



## Family Law Notes

### What are “Addbacks” in Property Cases and how does the Court deal with them?

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In a Full Court decision of the Federal Circuit and Family Court of Australia, **Candle & Falkner [2021] FedCFamC1A 102**, three Judges deciding an appeal provide a useful restatement of the principles regulating **addbacks** in property settlement cases.

The Full Court decision provides a caution to parties and legal representatives in relation to “how” and “when” arguments for addbacks are agitated during the course of a case. The decision also emphasises the need for a primary judge to provide adequate reasons in support of the final orders made at the conclusion of the trial.

The case involved a marriage of 9 years (preceded by a cohabitation period of 5 years) between spouse parties in their mid-50’s. There was no child of the relationship, nor children from any prior relationship. One of the parties was in a new relationship. Each party had experienced health issues, however, the husband’s health issues adversely affected his capacity for gainful employment. One aspect of the matter was that there were a number of interim distributions of property to the husband and the wife after their marital separation. These distributions were reviewed to determine their fate on the “family law balance sheet”.

The appeal was successful. The Full Court found that the primary judge erred on two grounds:

- Whilst the Primary Judge did take a holistic approach to the assessment of contributions, the primary judge failed to take into account the full extent of the husband’s contributions to the family business.
- The primary judge failed to provide adequate reasons in support of the 2.5% section **75(2)** adjustment in favour of the husband.

#### **A restatement of the principles in relation to “Addbacks”**

An “**addback**” is the characterisation of a transfer, distribution or expenditure of money or other property by a party as notional property on the balance sheet even though the money or other asset may no longer exist. That is, the property is considered to still be on the balance sheet, and it is notionally treated as being in the hands of the party who had the benefit of the property or who brought about its premature distribution.

After reviewing earlier case law on **addbacks** and considering the material in the appeal, the Court restated the law on **addbacks** in 4 clear propositions:

- 1) The treatment of property which has been distributed and expended as an **addback**, is an exceptional exercise of discretion requiring a consideration of the balance sheet, and must be an exercise which is necessary to achieve justice and equity between the parties.
- 2) The nature of the expenditure identified as an **addback** is relevant. Further, reasonably incurred expenditure should not usually be treated as an addback.
- 3) Previous decisions in **Stanford v Stanford (2012) 247 CLR 108**, and **Bevan & Bevans (2013) 279 FLR 1**, do not lead to the conclusion that the inclusion of notional property as an addback is erroneous, however, proper consideration must be given to existing interests in property when considering the inclusion of notional property on the balance sheet.
- 4) Cases which do not fall within the “exceptional” category can still achieve a just and equitable outcome through expended interim distributions being examined through the lens of section **75(2)(o)** (that is, “*any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account*”) rather than including them in the balance sheet exercise as an addback.

The restatement of the above principles provides clarity for legal practitioners, and will be beneficial to clients, who over the last decade have had to tip-toe through negotiations concerning the existence and operation of **addbacks** in family law property cases.

### **Adequate Reasons for Judgment**

The decision also found that the trial judge did not provide adequate reasons in support of the section **75(2)** adjustment in favour of the husband. Specifically, the trial judge did not explicitly examine the real money effect (or “dollar value”) of the proposed 2.5% adjustment in the husband’s favour.

The importance of adequate reasons is well settled. An assessment of the adequacy of reasons made by a trial judge is said to require a holistic reading of the entire judgment. An appeal Court does not require perfection. A trial judge is not required to identify every detail in the process of their reasoning leading to a finding, and not all evidence before the Court must be referred to. Nonetheless, the judge must provide the reasons for the resolution of an issue critical to the contest between the parties, and more generally show how they arrived at the final orders by reference to the evidence before the Court and the competing positions and applications of the parties.

The need for adequacy of reasons is a fundamental requirement for the exercise of the judicial function to show that justice has been done.

The transparency of justice through the provision of reasons allows justice to be scrutinised and permits parties to exercise any appellate right that may be available to them.

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*If you or a friend or colleague need advice in relation to Family Law or a related property settlement matter, please contact our Family Law Partner, Paul Lewis or our Associate, Katherine Evans.*