

Vest, Vested, Vesting, Do Such Shares Have Any Relevance ?

In **Russell [2016] FCCA 137** the Husband earned a base salary of \$540K and was also eligible for performance based bonuses in the form of shares in his ASX listed employer. The potential entitlement to those shares was one of a variety of adjustment factors relevant to the division of the parties' non-superannuation pool of \$4.2M.

It was the Husband's evidence that:

- He was issued rights to shares each year but those shares only vested with the right to sell them, three years after their allocation if the company met performance criteria measured against other ASX companies.
- In the last ten years only 30% of the shares issued to executives had vested and been able to be sold.
- While in 2014, 88% of the shares vested and in 2015 100% of the shares vested, that was only because of the relatively low value for which those shares were issued after the de-merger of the company.
- It would be very difficult three years hence for the company's level of performance to be maintained such that the performance measures against the other ASX companies were met and those shares vest.
- The Husband only had the right to sell those shares if he was still employed by the employer at the time that they vested and he flagged the possibility that he may not be employed by the employer at that time.

In these circumstances, it was submitted by the Husband that:

- the shares cannot be considered a financial resource available to him given it was unlikely that they would vest and he become entitled to them; and in any event,
- he may not be employed by the company when the shares vested.

In both 2014 and 2015, the Husband's share rights had vested. The total value of the 2015 vested shares was \$565,481 less a hefty tax liability.

Whilst taking no issue with the Husband's evidence as to the manner in which the shares may vest, it was submitted on behalf of the Wife that they were a financial resource of the Husband even though it was unknown if the shares would vest or what their value would be until the vesting date.

In **Beklar [2013] FamCA 327 Ryan J** considered the definition of property and the meaning of financial resource as follows in paragraph 118:

"The words "financial resource" are not defined in the Act but must mean something "not covered by the terms 'income and property', for example, contingent interests or benefits which a party actually received or was likely to receive, whether legally entitled thereto or not.

While **Judge Bender** was satisfied that the Husband's share rights were a financial resource, the big unknown was whether the future performance of the company would be such that it would meet its required performance hurdles at the time the shares were due to vest such that the Husband would actually receive them.

Accordingly the Judge noted that this factor must influence the weight the Court would give in exercising its discretion as to what, if any, adjustment to make in the Wife's favour to reflect this financial resource given it was extremely difficult to apportion any value to it at the time of the trial.

Given the various adjustment factors in this case, it was ultimately difficult to discern precisely what part this financial resource played in influencing the Judge to award the Wife 62.5% of the non-superannuation asset pool.