“Second bite of the cherry” – when are financial settlements really final?

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Most family law clients want certainty. When asked during their first meeting “*why are you here?*” or “*what do you want to achieve?*”, 90% of new clients respond with, “*I want a final deal so I can move on*”.

But what happens if one party has been dishonest or fraudulent in the negotiations, or has failed to tell the other party or the Court facts that are relevant and material to the outcome? What if circumstances have arisen that make it no longer practicable for a party to comply with the agreement they reached earlier with their spouse? What if exceptional circumstances have arisen with respect to a child and one party will suffer hardship if the current agreement remains in place? Is it possible for the agreement to be overturned or set aside so that the ‘disadvantaged’ party can re-open the property settlement?

The answer is yes. Section 79A of the *Family Law Act* empowers the Courts to set aside, vary or even make new, more appropriate orders where it is considered necessary, on an application by one party. However, there are very limited circumstances in which one party can set aside, vary or have new orders made. In summary, s79A provides that the Court may exercise its discretion and set aside, vary or make another property settlement order if it is satisfied that:

- there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance; or
- in the circumstances that have arisen since the order was made it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out; or
- a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make another order in substitution for the order; or
- in the circumstances that have arisen since the making of the order, being circumstances of an exceptional nature relating to the care, welfare and development of a child of the marriage, the child or, where the applicant has caring responsibility for the child, the applicant, will suffer hardship if the court does not vary the order or set the order aside and make another order in substitution for the order;

In a recent decision on appeal, the Full Court of the Family Court of Australia affirmed the decision of the trial judge in awarding a wife an additional $2 million, nine years after the original orders were made because a husband had failed in his duty to make a full and frank disclosure of all material facts.

In the matter of Pearce and Pearce *[2016] FamCAFC*, Murphy, Aldridge and Forrest JJ found that the husband was aware of significant information which he did not disclose to the wife prior to the original orders being made. Further their Honours found that had the wife been aware of the matters not disclosed, she would have made further enquiries before consenting to the order. Because the wife was prevented from making further enquiries before consenting to the order, their Honours found that the order should be varied so that the wife received an addition $2 million.

Specifically, the husband had informed the wife of the negotiations that had transpired regarding the potential acquisition of an interest in a business and the likely purchase price. However, he failed to inform the wife that:

- one month prior to the making of the original orders he had entered into a share sale agreement to acquire the 50% interest in a business
- that his 50% interest had a value of more than $500,000, however he was only paying $200,000

The notes included in the original orders about the transaction suggested the acquisition would cause debt and reduce income as opposed to reflecting the fact that the husband had entered into a share sale agreement and had acquired an interest in a company for under value.

The Full Court found that when an application is made because one party has failed to make full and frank disclosure, fundamentally the question is not the *value* of the interest not disclosed that is important. Rather, it was determined that the husband's failure to provide disclosure of a substantial interest in a business prevented the wife from making enquiries which caused a miscarriage of justice.

The Full Court was of the view that what was not disclosed was information and documents which may have provoked enquiries by the wife as to whether the picture painted by the husband in respect of the interest in the original orders was accurate. Arguably this represents a shift in the Court's previous position which required the lack of disclosure to be material to the outcome and the agreement that was ultimately reached.

There is rightly, a high benchmark to be met before a party should attempt to reopen a final property settlement order. Any person considering a section 79A application should seek specialist family law advice, as if the application ultimately fails, the party seeking to reopen could be ordered to pay the other party's costs. Legal advice about the prospects of successfully reopening the case is essential. In this complex area of law the potential benefits in your particular case may not outweigh the risks.

For more information or discussion, please contact HopgoodGanim Lawyers' Family Law team.

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