

FAMILY LAW PROPERTY SETTLEMENT INTERIM PROCEEDINGS SPOUSAL MAINTENANCE

Where the wife sought to vary spousal maintenance orders made by consent Where the wife claimed the amount is not proper or adequate and that there has been a change of her circumstances since the orders Consideration of s 83 of the Family Law Act 1975 (Cth) Where the wife failed to demonstrate that a variation of the orders is justified Application dismissed. FAMILY LAW PROPERTY SETTLEMENT INTERIM PROCEEDINGS Where the parties sought orders for partial property settlement in order to pay legal costs Where there is substantial equity in the former matrimonial home Where the amount sought by each party was insignificant compared with the overall net assets Where it was just and equitable to make orders for partial property settlement in favour of both parties. Family Law Act 1975 (Cth) ss 79, 83 Cuny & Cuny [2014] FamCA825 Strahan and Strahan (2011) FLC 93-466 APPLICANT: Mr Cuny RESPONDENT: Ms Cuny FILE NUMBER: SYC 1927 of 2013 DATE DELIVERED: 20 October 2014 PLACE DELIVERED: Sydney PLACE HEARD: Sydney JUDGMENT OF: Rees J HEARING DATE: 10 October 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Lloyd SC SOLICITOR FOR THE APPLICANT: Broun Abrahams Burreket COUNSEL FOR THE RESPONDENT: Mr Wheelhouse SC SOLICITOR FOR THE RESPONDENT: Rockwell Olivier ORDERS IT IS ORDERED (1) That the wife's application filed on 2 September 2014 to vary the orders for interim spousal maintenance made on 22 July 2013 be dismissed. (2) That within seven days the husband and the wife pay, or cause to be paid, by way of interim property settlement, to the husband the sum of \$120,000 and to the wife the sum of \$137,000. IT IS NOTED that publication of this judgment by this Court under the pseudonym Cuny and Cuny (No. 2) has been approved by the Chief Justice pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT SYDNEY FILE NUMBER: SYC 1927 of 2013 Mr Cuny Applicant And Ms Cuny Respondent REASONS FOR JUDGMENT Mr Cuny (the husband) asks the Court to make an order for interim property settlement in the sum of \$120,000 in favour of each of himself and Ms Cuny (the wife). The husband's application is that the interim property settlement be financed by a drawdown on the existing loan facility with the National Australia Bank (the NAB loan facility). The NAB loan facility is secured over the former matrimonial home located at

L Street, Suburb M (L Street). The wife opposes the making of an interim property settlement in favour of the husband but asks that the Court make an order that the husband pay \$137,000 to her solicitors by way of interim property settlement. The wife also applies for an order to vary spousal maintenance. THE SPOUSAL MAINTENANCE APPLICATION The orders for spousal maintenance which the wife seeks to vary were made on 22 July 2013. Those orders, which were made by consent, made provision for the husband to pay spousal maintenance in an amount of \$923 per week (or \$4,000 per calendar month) together with all expenses associated with L Street including municipal and water rates, telephone, Foxtel, gas, electricity, insurance, internet and security. The wife now seeks to vary those orders and asks the Court to make an order that the husband pay to her \$1,959 per week by way of spousal maintenance. The provisions for modification of spousal maintenance orders are contained in s 83 of the Family Law Act 1975 (Cth) (the Act). S 83(2) sets out the matters which the Court must consider as follows: (2) The court shall not make an order increasing or decreasing an amount ordered to be paid by an order unless it is satisfied: (a) that, since the order was made or last varied: (i) the circumstances of a person for whose benefit the order was made have so changed (including the person entering into a stable and continuing de facto relationship); (ii) the circumstances of the person liable to make payments under the order have so changed; or (iii) in the case of an order that operates in favour of, or is binding on, a legal personal representative--the circumstances of the estate are such; as to justify its so doing; (b) that, since the order was made, or last varied, the cost of living has changed to such an extent as to justify its so doing; (ba) in a case where the order was made by consent--that the amount ordered to be paid is not proper or adequate; (c) that material facts were withheld from the court that made the order or from a court that varied the order or material evidence previously given before such a court was false. Senior Counsel for the wife submits that the Court should take into account two matters. Firstly, that the orders made on 22 July 2013 were made by consent and secondly that there has been a change in the wife's circumstances in that her health has deteriorated and her cost of living has increased. In relation to the first submission, which relies upon s 83(2)(ba) of the Act, it is contended on behalf of the wife that the amount which was ordered to be paid on 22 July 2013 was

