IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-7669
[2013] NZHC 755

UNDER	the Companies Act 1993
IN THE MATTER OF	an application to set aside a statutory demand
BETWEEN	NZ NATURAL JUICE COMPANY LIMITED Applicant
AND	HEARTLAND BANK LIMITED Respondent

Hearing: 15 April 2013

Appearances: N T Gray for Applicant
J E M Lethbridge for Respondent

Judgment: 22 April 2013

RESERVED JUDGMENT OF ASSOCIATE JUDGE R M BELL

This judgment was delivered by me on ***22 April 2013*** *at* ***4:00pm***
pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

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[1] NZ Natural Juice Company Ltd applies under s 290 of the Companies Act 1993 for an order setting aside a statutory demand served on it by Heartland Building Society. The statutory demand seeks payment of $23,699 plus GST

> "in respect of the amount now owed to Heartland Building Society as assignee of Wemore in relation to stock..."

Attached to the statutory demand are copies of two emails. The first, dated 8 February 2012, sent by Heartland's assets manager, Mr Goodhew, to a director of the applicant, Mr Alwyn Burr, and also to a Mr Park, says:

> Thanks for details of stock ... so are you proposing a sale price of $23,699 when main deal occurs ...? Please advise/confirm.

The second email sent the next day by Mr Burr says in reply:

> Yes, that is the position but will need to consider in conjunction with Keith at the time.

[2] The case for Heartland is that in February 2012 NZ Natural Juice Co Ltd owed Wemore Holdings Ltd $23,699 plus GST for wet stock supplied and Heartland was entitled to that debt as an account receivable of Wemore Holdings Ltd over which Marac Finance Ltd had an enforceable security.

[3] NZ Natural Juice Co Ltd relies on all three grounds under s 290(4) of the Companies Act to set aside the statutory demand. It says that there is a substantial dispute as to the amount claimed in the demand. It also says that it has a counterclaim or set-off against Wemore for the sum of $22,481.76. It says that there are "other grounds" to set aside the statutory demand, for which it alleges abuse of process. I have found that NZ Natural Juice Company Ltd has made out its case under s 290(4)(a) that there is a substantial dispute as to its liability. It is unnecessary to address the other two limbs, and I do not do so.

Relevant entities

[4] **NZ Natural Juice Company Ltd** is a Hawke's Bay company that carries on business in the manufacture and marketing of juices and other products. Mr Alwyn Burr is the sole director.

[5] **Wemore Holdings Ltd** is the current name of the company formerly known as **Kiwi Beverages International Ltd**. It manufactured and marketed juices and also wine. It is also a Hawke's Bay company. The directors of Wemore Holdings Ltd were Owen Park and his wife Diane. Transactions between Wemore Holdings Ltd and NZ Natural Juice Company Ltd are the subject of this decision. The transactions were in the name of Kiwi Beverages International Ltd, but for convenience I refer to it under its current name. At relevant times, Wemore Holdings Ltd was not solvent.

[6] **Crasmore Ltd** and **Whakatu Cool Stores Ltd** are cool store companies in the Hawke's Bay which stored Wemore's wet stock (juices and wines) under refrigeration. They charged storage fees, but Wemore was not able to meet those charges.

[7] **Park Estate Ltd** is another company of Mr and Mrs Park. Park Estate Ltd owned premises at 2087 Pakowhai Road, Hawke's Bay, which NZ Natural Juice Company Ltd leased from April 2011 to June 2012.

[8] **Cooks Food Group Ltd** is an Auckland company that for a period was interested in buying the business of NZ Natural Juice Company Ltd. That proposed sale is the "main deal" in Heartland's email of 8 February 2012. The "Keith" in Mr Burr's email of 9 February 2012 is Keith Jackson, director of Cooks Food Group Ltd.

[9] **Marac Finance Ltd**, a well-known finance company, provided finance to Park Estate Ltd. Security for the finance was provided by a mortgage over the Pakowhai Road premises and by a general security deed. In June 2010 Wemore gave Marac Finance Ltd a guarantee of the obligations of Park Estate Ltd, and also gave a

general security deed to Marac Finance Ltd. In this case, Heartland relies on the rights given to Marac Finance Ltd under the general security deed given by Wemore.

