SUPREME COURT OF QUEENSLAND

CITATION:	*Rapid Roofing P/L & Ors v Natalise P/L as trustee for the St Ange Family Trust & Ors* [2006] QCA 515
PARTIES:	**RAPID ROOFING PTY LTD** (first plaintiff/first respondent) **ALLEN LEO GEORGE ERNESTINE AND MARY-ALISE PARQUETTE ERNESTINE** (second plaintiffs/second respondents) **v** **NATALISE PTY LTD as TRUSTEE FOR THE ST ANGE FAMILY TRUST** ACN 094 771 954 (first defendant/first applicant) **JOSE ST ANGE AND MICHELLE ST ANGE** (second defendant/second applicant)
FILE NO/S:	Appeal No 8388 of 2006 DC No 115 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	District Court at Southport
DELIVERED EX TEMPORE ON:	5 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	5 December 2006
JUDGE:	Holmes JA
ORDER:	**1. On the applicants undertaking to prosecute Appeal No 8388 of 2006 expeditiously, and upon their payment into court within 7 days of today's date of the sum of $106,000 to be held pending determination of that appeal, it is ordered that enforcement of the judgment of McLauchlan QC DCJ given 8 September 2006 is stayed in part, to this extent: that the order that the second applicant Jose St Ange pay the first respondent Rapid Roofing Pty Ltd $70,000 with interest from 31 October 2001 be stayed pending determination of the appeal** **2. Costs are to be costs in the appeal**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – WHEN GRANTED – arguable grounds

	of appeal – entitlement to damages in conversion by detention – balance of convenience between the parties – respondents overseas residents with properties in Australia – whether stay of execution should be granted
	National Australia Bank Ltd v Nemur Varity Pty Ltd (2002) 4 VR 252; [2002] VSCA 18, considered
COUNSEL:	J C Faulkner for the applicants N J Thompson for the respondents
SOLICITORS:	Ledger Commercial & Property Lawyers for the applicants Stacks Gray for the respondents

HOLMES JA: The applicants have appealed against a judgment pursuant to which, inter alia, the male second defendant, Mr St Ange, was required to pay damages for conversion in the sum of $70,000 together with interest. This application is for a stay of enforcement of the judgment so far as that order is concerned.

The claim of the respondents, the plaintiffs below, arose out of an agreement with the applicants to enter a partnership pursuant to which the first respondent, Rapid Roofing, was to sell and ship to Australia machinery for use in the partnership business of manufacturing roofing and tiling.

The first applicant, Natalise, was to buy a half-interest in the machinery for the sum of $150,000 and as security for its advance of that money and in the machineries arrival the second respondents, Mr and Mrs Ernestine, were to give a mortgage over a house property they bought at Hope Island.

The machinery was duly shipped in two containers. The first container was filled, but for four items belonging to Mr

Ernestine, with the machinery the subject of the agreement with the St Ange interests. The second container held one prospective partnership machine but the rest of the contents, including something called a purlin machine, belonged to Mr Ernestine and were not to form any part of partnership property. The bills of lading for both containers were sent to Mr St Ange who duly presented them. They were thereafter held in storage in the Port of Brisbane on his account as consignee, as the trial Judge found.

The partnership arrangements broke down. The learned trial Judge found that the St Ange interests offered to return the contents of the containers in November 2001 but that offer was made subject to a number of conditions to which the respondents were unable to agree. In February 2002 another offer, which his Honour does seem to have considered acceptable, was made which included the release of the Mr Ernestine's property, subject to payment of port charges.

The learned trial Judge found that the respondents were entitled to damages for conversion in respect of the applicant's refusal, up to at least February 2002, to deliver up those chattels unconditionally. Those damages included consequential damages of $70,000 in respect of a lost contract for which the purlin machine was needed.

The applicants argue that no case of conversion by detention by made out simply because the applicants had failed to make an unconditional offer for the return of the goods and further

they argue that conversion was not established because there had been no lawful demand.

I am not entirely convinced about that but it is unnecessary to venture further into that point because the applicants have a better argument which they mount on the strength of what was said by the Victorian Court of Appeal in National Australia Bank v Nemur Varity Pty Ltd [2002] 4 VR 252. The Court there embarked on a considered discussion, which was obiter but is very persuasive, in arriving at the conclusion that entitlement to consequential damages in conversion requires that the defendant have knowledge of the likely loss, or at least that it be within his contemplation as a likely consequence.

Here it is said it was not shown that the applicants had any notice of the prospective loss of the contract if the purlin machine were not available. The issue has not, so far as I know, been the subject of any resolution in this State. It may well be resolved in favour of the applicants. At any rate it suffices to say that they have a good arguable case in this respect.

In support of their argument for a stay the applicants point to the fact that the respondents are citizens of the Seychelles and live there and they, the applicants, are not aware of any property other than the Hope Island property. That seems to indicate a failure to search very extensively as will become clear.

The applicant's solicitor says they have instructed him that there is a risk of dissipation of the judgment amount if paid and that the respondents are likely to remove their assets from the jurisdiction to thwart the applicant's ability to recover the damages if they succeed in the appeal.

There has, it is said, been a falling out between the applicants and the respondents, not such an unusual development in the course of litigation of this kind. It was also suggested initially that the male second respondent had previously attempted to avoid payment of a judgment in the Seychelles but that contention was withdrawn, prudently when one looks at the document relied on to support it.

The respondent's solicitor has sworn an affidavit in which he states on information and belief that Mr and Mrs Ernestine hold Australian citizenship and that they own four properties with a value of some $2.5 million, mortgaged for $1.4 million. He says that the respondents have borrowings in the Seychelles upon which they are paying interest at a rate higher than the statutory interest rate here but the information does not descend into detail so I am left uninformed as to whether the prospective loss is in the tens, hundreds or thousands of dollars. Mr Thompson, for the respondents, offered an undertaking not to dispose or encumber of the real property which the respondents hold in this jurisdiction pending the outcome of the appeal.

I proceed on the basis that the exercise of discretion in relation to a stay really involves determining whether it is an appropriate case and in that exercise the considerations are whether there is an appeal arguable - I am satisfied that there is - and where the balance of convenience lies as between the parties.

The balance here is an extremely fine one. I am informed that the appeal itself is set down for the 19th of February 2006. The applicants have offered to pay the amount of the judgment plus interest, which will be an amount of roughly $106,000, into Court. That means that any loss to the respondents is simply the difference between interest rates on an unspecified principal for a period of some three to four months.

The prospective loss to the applicants is that they may have difficulty in recovering the judgment funds which they have borrowed if they are taken off-shore. They would then have to seek recourse against the properties. That would not of itself carry great risk, given the undertaking not to dispose of or encumber them; but on balance it seems to me that the difficulties to which they would be put in having to recover against properties are sufficient to tip the balance of convenience in their favour, as against the relatively limited inconvenience to the applicants of being held out of their funds for a couple of months.

The applicants undertake to prosecute appeal number 8388 of 2006 expeditiously. On that undertaking I am prepared to grant the stay sought, also upon the payment into Court.

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HOLMES JA: On the applicant's undertaking to prosecute appeal number 8388 of 2006 expeditiously and upon their payment into Court within seven days of today's date of the sum of $106,000 to be held pending determination of that appeal, it is ordered that enforcement of the judgment of McLauchlan QC DCJ given 8th of September 2006 is stayed in part, to this extent: that the order that the second applicant, Jose St Ange, pay the first respondent, Rapid Roofing Pty Ltd, $70,000 with interest from the 31st of October 2001, be stayed pending determination of the appeal.

...

HOLMES JA: The costs of this application will be costs of the appeal.