not proper or adequate. On 22 July 2013, the matter was listed before the Court for determination, inter alia, of the wife's application for spousal maintenance. She sought an order that the husband pay spousal maintenance, pending further order, in the sum of \$1,954 per week in addition to electricity, gas and Foxtel/Internet payments, fees and rates. The order which the wife seeks before me today by way of variation is in approximately the same amount as that which she sought on 22 July 2013. In the proceedings on 22 July 2013, the wife was represented by Counsel instructed by her current solicitors. In support of her application for spousal maintenance on 22 July 2013, the wife relied upon a Financial Statement sworn on 18 June 2013. In that Financial Statement she deposed to having income from a rental property but no income by way of employment. That remains the wife's position today. At Part N of that Financial Statement the wife assessed her personal weekly expenses at \$1,508. On 22 July 2013, the parties reached an agreement and orders were made, by consent, that the husband pay to the wife the sum of \$4,000 per calendar month (or \$923 per week). The expenses claimed by the wife in the Financial Statement sworn 18 June 2013, at Part N, included, for example, \$368 per week for educational expenses (flying lessons), \$91 per week for pharmaceutical expenses, \$100 per week for house cleaning, \$85 per week for telephone, \$80 per week for petrol. It is unsurprising that some compromise was reached between the parties as to the quantum of the order for spousal maintenance. It is not, however, open to the wife, having compromised her claim on 22 July 2013, to now assert that the amount which was ordered to be paid is not proper or adequate. It was open to her on 22 July 2013, had she chosen to do so, and had she been of the view that the amount which was agreed to by the husband was inadequate, to run her case on that day. She cannot now assert that the amount to which she agreed, in those circumstances, was neither proper nor adequate. The next matter upon which the wife relies is that it is asserted on her behalf that her health has deteriorated and her cost of living has increased. In relation to the issue of the wife's health, the wife relies upon an affidavit of Ms R who is a clinical psychologist. Ms R has been the wife's treating therapist since 19 August 2013 and expresses the view that the wife has a major depressive disorder and a generalised anxiety disorder. Ms R expressed the view that the wife is unable to work, but since the wife was not working when the consent orders were made in July 2013, that does not

constitute a change of circumstances. Insofar as it is asserted on behalf of the wife that her costs of living have increased, Senior Counsel for the wife relies upon the expenses which the wife now incurs for medical treatment. In relation to the claimed medical expenses the wife, in her Financial Statements sworn 2 September 2014, in support of the present application, claims those expenses to be club membership of \$15 per week, yoga of \$87 per week and counselling of \$150 per week. On 15 September 2014 the solicitors for the husband wrote two letters to the solicitors for the wife requesting that they provide documentary verification of the wife's claims in relation to her asserted mobile telephone costs of \$90 per week, parking costs/fares of \$65 per week, medical, dental, optical expenses of \$85 per week, counselling costs of \$150 per week, chemist/pharmaceutical expenses of \$91 per week, Telstra/Internet costs of \$63 per week, educational expenses of \$368 per week and yoga expenses of \$87 per week. Whilst some documents were produced to the husband's solicitors on the morning of the hearing, no documents were produced which came within the categories set out in the letters of 15 September 2014. The wife was on notice that her evidence in relation to the expenses referred to in those letters was challenged. In those circumstances she bore the onus of proving the expenses. No documents were tendered in the wife's case to substantiate those claimed expenses and accordingly the wife has failed to demonstrate that her medical expenses, or her living expenses, have increased. Leaving aside the expenses which were challenged in the letters dated 15 September 2014, many of the expenses claimed by the wife in Part N of the Financial Statement sworn on 18 June 2013 were in fact greater than those which she claims in the Financial Statements sworn 2 September 2014. For example she previously claimed an expense of \$200 per week for food but that expense has now reduced to \$150. The wife has failed to demonstrate that her circumstances have so changed that a variation of the orders for spousal maintenance is justified in accordance with s 83 of the Act. If I am in error in relation to that assessment and I am required to consider what orders should be made for spousal maintenance, I note that it was conceded on behalf of the wife that the amount of \$368 per week for flying lessons (being the educational expenses referred to above) was no longer claimed. The total personal weekly expenses outlined by the wife in Part N of her Financial Statements sworn 2 September 2014,

including the educational expenses, had amounted to \$1,959. The expenses, other than the educational expenses, which were challenged by the husband's solicitors in the letters dated 15 September 2014, totalled \$631 per week. Thus the wife has either abandoned or been unable to prove \$999 (\$368 plus \$631) of expenses, leaving her with unchallenged expenses of \$960 per week. In circumstances where the husband is currently paying \$923 per week together with all of the costs of maintaining the home in which the wife lives, it would not be appropriate to vary the order. The wife's application will be dismissed.

