

DISTRICT COURT OF QUEENSLAND

CITATION: *ACB v VIN & Ors* [2013] QDC 152

PARTIES: **ACB**
(Plaintiff / Respondent)

&

VIN
(First Defendant)

MAR
(Second Defendant)

BER
(Third Defendant / Applicant)

NNE
(Fourth Defendant / Applicant)

FILE NO/S: 1189/2012

DIVISION: Civil

PROCEEDING: Applications

ORIGINATING
COURT: District Court of Queensland

DELIVERED ON: 11 July 2013

DELIVERED AT: Brisbane

HEARING DATE: 4 July 2013

JUDGE: Kingham DCJ

- ORDER:
- 1. The settlement of the claim by the plaintiff against the fourth defendant is sanctioned.**
 - 2. By consent of the plaintiff and the third and fourth defendants, the default judgment by the plaintiff against the third and fourth defendants filed 4 May 2012 is set aside.**
 - 3. By consent of the plaintiff and the third and fourth defendants, the proceedings by the plaintiff against the third and fourth defendants are discontinued.**
 - 4. By consent of the plaintiff and the third and fourth defendants, there is no order as to costs as between the plaintiff and the third and fourth defendants in these proceedings, including with respect to the application filed 26 June 2013.**
 - 5. The opinion and outline of submissions of Micheal**

Liddy of Counsel and the affidavit of BER sworn 11 June 2013 and the affidavit of Bridget Ann Burton sworn 11 June 2013 are placed in a sealed envelope on the Court file, not to be opened without an order of the Court.

CATCHWORDS: UNCONSONABILITY- MISTAKE - CAPACITY-
SETTING ASIDE EX PARTE JUDGMENT- SANCTION
TO A SETTLEMENT – DEFAULT.

Public Trustee Act 1978 s 59(1).

Uniform Civil Procedure Rules rr 93 – 98, 290, 304(2).

COUNSEL: M.J. Liddy for the Applicants.

T. Dighton (sol.) for the Respondent.

SOLICITORS: Caxton Legal Inc for the Applicants.

Gadens Lawyers for the Respondent.

- [1] These orders give effect to a just settlement between a Bank and two individuals who guaranteed the obligations of family members who borrowed funds from the Bank. Because one of the guarantors is a person under a disability, the settlement requires the consent of her husband in his capacity as her litigation guardian. It also requires this Court's sanction.¹
- [2] I have taken pleasure in my duty to give the Court's sanction to a settlement which sets aside a default judgment, relinquishes the Bank's claim over the guarantors' home, releases them from all liability to the Bank, and brings proceedings against them to an end, with each party bearing their own costs. In the unusual and difficult circumstances faced by the guarantors it is a fair and just outcome and does credit, both to the parties themselves, and to their professional advisers.
- [3] I do not wish to distress the guarantors by revealing, unnecessarily, their personal circumstances or how it was they say they came to be guarantors of the loan. Suffice it to say their counsel considered they had a relatively strong case to defend the Bank's claim. Had it been necessary to establish their defence; however, they would have embarked upon complex litigation, involving allegations of unconscionability, mistake and incapacity, which could well have been both lengthy and costly. The Bank's agreement with the guarantors has avoided any further stress to the guarantors who will not face the delay and uncertainty of contested proceedings.
- [4] It reflects well on the Bank that it has willingly entered into this settlement. The guarantors' case was not without risk. The Bank has had the benefit of professional advice from its solicitors, a respected and well regarded firm. Although it has a sizeable shortfall after sale of the primary security for the loan, the Bank will abandon any rights formerly asserted over the guarantors' home.

¹ *Public Trustee Act 1978 s59(1); Uniform Civil Procedure Rules rules 93 – 98.*

- [5] The guarantors are not in a position to pay for legal advice. They have been most ably and generously assisted by experienced and capable professionals. This case is an exemplar of the critical work done by community legal centres and by the solicitors and barristers who offer assistance to those who cannot afford their services.
- [6] The guarantors have taken many years to purchase their house from the Housing Commission. Their home, adapted to meet the special needs of the fourth defendant and their disabled son, is no longer at risk of sale.

Orders

- [7] I make the following orders:
1. The settlement of the claim by the plaintiff against the fourth defendant is sanctioned.
 2. By consent of the plaintiff and the third and fourth defendants, the default judgment by the plaintiff against the third and fourth defendants filed 4 May 2012 is set aside.
 3. By consent of the plaintiff and the third and fourth defendants, the proceedings by the plaintiff against the third and fourth defendants are discontinued.
 4. By consent of the plaintiff and the third and fourth defendants, there is no order as to costs as between the plaintiff and the third and fourth defendants in these proceedings, including with respect to the application filed 26 June 2013.
 5. The opinion and outline of submissions of Micheal Liddy of Counsel and the affidavit of BER sworn 11 June 2013 and the affidavit of Bridget Ann Burton sworn 11 June 2013 are placed in a sealed envelope on the Court file, not to be opened without an order of the Court.