



## Counsel Family Lawyers

### Family Law Case Update #8: Property

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#### ***Diggelen & Diggelen [2014] FamCAFC 160***

Coram: Justice Strickland, Justice Ainslie-Wallace and Justice Ryan

Registry: Full Court Sydney

Appeal from Family Court of Sydney of Justice Johnston

#### Procedure

- The Wife appealed against property settlement orders of Johnston J, there was no appeal against child support and spousal maintenance orders
- No appearance by husband, he had made an application to adjourn related to his admittance to psychiatric hospital the previous night, which was related to depression from his ongoing addiction to cocaine. The adjournment application was not granted.
- The Husband had failed to attend during the hearing of parenting matters and only showed up on the second day for property matters

#### Facts

- Parties lived together from 1994 in Africa and married in November 1996 and finally separated in December 2008.
- There was one child of the marriage born in June 2001, who lives with the wife and spends time with husband
- When the parties started living together the husband worked in finance for a bank in Africa and later Australia. Wife worked during the marriage before and for a short time after the birth of their child. Wife was main homemaker.
- Undisputed that from 2005 the husband was a cocaine user.
- He had attended rehabilitation programs in 2008 and 2009, neither was successful.
- Parties moved to Sydney after 9 years, the husband received share options as part of his employment. The husband was made redundant in 2011 and received a payment of \$469,199
- Despite the redundancy the husband was re-employed with the same company on a contract basis - he was still so employed at the time of the trial.
- In the matter interim orders had been made that the husband pay the wife spousal maintenance of \$2,500 per week.



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### Grounds of Appeal

- Treatment of husband's redundancy payment of \$469,199 after tax would attract "tax implications"
- Honour erred by ignoring the 100,000 LTIP options for purpose of calculating the Balance Sheet

### Decision

#### *Redundancy*

- The Trial judge had added back a sum of \$300,000 of the husband's redundancy payment into the pool, to account for tax.
- The first time the matter of tax was raised however, was by his Honour in judgement:
- para [30] " *Neither then nor at any other time during submissions was it suggested either by counsel for the wife or his Honour that the redundancy payment or any part of it was liable to tax in the husband's hands. The first and only time this was raised was in his Honour's reasons for judgment.*"
- The Full Court concluded there was no basis upon which his Honour could find that the redundancy payment was subject to tax. Quoted ss 12-85 of the Taxation Administration Act (Cth) requiring an employer to retain PAYG payments on the redundancy/termination of employment payment.

#### *Options*

- There was a single expert report prepared in the matter, calculated the value of husband's share options as at \$1,218,626 once the shares had vested - Judge made no reference to the unvested options only to the vested options in his calculation of the pool
- Due to the errors the matter was remitted for rehearing.

### Orders

#### Appeal allowed

- Orders 1 to 8 of orders made on 9 November 2012 be set aside.
- There be no order as to costs

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