INTERIM PROPERTY SETTLEMENT

The husband by an Application in a Case filed 11 July 2014 seeks the following order: That within seven days by way of partial property settlement the Husband and the Wife pay or cause to be paid to the Husband the sum of \$120,000 for interim costs with such funds coming from the drawdown facility with National Australia Bank secured over the property [L Street, Suburb M]. In submissions before me, Senior Counsel for the husband conceded that it would be appropriate for a similar amount to be provided to the wife by way of partial property settlement and by the same mechanism. The wife in a response filed on 2 September 2014 seeks the following order: That within twenty-eight (28) days from the date of these orders, the husband pay the sum of \$137,000 to the wife's solicitors (named) by way of cleared funds. The wife sought that the husband's application for interim property settlement be dismissed. Both Senior Counsel approached the applications as an exercise of power pursuant to s79 of the Act. No submissions were directed to the appropriateness, or otherwise, of the sums sought respectively by the husband and by the wife and I will proceed on the basis that no issue is taken that the amounts sought are reasonable (noting that it is the wife's case that no interim distribution should be made to the husband). Somewhat curiously, in submissions, Senior Counsel for the husband submitted the Court had no power to order the husband to draw down on the NAB loan facility secured on L Street in order to pay an amount of money to the wife by way of interim property settlement. However, it was submitted that the Court could make the orders sought by the husband, in favour of both parties, because the husband consented to a draw down on these terms. It is not necessary to determine that issue here because the husband has conceded, by virtue of his application that each of the husband and the wife receive \$120,000 by way of interim property

settlement, that he has the capacity to raise those funds. The matters to be taken into consideration when determining whether interim property settlement orders should be made are set out in the decision of the Full Court in *Strahan and Strahan* (2011) FLC 93-466. The Full Court made it clear that it is not necessary for a party to establish compelling circumstances to justify the exercise of discretion and the Full Court recognised that it may be appropriate to make orders which would allow the parties to fund their litigation. On behalf of the wife, Senior Counsel submitted that it was inappropriate to make an order in favour of the husband because the husband had a high disposable income and had not demonstrated to the Court that it was not possible for him to fund his litigation from his income. I have already made findings in relation to the husband's available income. In my judgment delivered on 11 September 2014. Those findings are reproduced here: 13. The husband discloses a gross income of \$1,072,000 per annum. That income includes a distribution from the [Cuny] Family Trust. It is an agreed fact that the [Cuny] Family Trust is an alter ego of the husband. There is no evidence of the current income or assets of the [Cuny] Family Trust. In the year ended 30 June 2013, the [Cuny] Family Trust made distributions totalling \$255,000 to the husband's adult children. In that year, the income of the [Cuny] Family Trust was \$352,380. All of that income was available to the husband. 14. Bank statements tendered in the wife's case show that at least in July and August 2013 the spousal maintenance that was paid for the benefit of the wife pursuant to the orders made 22 July 2013 was paid from the [Cuny] Family Trust. Credit card statements for the husband tendered in the wife's case showed substantial discretionary spending including \$31,955 to [P Jewellers] in September 2013. Between 16 October 2013 and 1 August 2014, some \$260,000 was paid into the husband's American Express account. 15. Bank statements for the husband's National Australia Bank account ending in the numbers ...88 show that in 2013 the husband paid his daughter [Q] \$42,500. The husband has superannuation entitlements in a self managed fund valued at \$2,111,000. He draws a pension from the fund of \$82,576 per year which is disclosed as part of his income in his financial statement. However, there is no evidence of the maximum amount that the husband would be entitled to draw. Senior Counsel for the wife drew attention to the Regulations relating to the limits on transition to retirement pensions. It may be that

the husband could have access to his superannuation fund to draw money for the payment of legal fees but, whether he draws \$120,000 from superannuation or from the line of credit makes no difference to the net amount of the property pool. The argument on behalf of the husband is that he also needs a partial property settlement in order to finance his legal fees. It appears to be his contention that he cannot fund his legal fees from his income without curtailing his lifestyle and that there is no other source for a lump sum to be provided to his lawyers than from the equity in the former matrimonial home. In response, Senior Counsel for the wife submits that there should be no payment to the husband because that sum will somehow be lost in the final determination of the applications for property settlement. A further matter relied upon by the wife is that the husband is not currently making any payments towards the costs of the NAB loan facility secured over L Street and that, it is submitted, he ought not be permitted to increase the indebtedness. That is a matter that will no doubt be considered by the Trial Judge when the proceedings are finally determined. However, in the meantime, no issue is raised by the lender which would suggest that no further funds can be advanced. On the contrary, it is agreed that the parties can draw down in excess of \$1 million on the NAB loan facility. L Street has been valued by a single expert at \$6 million. On any version of the evidence, there is at least \$5 million worth of equity in the property. It is not suggested in either case that an interim distribution of \$120,000 to each party, or of \$137,000 to the wife, would be incapable of being absorbed into a final distribution. There is no reason that the substantial equity in L Street should not be available, at least in part, to both of the parties to use in whatever manner they see fit. The amount which they each seek is minute compared with the overall net assets which are available for division. I am satisfied that it is just and equitable in the exercise of power pursuant to s 79 of the Act to make a small portion of the assets of the parties available to each of them. I note that each party says that the funds are to be used to pay legal costs. The parties can choose whether to pay the amounts by drawing down on the NAB loan facility, which they both agree is available, or from any other source. I certify that the preceding forty-eight (48) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Rees delivered on 20 October 2014. Associate: Date:

<http://www.austlii.edu.au/au/cases/cth/FamCA/2014/884.html>