[10] **Heartland Building Society** was originally a building society, but has since become a bank. During this proceeding it has changed its name to **Heartland Bank Ltd**. The business of Marac Finance Ltd has in some way been combined with the business of Heartland Building Society, but there is no clear evidence to explain why Heartland Bank Ltd is able to stand in the shoes of Marac Finance Ltd. In referring to Heartland, I am not to be understood to accept that it has established in this proceeding that it has succeeded to any rights of Marac.

Evidence

[11] Mr Burr, the applicant's director, swore the primary affidavit and an affidavit in reply. Mr Graham Goodhew, an asset manager, first with Marac, then with Heartland, swore the affidavit in opposition. They give accounts of events from different perspectives, but there are not significant areas where their evidence is in conflict on matters of primary fact. In a setting aside application, the court is not required to resolve factual conflicts in the evidence. It can reject evidence that does not pass the threshold of credibility, but that is not the case here. In this application Mr Burr's evidence has not been shown to be implausible or unbelievable.

Background facts

[12] Park Estate Ltd defaulted under its arrangements with Marac Finance Ltd. In December 2010 Marac's lawyers began enforcement action for Marac, including service of notices under the Property Law Act 2007 and the Personal Property Securities Act 1999. The enforcement action was directed against both Park Estate Ltd and Wemore. Wemore's general security deed in favour of Marac:

(a) Gave Marac security for its obligations to Marac under the deed of guarantee and indemnity for the obligations of Park Estate Ltd;

(b) Gave Marac a security interest in its personal property, including present and after-acquired property;

(c) Included Wemore's interest in its dry and wet stock and accounts receivable in that personal property; and

(d) Had become enforceable in late 2010 upon Wemore's default in meeting its obligations under the deed of guarantee and indemnity.

[13] Park Estate Ltd was put into liquidation in April 2011. However, Marac has not put Wemore into liquidation or receivership, although its security documents give it the power to appoint receivers upon default. A statement by Heartland dated 4 February 2013 shows that Park Estate Ltd's indebtedness at that date was approximately $1,052,000. Wemore did not have the means to meet that liability.

[14] As Wemore was not under any form of insolvency administration, Mr and Mrs Park remained directors and were able to exercise the normal powers of directors. At the same time, NZ Natural Juice Company Ltd employed Mr and Mrs Park in its business, Mr Park as general manager and Mrs Park as office manager. NZ Natural Juice Company Ltd had these dealings with the Park companies:

(a) Lease of the premises at 2087 Pakowhai Road from Park Estate Ltd;

(b) Purchase of Wemore's dry stock; and

(c) Purchase of Wemore's wet stock, juice and wine.

[15] NZ Natural Juice Company Ltd's lease of the premises at 2087 Pakowhai Road, Napier, was from April 2011 to June 2012, although it did not vacate the premises until August 2012. It paid rent to Marac Finance Ltd as mortgagee in possession. The lease and NZ Natural Juice Company Ltd's departure from the premises are not the subject of this proceeding.

[16] NZ Natural Juice Company Ltd bought various dry goods (bottles, caps, cartons and labels) and miscellaneous stock stored at the Pakowhai Road premises

from Wemore. Marac Finance Ltd required NZ Natural Juice Company Ltd to pay the purchase price, $44,250.04, to it and it did so in June 2011. That transaction is not the subject of the statutory demand.

[17] From May 2011 onwards, Wemore sold wet stock held in the cool stores to NZ Natural Juice Company Ltd. Most of these sales were between May 2011 and November 2011. However, there were two supplies in February 2012:

4 drums of feijoa juice	$1,380.00
1 drum of pear juice	$1,150.00
Total:	**$2,530.00** (including GST)

[18] For the wet stock to be released from the cool stores, the cool stores had to be paid. At the times in issue, both parties to this case accepted that the cool stores were entitled to be paid their storage charges. An email of Mr Goodhew of 18 September 2012 to a director of one of the cool store companies accepted that if Heartland were to remove the wet stock under security rights in the general security deed, it would pay outstanding rental.

