22/11 N2LR

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A 30/88

BETWEEN DEANE LINDSAY FULLER

Plaintiff

A N D GARY MICHAEL LUNJEVICH

Defendant

Hearing: 3 November 1988

Counsel: P.B. Marriott for the Plaintiff
Barbara Bucket for the Defendant

ORAL JUDGMENT OF ELLIS J

This is an application by Mr Fuller for an interim injunction. Papers were filed on 31 October and placed before me on 1 November, at 10.00am. I directed that the Defendant be served and that I would hear counsel in chambers today at 9.30am. Counsel appear accordingly and the position has been clarified as far as is possible at short notice.

The parties entered into an agreement for the sale of a business in Taupo. A copy of the agreement was exhibited and the secondary handwritten agreement modifying the original agreement. The Defendant sold his business, which operated from a shop at Taupo. The business was and is called "Arkwrights Emporium". The Plaintiff as purchaser, was to pay the purchase price of $91,435, first by way of a deposit of $1,000, which has been paid.

Secondly, by a sum of $49,000 on 1 September 1988. That has not been paid, and by transferring to the Defendant 530 PAO alarms. I understand that these have been handed over. Finally, the Plaintiff was to transfer to the Defendant his 1986 Honda motor car. The above was modified and expanded to provide for payment of the purchase price by the deposit, $1,000, cash of $49,000 on 1 September, the transfer of the 530 alarms to the value of $15,900, the transfer of 141 solar heaters to the value of $65,505 and the motor car.

The agreement provided for possession on 11 August 1988, although apparently possession was not given on that date, it was in effect given and the Plaintiff ran the business thereafter. As has already been recorded, the Plaintiff has not paid $49,000 on the due date and apparently he has not signed the change of ownership papers for the Honda car. There is also difficulty in connection with the solar heaters and it can be summarised by saying the Plaintiff is in default in this respect also.

On the other hand, the Plaintiff has endeavoured to initiate an adjustment of the obligations I have referred to, but to date has not been successful. In his affidavit he expresses the hope that he will be able to make a satisfactory arrangement in fulfilling his obligations by tomorrow week.

Following the default by the Plaintiff that I have referred to, the Defendant took action by way of self-help and changed the locks on the shop and himself thereby took possession to the exclusion of the Plaintiff on 21 October. Mr Fuller has been out of possession since then, but did not file proceedings until 10 days later.

The evidence is that Mr Fuller has stocked the premises and refers particularly to fireworks, because in the ordinary course of events, they must be sold this week. On the other hand, the position as to stock is uncertain. The agreement provided that there would be a stocktaking and valuation at or shortly after possession, this has not taken place. It is not clear whose fault this is, at least to me, but it is an added difficulty of a practical nature that the parties face in adjusting their obligations. Mr Fuller's concern is that he will lose control of the stock to his disadvantage. Again, the practical matter is that the business is run behind the counter by a manager who apparently worked for the Defendant and more lately for the Plaintiff, until he was dis-possessed.

The agreement is on an Auckland Law Society printed form and contains clause 15, which provides for the vendor being entitled to re-enter on default by the purchaser. That clause has been expressly deleted and initialed by the parties, so it is clear at the time the agreement was entered into, that particular remedy of the Defendant was expressly excluded. This is to an extent in line with the scheme of the Contractual Remedies Act 1979.

From what I have related, it is plain that damages can be assessed as a result of an injunction I might grant, and so too can it be assessed if I refuse the injunction and the Defendant is held to be at fault. By way of completeness, undertakings are available to pay damages and offered by each party.

On the face of it, the Plaintiff is plainly in default under the agreement, but equally plain, the remedy the Defendant has taken is contrary to the contract and probably to the Contractual Remedies Act. If the parties can not reach some form of agreement, the scene is set for litigation. It is plain therefore that there are serious questions to be determined between the parties if they can not resolve them and this being the case, the Court is entitled to intervene and determine the Plaintiff's application on the balance of convenience.

In my view, the balance of convenience is rather evenly balanced. In this circumstance and against the express provision in the contract, I consider the appropriate order is to grant the injunction in as limited form as is possible and in particular to give the Plaintiff no more time than is absolutely necessary to endeavour to negotiate with the Defendant along the lines I have indicated.

Accordingly, I will grant an injunction to expire at 4.00pm on Thursday 10 November 1988. That is not to say that it may not be appropriate to extend it in due course, but as I now appreciate the matter, the Plaintiff must have by then taken substantial steps to remedy his default.

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