IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1265/85

NZLR

BETWEEN JITENDRA PATEL and INDIRA PATEL both of Auckland, Shop Proprietors

1106

Plaintiffs

A N D BARBARA ROBERTS of Auckland, Shop Proprietor

Defendant

Hearing: 14 October 1985

Counsel: T J McBride for plaintiffs
D E Wackrow for defendant

Judgment: 17th October 1985

JUDGMENT OF HENRY J.

This is a motion brought pursuant to R.476 of the Code of Civil Procedure seeking an order requiring the Defendant to pay into Court the sum of $15,518.20.

The substantive action concerns an agreement for the sale and purchase of a dairy business, the Plaintiffs being the purchasers and the Defendant being the vendor. The affidavits disclose that the agreement was in standard form, executed on or about 8 September 1985 and stipulated a purchase price of $21,500.00 including stock. Possession was agreed to be given and taken on 16 September 1985.

A deposit of $2000.00 had been paid during negotiations and prior to execution of the agreement, and further payments totalling $15,832.71 were made by two cheques, these being handed over to a Mr Naran (one of the landlords), and were subsequently paid into the Defendant's solicitor's trust account to her credit. Payment of one of those cheques for $2314.21 was subsequently stopped by the Plaintiffs, and accordingly the Defendant has received a total sum of $15,518.50 on account of the purchase price. Difficulties occurred in relation to the obtaining of the landlords' consent to an assignment of the lease to the Plaintiffs, as a consequence of which Plaintiffs purported to avoid the agreement by letter dated 20 September on the ground that consent to the assignment had not been obtained by 16 September. The action seeks recovery of the sum of $15,518.50.

Clause 14 of the agreement provides inter alia:

> "14. THE said business premises are held for the term of THREE years from the 25TH day of MARCH 1985 (with two rights of renewal for a further term of THREE years each) at the monthly rental for the current term of $632.50 by virtue of a certain Lease dated the day of 1985 under which D.R. NARAN is the lessor.
>
> This Agreement is subject to and conditional upon the Lessor under the said Lease consenting to the Assignment thereof to the Purchaser and the Vendor shall procure at his own expense such consent and the Purchaser if required to

> do so will execute any Deed of Covenant to be entered into in terms of the said Lease as a condition of the granting of such consent. If such consent shall not be forthcoming by the 6TH day of SEPTEMBER 1985 then this agreement shall become voidable at the option of either party and if avoided all moneys previously paid hereunder by or on behalf of the Purchaser shall be refunded to the Purchaser and neither party hereto shall have any claim against the other."

The date of 6 September is said to have been varied by agreement of the parties to 16 September.

Rule 476 is in the following terms :

> "476. Preservation or interim custody of property - Where a prima facic case of liability under a contract is established, and there is alleged as a matter of defence a right to be relieved wholly or partially from such liability, the Court or a Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured."

The Rule is one of several designed to provide for the protection of property which is the subject of litigation and does not in my view apply to a situation such as the present which is simply a claim for the refund of moneys paid under an agreement for sale and purchase which has allegedly been avoided. There is no property requiring preservation. It was submitted that the moneys paid to the Defendant form some kind of specific identifiable fund to which Plaintiffs can claim some entitlement, but I do not think that can be successfully contended in the present circumstances.

All that happened is that Plaintiffs paid the money as part-payment of the purchase price without any express stipulation or condition, and they now have a claim based on general contract law or on the express provisions of Clause 14 of the agreement. Quite apart from having serious reservations as to whether the Rule could possibly be used in the way now submitted, which would give it an application to a wide variety of claims to recover money in a contract situation, I do not consider the requirements necessary for its operation exist.

There must first be a prima facie case of liability under a contract established. That can only refer to a situation where a plaintiff is making a claim under contract. Here a claim under contract is alleged but is disputed, the dispute being whether there has been an effective avoidance of the contract by the Plaintiffs which gives the right to recovery. It is disputed that there was a failure to obtain the landlords' consent, it being argued that this was obtained orally and in a form binding on the landlords. Whether that is so is on present information somewhat doubtful, and I also have reservations as to whether an oral consent is compliance with the vendor's obligations under the clause in question. That, however, cannot be determined on the present motion, and the issue remains one in dispute, with no prima facie liability being established as against the Defendant.

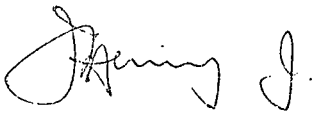
Secondly, the Defendant is not alleging a right to be relieved from that contractual liability, she is simply alleging that liability has never arisen and she seeks no relief from any contractual obligation or liability.

Counsel were able to refer to only one relevant New Zealand authority on the Rule, namely Butler and Hutt Hi Fi Limited v Broadlands Finance Limited (CA.34/82 11 June 1982). In that case there was a dispute as to payments made under hire purchase agreements which had been assigned to Broadlands, Broadlands claiming an entitlement to instalments paid and payable by customers of the appellant company and which it alleged were not being properly accounted for. An order was made in the High Court inter alia requiring appellants to pay into Court moneys already received by them. That order was set aside, Woodhouse P. and McMullin J. in a joint judgment expressing doubt whether R.476 could be used as a means of compelling defendants to pay moneys to a plaintiff before a dispute has been finally resolved, and holding that no basis for making the order was established. In the course of the judgment reference was made to the charging order provisions contained in R.314. Holland J. concurred in the setting aside of the order in question. The case is in my view authority against the present application.

Reference was also made during the course of argument to R.S.C. O.29 r.2, the equivalent of our R.476. It is however expressed in different words and is of no real assistance, although it is noteworthy that as regards money, there is a separate provision under sub-rule (3) relating to a "specific fund" dispute situation, in which case the Court may order the fund paid into Court. That could be consistent with the general intendment of R.476, which may perhaps be able to be applied to such a situation providing the pre-requisites I have earlier mentioned are established.

In my view therefore, R.476 has no application to the present factual situation and the motion is accordingly dismissed.

Defendant is entitled to an award of costs which I fix at $250.00.



Solicitors:

Shieff Angland Dew & Co., AUCKLAND, for plaintiffs

Murdoch Price & Hall, PAPATOETOE, for defendant