

SUPREME COURT OF QUEENSLAND

CITATION: *Theodore v Mistford P/L & Ors* [2003] QCA 295

PARTIES: **MARIE MARGARET THEODORE**
(plaintiff/appellant)
v
MISTFORD PTY LTD ACN 050 406 650
(first defendant/first respondent)
MAX EGERTON VINES
VALERIE LYNETTE VINES
(second defendants/second respondents)

FILE NO/S: Appeal No 11225 of 2002
DC No 147 of 1998

DIVISION: Court of Appeal

PROCEEDING: Application for Stay of Execution

ORIGINATING COURT: District Court at Maroochydore

DELIVERED EX
EXTEMPORE ON: 16 July 2003

DELIVERED AT: Brisbane

HEARING DATE: 16 July 2003

JUDGE: Williams JA

ORDERS: **1. Stay granted as sought until the determination of the appeal**
2. Costs reserved to the Court hearing the appeal

CATCHWORDS: APPEAL AND NEW TRIAL - APPEAL - PRACTICE AND PROCEDURE - QUEENSLAND - STAY OF PROCEEDINGS - WHEN GRANTED - where judgment for respondent in court below - where prompt appeal by appellant - where respondent sought to enforce order below by executing sale of appellant's property - where a hearing date has been set for the appeal - whether appellant has an arguable case on appeal - whether stay of execution should be granted

Croney v Nand [1999] 2 Qd R 343; [1998] QCA 367; Appeal No 7315 of 1998, 13 November 1998, cited

COUNSEL: M J Taylor for the appellant
F Redmond for the respondents

SOLICITORS: North Coast Law for the appellant
Klar & Klar for the respondents

HIS HONOUR: This is an application for a stay of an enforcement warrant.

The relevant chronology is as follows. Judgment was delivered in the District Court on 14 November 2002, a notice of appeal was filed promptly thereafter. The appellant's outline was delivered on the 6th January 2003 and the respondents' outline on 28 February 2003. The record has been prepared and a hearing date has been fixed for the 25th August 2003.

It is true that an application for stay before the primary Judge failed and pursuant to his order, ultimately although belatedly, a mortgage was executed by the applicant over what I will describe as the vacant land.

Warrants of execution were taken out on 17 February 2003 with respect to both the vacant land and the applicant's residential property. Attempts have been made to enforce those warrants and an auction is proposed to be held within a day or two. It is now conceded by the respondent to this application that execution could not proceed against the vacant land because of the existence of the mortgage. In consequence the execution would be levied against the applicant's residential property.

The principles on which a stay will be granted are well known and it is only necessary to refer to authority such as *Croney v. Nand* [1999] 2 QdR 343.

Whilst the applicant's prospects of success may not be strong, in my view she has an arguable case. She has prosecuted the appeal promptly, a hearing date has been set and if a stay were not granted, her residential property would be sold in execution where it would appear that there is other property available, which if it did not entirely satisfy the judgment debt, would go a long way towards achieving that.

In all the circumstances, I am persuaded that it is appropriate to grant the stay as sought until the determination of the appeal.

Costs should be reserved to the Court hearing the appeal.