[19] There is no express evidence whether the cool stores had a lien over Wemore's wet stock. Mr Gray submitted that a common law lien would arise because wet stock was kept under refrigeration. It is also plausible that commercial cool stores would provide for a lien in their terms of business. Heartland did not submit that it was unarguable that the cool stores would have a lien over the wet stock.

[20] Because Wemore did not have the funds to pay the storage charges, and because it was planning to buy wet stock from Wemore, NZ Natural Juice Company Ltd began paying the cool stores' storage charges. Mr Burr describes a three-way consensual arrangement among the cool stores, Wemore and NZ Natural Juice Company Ltd, under which the cool stores accepted the payment of the storage charges and released the wet stock, Wemore supplied the wet stock with the price being met by payment of the storage charges. NZ Natural Juice Company Ltd stopped paying the storage charges in August 2012.

[21] In addition, in November 2011 it paid New Zealand Customs excise duty, payable by Wemore on its wet stock. This was to prevent Customs seizing the wet stock. Under s 97 of the Customs and Excise Act 1996, the duty under that Act is a charge on the goods until the duty is fully paid. Customs may enforce the charge by seizure and sale.

[22] For this application NZ Natural Juice Company Ltd has provided a reconciliation of all the purchases (dry and wet stock) it made from Wemore and the storage charges it paid. Mr Burr acknowledges in his reply affidavit that the purchases of February 2012 were left out. The reconciliation shows sales by Wemore amounting to $85,174.04. On the other side, NZ Natural Juice Company Ltd paid for the dry stock, for storage and for excise duty totalling $107,655.80, showing an overpayment of $22,481.76.

[23] NZ Natural Juice Company Ltd bought juice from Wemore, as it required, for its business but leaving significant quantities of wet stock in the cool stores. In December 2011 its administrator carried out a stock reconciliation, which it sent to Mr Goodhew. This reconciliation showed that NZ Natural Juice Company Ltd was deducting the excise duty and storage charges as payment for the wet stock supplied by Wemore under the arrangement with Wemore and the cool stores. Mr Goodhew replied asking how much is getting paid. In a further email, Mr Burr explained to Mr Goodhew that NZ Natural Juice Company Ltd was in credit for stock purchased, because of storage and excise tax paid; there was therefore nothing payable to Wemore, as NZ Natural Juice Company Ltd was in credit; and that NZ Natural Juice Company Ltd would use payments of storage as a credit against the purchase price for future purchases. There is no evidence that Mr Goodhew took issue with that reconciliation at the time. It seems to have been the first time he learnt that payments of storage and excise duty were being applied against the price of Wemore's wet stock.

Reconciliation of February 2012

[24] In February 2012 NZ Natural Juice Company Ltd's administrator sent a fresh reconciliation to Marac Finance Ltd. Mr Goodhew's response is his email attached

to the statutory demand. It shows his view that the revised reconciliation shows an amount, $23,699, that NZ Natural Juice Company Ltd owed for wet stock supplied. It is therefore necessary to look at the reconciliation in its surrounding circumstances to see if it has that effect.

[25] The administrator's covering email sent with the reconciliation begins:

> Please find a simplified version of what stock that is left has value and that which NZJC are happy to purchase...

[26] The email also gives an explanation about storage charges and excise, the payment for dry stock in June and adjustments to wet stock figures for unwanted and dead stock.

[27] The attachments to the email include:

(a) A schedule of Wemore's invoices to NZ Natural Juice Company Ltd totalling $77,074.89 with payments and contras claimed to show a nil balance;

(b) A schedule showing adjustments to stocktakes from May 2011 to November 2011, taking into account current Wemore stock and purchases by NZ Natural Juice Company Ltd;

(c) A stocktake schedule at May 2011;

(d) An adjusted stocktake schedule at November 2011;

(e) A schedule of stock purchased by NZ Natural Juice Company Ltd totalling $77,074.89.

[28] None of these pages have the figure $23,699. That appears on another page. That page sets out under the heading "Bulk" quantities of wet stock held by Wemore with values attributed to the various items and with their place of storage noted. Prices are given for various items under the heading "Stock NZNJC will buy". The total price is $34,875.00. Various credits are claimed for storage and like charges up

to January 2011. There is also a notation that storage has been contra-ed against other purchases shown in the reconciliation from the end of 2011. Finally there is the item "Payable on settlement day" and then "$23,699.00". Mr Goodhew has relied on this particular page as an acknowledgement of indebtedness by NZ Natural Juice Company Ltd.

