \$26,751,023. Wilson J found in favour of the wife and ordered the husband 'buy out' the wife. The husband appealed that decision.

The Court's role in drafting binding orders

As a preliminary matter, the Full Court took the opportunity open to it on the facts to consider the role of the Court in drafting binding orders. This was in circumstances where at trial, Wilson J, on three separate occasions, directed the parties to provide a minute of order reflecting his reasons. Unsurprisingly, the parties were unable to agree on a minute of order and on no occasion as so directed was a joint minute of order

delivered to the primary judge's chambers. Upon the third occasion, Wilson J stated in his reasons "*it's not my job to draft the orders; it's the representatives' jobs.*"

Eventually on 16 November 2022, Wilson J made final orders in the terms submitted by the wife. Notably, order 23 required the husband personally to pay the wife the sum of \$26,751,023 for the acquisition of her interest in D Pty Ltd. It was common ground that Wilson J did not include a default sale order in the event the husband could not comply with order 23.

In the appeal, the Full Court opined that "*[r]epeatedly delegating responsivity to the parties to conceive the nature and form of the orders required to quell the controversy between them arguably amounted to an abdication of judicial duty...*" Disagreeing with Wilson J's assessment of the scope of his 'job', the Full Court referred to *Wilson and Ors v Minister for Aboriginal and Torres Strait Islander Affairs and Anor* (1996) 189 CLR 1 at 11, in which the High Court described the function of Commonwealth judicial power in the following terms:

"the function of the federal judicial branch is the quelling of justiciable controversies...This is discharged by ascertainment of facts, application of legal criteria and the exercise, where appropriate, of judicial discretion (Fencott v Muller (1983) 152 CLR 570 at 608). The result is promulgated in public and implemented by binding orders."

The Full Court clarifying further, that ss79 and 81 of the *Family Law Act 1975* ("the Act") require a judicial officer to determine the cause of action and make orders that are appropriate, just and equitable, and as far as practicable able to finally end financial relationships.

The ground of appeal – to 'buy out' or sell

At the appeal, the appellant proceeded on a singular ground, that the primary judge erred in making order 23 in that:

- a. "*[h]is Honour failed to articulate the reasons by he rejected the Husband's proposal for a sale of [D Pty Ltd] insofar as the Trial Judge failed to address the capacity of the Husband to make the additional payment to the Wife necessitated by that rejection";* and

- b. “[h]is Honour did not have any evidence before him that the Husband had the capacity to pay the wife the sum required.”

The ground incorporated two complaints: the legal error of inadequate reasons and the discretionary error of failing to take a material consideration into account.

In summary, the husband argued that:

- The evidence before the Court as to the value of assets held by the husband (in his personal capacity alone) amounted to \$1,128,188, a sum far less than required to make the payment.
- There was no cogent evidence before the Court that the husband could borrow or secure funding to make the payment ordered.
- Having regard to the failure of the primary judge to engage with the issue of the husband’s capacity to fund the payment ordered, the primary judge provided insufficient reasons for why he rejected the husband’s proposed sale of D Pty Ltd.

In summary, the wife argued that:

- The issue of the husband’s capacity to meet the payment was not an issue of controversy in the proceedings.
- The husband failed to draw the primary judges’ attention to his inability to pay the lump sum required at trial.
- The husband’s capacity to pay the sum was not a ‘fundamental and obvious’ issue requiring the primary judge’s consideration (by reference to *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42 at [120]).
- In any event, it can be reasonably inferred by the primary judges’ reasons that he concluded the husband had capacity to pay the lump sum ordered.

The Full Court acknowledged that the husband did not give evidence in chief as to his capacity to make any lump sum order made. It was noted however, that the valuation

of D Pty Ltd was received after the filing timetable allowing the parties to file their evidence in chief. Accordingly, counsel for the husband at trial made it clear in both opening and closing the husband's case that the husband contended he did not have capacity to 'buy out' the wife's interest in D Pty Ltd. For this reason, the Full Court accepted that the issue was clearly before the Court.

Referring to *Macedonian Orthodox Community Church*, the Full Court wholly rejected the wife's argument that the husband's capacity to pay the sum ordered was not a 'fundamental and obvious' issue. Having satisfied himself of the 'justice and equity' of the order, the primary judge by the language of both s79(1) and s79(2) was required to make orders that were 'appropriate' (referring to *Zao & Lee* [2019] FamCAFC 196 at [48]).

Relevantly, the primary judge identified two key facts. First, that the husband had limited assets in his personal name. Second, that the value of the parties' property ranged between \$79,925,966 and \$82,522,809, with the larger sum being subject to taxation liabilities which required assessment by an expert. Further, the Full Court acknowledged that the assets held by D Pty Ltd were such that liquidating to fund any payment may trigger other uncalculated costs such as Capital Gains Tax. The failure to make any default clause requiring the sale of D Pty Ltd further added to the impractical nature of the order. The Full Court concluded the husband's capacity to pay was not only 'fundamental and obvious' but an issue that should have, but did not, receive adequate consideration in the proceedings.

Finally, with respect to the wife's argument that the primary judge's consideration of the husband's capacity to pay could be inferred from his reasons, the Full Court disagreed. It reiterated the principles relating to inferences which may be drawn in civil cases and here, concluded that without any facts established by admissible evidence as to the husband's capacity to meet the payment, no inference as to capacity could be drawn from the primary judge's reasons.

Having regard to the above, the Full Court concluded that "*the primary judge had an obligation to clearly explain why, despite the submission by the husband that he lacked the capacity to pay the required sum to the wife, the primary judge made order 23 which required the husband to do just that.*" Concluding that he had not, the Full Court upheld the husband's appeal in toto.

Remittal vs re-exercise

The Full Court briefly considered the wife's application for it to re-exercise discretion upon error being found. In summary, the Full Court agreed with senior counsel for the husband that because order 23 was *"the final piece required to give effect to the transactions specified in the orders it was not possible for the Full Court to re-exercise discretion in respect to only order 23 without receiving evidence and submissions regarding the operation of the orders as a whole."* The matter was accordingly remitted.



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Therese accepts briefs to appear (as counsel or in her capacity as a Nationally Accredited Mediator) in, and advise on, matters involving all aspects of family law and related jurisdictions. This year (2023) she has been included by Doyles Guide to the Australian Legal Profession in their annual list of leading family law junior counsel for Victoria.

Recognised in 2018 and 2019 by Doyles Guide to the Australian Legal Profession as a Rising Star in family law, and previously named by Lawyers Weekly as one of the top 30 lawyers practicing under the age of 30 across Australia in all areas, Therese comes to the Bar with a dedicated focus on her chosen field.

Starting from a foundation of general practice including civil, criminal and administrative law, she commenced exclusively working in family law at the start of 2016 with Kennedy Partners Lawyers - a first tier Melbourne based firm with a domestic and international client base. Since that time, Therese has advised on and litigated extensively in all aspects of the jurisdiction including:

- Complex property settlements for married and de-facto couples;
- Financial agreements entered prior to or during a relationship;
- Financial agreements entered following separation; and
- Complex parenting matters including residency, relocation, and discrete parental responsibility issues.

Therese is a contributor to ongoing legal education and regularly presents for industry CPD providers. She is a member of the Women Barristers Bar Association, and a committee member of the Family Law Bar Association and the Family Law Institute LGBTI Australian Chapter. She holds a Bachelor of Laws, Bachelor of Arts (International Relations), a Graduate Diploma in Legal Practice and a Masters of Applied Law (Family Law).

Therese read with Dan Sweeney and her senior mentor is Minal Vohra SC.

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