The Sydney Property Market - How Family Law Lawyers deal with this?

Date : October 10, 2017

In Blackwell & Scott (2017), the Full Court considered whether the Trial Judge had made an error by setting aside consent orders that were entered into by the parties.

These property consent orders were made; which were to an equal division. In order to give effect to this equal division of property, the parties negotiated and entered into consent orders that provided for (in summary):

1. a property held in the husband's sole name be sold and the parties were to share equally in any proceeds of sale exceeding $440,000;
2. pending the sale, the husband will be responsible for the mortgage payments, outgoings and other expenses;
3. that the husband retain a second property also held in his sole name and on the payment by him to the wife of $130,000 within 90 days of the orders, the wife shall relinquish any right, title and interest in this property; and

The husband breached the consent orders and did not make the $130,000 payment that he was required to make to the wife within 90 days.

By the time the enforcement case was before the Court the property value had climbed from $860,000 to $1M.

The wife filed an Initiating Application which sought to set aside the consent orders made on 24 February 2014 pursuant to s.90SM(1)(c) of the Family Law Act 1975. This section provides the Court with the discretion to vary or set an order aside even after final property orders have been made, if a person has defaulted on an obligation and in the circumstances it is just and equitable to vary the order or to set the order aside.

9 months after the enforcement application was started the husband paid the $130,000 that was due.

The Trial Judge set aside the original property agreement of the parties. The Trial Judge identified that the consent orders were intended to effect an equal division of the parties' net assets. That identification included reference to the provision in the orders for the parties to share equally in any excess sale price (above $440,000) achieved in the sale of the property and this had in fact occurred.

The appeal

The Husband was unhappy with the outcome and appealed. The Full Court agreed with the original Trial Judge and dismissed the husbands appeal.

What was important for the court of appeal was that the parties had reached an agreement to divide their assets equally. The husbands delay, meant that the wife would no longer receive an equal share of the assets because by the time the payment was made to her, the property market had increased.

The Husband had solely caused the delay in the payment to the wife. The Court found that it was unfair for her to be disadvantaged because the husband had failed to comply with the orders.

What does this mean? and why should you involve family law lawyers?

This decision highlights the importance of involving family law lawyers and considering the effect of variations in the value of assets that may occur before or after the making of final property orders. It also highlights the importance of compliance with Court orders, noting the discretion that the Court has to vary and set aside orders altering property interests pursuant to s.90SM of the Family Law Act or s.79A (for married couples). It is also important to ensure that consent orders are properly considered (including obtaining advice) and appropriately drafted.

If you are going through a separation at the moment and require expert legal advice in relation to property proceedings, our specialist family law lawyers can assist you.

Speak to one of them today!

Contact us on 1800 300 170 or email us at familylaw@matthewsfolbigg.com.au

Disclaimer

Family law situations can be complex and sometimes they can involve serious issues. Information outlined is proposed to provide general guidance only. Due to the seriousness of legal matters as well as the uniqueness of your individual situation, professional advice should be sought. For advice, please contact one of our Family Lawyers.