Is there an indisputable debt?

[29] In response to my question how Heartland Building Society would plead its cause of action for this debt, Heartland said that it relied on an agreement made by Wemore and NZ Natural Juice Company Ltd, but it was entitled to the proceeds of that agreement under s 45 of the Personal Property Securities Act. Its right to be paid the sale price could not be subject to any credit for storage charges because under the provisions of the Personal Property Securities Act, it was entitled to priority. It was not part of the case for Heartland that the email exchange of 8 and 9 February 2012 was an agreement for sale and purchase between Heartland as seller, and New Zealand Natural Juice Company Ltd as purchaser. In other words, in this proceeding, Heartland is not relying on any powers that Marac had to sell assets of Wemore, in which it held a secured and enforceable interest under the general security deed. Instead, it says that the sales were made by Wemore, through its agents, Mr and Mrs Park as directors, but that it is entitled to the proceeds of those sales under its security. It is claiming the benefit of an account receivable, in which it has an accrued enforceable security interest. It says that the debt is indisputable and can therefore be the subject of a statutory demand.

[30] NZ Natural Juice Company Ltd has a number of sound responses to that claim.

[31] The document in paragraph [27] above attached to the email with the February 2012 reconciliation addresses a future sale of bulk wet stock still held by Wemore, not past sales. That is shown by:

(a) The listing of bulk stock still held by Wemore, rather than a list of juices already supplied (which were set out on a separate document in the reconciliation),

(b) The words "Stock NZNJC will buy",

(c) The words "Payable on settlement day", showing that settlement of the sales, including delivery, had still to take place, and

(d) The first line of the email of 7 February 2012:

> Please find a simplified version of what stock that is left has value and that which NZJC are happy to purchase.

[32] The schedule in paragraph [27] is provisional. It was a snapshot in time as at February 2012. It took into account storage charges incurred in January 2012, but if further storage charges were incurred and NZ Natural Juice Company Ltd met them, the price would be adjusted.

[33] The arrangements made in the email exchange were conditional. That is shown by the expression, "when main deal occurs", in Mr Goodhew's email. That refers to the proposed sale of the business of NZ Natural Juice Company Ltd to Cooks Food Group Ltd. If that deal had gone ahead, Cooks were likely to acquire Wemore's bulk wet stock. But it was also possible that Cooks Food Group Ltd would buy the bulk stock directly from Wemore rather than from NZ Natural Juice Company Ltd. The sale of the business of NZ Natural Juice Company Ltd to Cooks Food Group Ltd did not go ahead. Cooks Food Group Ltd and NZ Natural Juice Company Ltd were not able to reach agreement on terms for the sale of the business. That became apparent only later in May 2012. Mr Burr's email response, "will need to consider in conjunction with Keith at the time", reflects the uncertainty of whether the main deal would go ahead and in what form. The matter never developed to the stage where there was a firm arrangement in place for NZ Natural Juice Company Ltd to buy Wemore's remaining bulk wet stock. Mr Burr also says that NZ Natural Juice Company Ltd did not need to buy the bulk wet stock for its own purposes.

[34] Mr Goodhew contends that "when main deal occurs" refers to the time for payment of a debt that had already accrued, but that does not square with the other documents that show a debt that might accrue later upon a sale taking place later. Besides, even on Mr Goodhew's version, the time for payment did not arrive.

[35] For the debt to become due under the proposed sale of bulk wet stock, there had to be delivery. Payment of the price and delivery are concurrent obligations – s 30 of the Sale of Goods Act 1908. NZ Natural Juice Company Ltd's evidence shows that the only supplies of Wemore wet stock after the February 2012 reconciliation are the supplies worth $2,530 in paragraph [17] above. It has accounted for payment of those supplies by paying storage charges. Heartland has not shown any other supplies after February 2012.

Abatement of price for payment of storage charges and excise duty

[36] Heartland contends that its claim for payment for the supplies of wet stock sold by Wemore cannot be the subject of any set off by NZ Natural Juice Company Ltd for storage charges and excise duty it has paid. It says that its right to be paid the purchase price in full prevails and NZ Natural Juice Company Ltd must instead look elsewhere for reimbursement of the storage charges it has paid.

