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FAMILY LAW & EXPERT EVIDENCE

In any court jurisdiction, there are limits as to the evidence that can be given by the plaintiff or the defendant or the applicant or the respondent (depending on what they are called in each jurisdiction). The evidence of an unqualified individual is limited to their direct evidence of what was seen or heard by them. There are specific rules to exclude hearsay evidence (ie, to give evidence of something that was said when the witness was not present).

An ordinary witness can also not give evidence of matters that are considered to be within the expertise of a particular profession or qualification. In family law cases, an ordinary witness cannot competently give evidence on issues such as the value of a property or the impact of medical conditions on earning capacity.

The most common requirement for expert evidence in family law matters is to value real estate. A qualified and registered valuer will charge a fee of anywhere between \$800-\$3000 for valuation of real estate depending on the location and type of property.

The court encourages separated spouses to reach agreement on the valuation of real estate by the exchange of market appraisals for the property. If there are three or more appraisals obtained and those appraisals are within range then in most cases, the husband and the wife reach agreement on a compromise value typically based on the average of the appraisals.

In some matters, the appraisals obtained by each spouse may have a variation of up to \$100,000 and in those circumstances we advise clients not to accept a compromise midrange value of the property. It is important to note that market

appraisals are not admissible as evidence in court of the value of real estate.

Where no agreement can be reached as to the value of a property, the court rules provide a mechanism for the appointment of 1 valuer as a single expert witness in the proceedings between the husband and the wife and both the husband and the wife are bound by that valuation. The court rules state that any second valuation that either spouse seeks to tender in a hearing can only be done so with the leave of the court.

These court rules have been in force for over 10 years now and it is very rare for the court to grant leave for any second valuation report to be tendered as evidence in a hearing.

For most couples, the valuation of the real estate is the most important issue to get right in the property settlement process. It is important for clients to be aware of their rights and their options before any final decision is made on property settlement orders under the Family Law Act.

If you need any advice in relation to Family Law issues then please contact Sean Cahill who is an Accredited Family Law Specialist.

WHEN AN INCLUSION IS NOT AN INCLUSION

Recently we acted for a vendor on the sale of a property. The contract for sale of land requires items that are to be included with the sale to be specified. Each item has a box that is marked if the items are present at the property and are to be included in the sale.

If items at the property are to be removed prior to settlement they should be specified as "exclusions". When we prepared the contract,

our client instructed us that the property had blinds and the inclusion box was marked.

The purchaser under a contract for sale of land acquires the property in its state of repair and condition as at the date of exchange.

On the date of settlement, the purchaser's conveyancer relied upon the blinds being marked as an inclusion on page 1 of the contract and was demanding that the sum of \$1500 be withheld to enable the purchaser to receive the blinds that were marked as an inclusion in the contract.

The photographs of the property that were on the real estate agents website that had been used for the marketing of the property showed that all of the windows at the property had curtains on them with no blinds. Our client was mistaken in his belief that there were blinds in some of the windows. The photographs of the property as it was inspected by the purchaser proved that there were no blinds and the purchaser was not able to validly request that blinds be replaced or that money be set aside to compensate them for the blinds that were not there.

Settlement proceeded on that day without the purchaser receiving the non-existent blinds. The lesson to all vendors is to ensure that you provide accurate instructions as to the items that are to be marked as inclusions on the property.

The lesson to all purchasers is to ensure that you have accurate records of the condition of the property as it was at the date of exchange.

Both vendors and purchasers should take digital photographs of the condition of the property at the time of exchange to assist resolving any disputes that may arise prior to settlement about the state of the property at the time of exchange.

Should you require any assistance or advice in the purchase or sale of the property, please contact one of our conveyancing solicitors.

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