[37] For that it relies on the combined effects of s 45 and s 102 of the Personal Property Securities Act. Section 45 says:

> 45 Continuation of security interests in proceeds
>
> (1) Except as otherwise provided in this Act, a security interest in collateral that is dealt with or otherwise gives rise to proceeds—
>
> (a) Continues in the collateral, unless the secured party expressly or impliedly authorised the dealing; and
>
> (b) Extends to the proceeds.
> [Example: Person A has a security interest in person B's car. Person B sells the car without person A's consent. Person A has a security interest in the car and in the money received by person B from the sale of the car.]
>
> (2) The amount secured by a security interest in collateral and the proceeds is limited to the value of the collateral at the date of the

dealing that gave rise to the proceeds, if the secured party enforces the security interest against both the collateral and the proceeds.

Section 102 says:

> **102 Priority of interests on assignment of account receivable or chattel paper**
>
> (1) The rights of an assignee of an account receivable or chattel paper are subject to—
>
> (a) The terms of the contract between the account debtor and the assignor and any defence or claim arising from the contract or a closely connected contract; and
>
> (b) Any other defence or claim of the account debtor against the assignor (including a defence by way of a right of set-off) that accrues before the account debtor acquires knowledge of the assignment.
>
> (2) Subsection (1) does not apply if the account debtor on an account receivable or chattel paper has made an enforceable agreement not to assert defences to claims arising out of the contract.
>
> (3) In this section,—
>
> **Account debtor** means a person who is obligated under an account receivable or chattel paper:
>
> **Assignee** includes a secured party and a receiver.

[38] The effect of that submission is that Heartland is trying to have the best of both worlds. It is saying that it is entitled to the benefit of sales of wet stock without the costs of sales being brought into account. If there had been no sales to NZ Natural Juice Company Ltd and Marac had sold the wet stock itself under its powers to enforce its security, it would have had to pay the costs of storage and excise duty to give clear title and pass possession to the buyer. Its case is that it can do better if Wemore sells and it can claim on the ensuing account receivable.

[39] Heartland's argument is that under s 45 its security interest in the wet stock extends to the proceeds, that is, the account receivable arising on its sale. It says that NZ Natural Juice Company Ltd cannot raise any defence that it might have had against Wemore because NZ Natural Juice Company Ltd knew of the assignment of the account receivable to Marac. For that it relies on s 102(1)(b). I accept its argument that NZ Natural Juice Company Ltd had knowledge of any assignment of

proceeds of sale of Wemore's stock in trade to Marac by June 2011. That is when NZ Natural Juice Company Ltd paid Marac for the purchase of the dry stock. However, s 102(1)(a) applies, not subsection (b). Mr Burr's evidence shows that the contractual arrangements he made with Wemore and the cool stores were that the payment of storage charges and excise duty could be set off against the purchase price of the wet stock supplied. Accordingly, Marac's rights to recover are subject to those terms of the contract. Those terms of the contract give NZ Natural Juice Company Ltd defences to any claims that payment should be made, without taking into account the storage charges and excise duty.

[40] Equally, it is also arguable that even if the arrangements for storage charges were not part of the terms of each agreement to supply the wet stock, they were part of a closely-connected contract under s 102(1)(a). That closely-connected contract was the agreement allowing storage charges paid to the cool stores to be applied against the purchase price of the wet stock.

[41] Even if there had not been the agreement described by Mr Burr, it is also arguable that the payment of the storage charges could be taken into account in any event. As seller of the wet stock, Wemore had to be able to deliver, and also to pass good title. Unless the storage charges were paid, delivery could not be carried out and any lien asserted by the cool stores could not be lifted. The inability to pass title and possession is a breach of contract. Under s 54(1) of the Sale of Goods Act, NZ Natural Juice Company Ltd is entitled to abate the purchase price on account of the breach.

[42] Section 93 of the Personal Property Securities Act makes it clear that any security interest in the wet stock asserted by Marac/Heartland is subject to a lien for materials or services provided. As it is arguable at this stage that the cool stores had liens over the wet stock, Marac's security interest was subject to those liens.

[43] Accordingly, even if Heartland could make out a case that in February 2012 NZ Natural Juice Company Ltd agreed to pay Heartland for wet stock already supplied, NZ Natural Juice Company Ltd would still be entitled to raise in abatement of the price its payments of storage and excise duty.

Conversion allegation

[44] Heartland also alleged conversion against NZ Natural Juice Company Ltd. That allegation was inconsistent with its primary basis for the debt, namely that it was relying on sales negotiated between Wemore and NZ Natural Juice Company Ltd. The statutory demand does not suggest that a claim in conversion is the basis for the demand. In any event, any claim for conversion would be subject to defences that in assessing the damages payable for the wet stock, it would be necessary to take into account the charges against the wet stock for excise duty and for storage claimed by the cool stores to find the value of the wet stock to Marac.

[45] Further, a claim for conversion is not a debt which can be the basis for a statutory demand. A claim in conversion gives rise to a claim for unliquidated damages. Claims for unliquidated damages cannot be the subject of a statutory demand. *Re Prime Link Removals Ltd*[1] is a decision under s 218 of the Companies Act 1955. In that case, a demand under s 218 had been used for a claim for damages for breach of contract. The claimant was held to be a prospective creditor only. Until there had been a judgment, a debt had not fallen due for the purposes of s 218 of the Companies Act 1955.[2]

[46] A similar question came before Associate Judge Gendall in *Northern Crest Investments Ltd v Robert Jones Holdings Ltd*.[3] In that case a landlord had included in its statutory demand a claim for damages for loss of bargain following termination of a lease. Associate Judge Gendall followed *Re Prime Link Removals Ltd*, and held that under s 289 of the Companies Act 1993 an unliquidated claim for damages could not constitute a debt.[4] The damages claimed would not become a debt until the claim had been liquidated by a judgment or arbitral award.

[47] In *OPC Managed Rehab Ltd v ACC*,[5] the Court of Appeal held that a claim in quantum meruit for overpayments could be a debt under s 289 of the Companies Act. *Re Prime Link Removals Ltd* was cited to the Court of Appeal. The Court of Appeal

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1 *Re Prime Link Removals Ltd* [1987] 1 NZLR 510 (HC).
2 At 512.
3 *Northern Crest Investments Ltd v Robert Jones Holdings Ltd* (2009) 19 PRNZ 258 (HC).
4 At [20].
5 *OPC Managed Rehab Ltd v Accident Compensation Corp* [2006] 1 NZLR 778 (CA).

did not indicate that it was wrongly decided, but distinguished it. While the Court of Appeal held that a claim in quantum meruit might in some cases amount to a debt, the court's decision cannot be read as extending the meaning of "debt" to an unliquidated claim for damages.

Outcome

[48] NZ Natural Juice Company Ltd has shown a fairly arguable case that there is a substantial dispute whether it is indebted to Heartland for the sum of $23,699 plus GST based on the email exchange of February 2012. It is not clear that Heartland is entitled to enforce Marac's rights under its general security deed. Even if it could, the arrangements made in the email exchange were not for payment of an accrued debt, but were for a proposed sale, conditional on a deal with Cooks Food Group Ltd, which did not take place. There was not any certainty whether that deal would go ahead and what form it would take. The price could also be subject to change on account of ongoing storage charges. NZ Natural Juice Company Ltd did receive two small supplies in February 2012, but it has a defence to claims for payment for them. Heartland's arguments that it can by-pass the storage charges and excise duty paid by NZ Natural Juice Company Ltd are also contestable because of defences available under s 102(1)(a) of the Personal Property Securities Act and the priority of liens held by the cool stores. Because the debt claimed in the statutory demand is genuinely contestable, liability should be decided in a standard civil proceeding, not by an application under s 290. The demand should be set aside.

[49] I make these orders:

(a) Heartland Bank Ltd's statutory demand served on NZ Natural Juice Company Ltd on 13 December 2012 is set aside;

(b) Heartland Bank Ltd shall pay NZ Natural Juice Company Ltd costs on the application on a Category 2 basis; and

(c) If the parties cannot agree costs, memoranda may be filed and I will decide costs on the papers.

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Associate Judge R M Bell