IN THE DISPUTES TRIBUNAL **[2016] NZDT 906**

BETWEEN	**CP LIMITED** APPLICANT
AND	**XL LIMITED** RESPONDENT
Date of Order:	16 March 2016
Referee:	Referee Perfect

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that XL Limited is to pay the sum of $12,522.69 directly to CP Limited on or before 6 April 2016.

Reasons

[1] CP Limited ('CP') purchased a restaurant from XL Limited ('XL') in June 2015. CP claims that equipment critical for the running of the business was not included in the sale, which it only discovered on the day they took over the business, when told by staff that many items of equipment were missing.

[2] CP agrees that the items included in the chattels list that forms part of the contract were present. However it says that it could not have known that all the equipment required to run the restaurant as it had been operating was not included on the chattels list, and that this is a breach of the terms and conditions of the sale and purchase agreement, particularly the statement under 'Further Terms of Sale, Background b)' that "The Vendor agrees to sell and the Purchaser agrees to buy the business and all assets used in relation to the business as a going concern."

[3] CP claims an amount of $15,000.00 (reduced from $15,797.00 worth of invoices submitted) for one year's hire of the equipment allegedly not provided by XL.

[4] XL counter-claims for the unpaid balance of $2,447.31 for stock-in-trade. CP does not dispute this figure represents the amount of stock in excess of $10,000 provided for as an estimate in the agreement but contends that AA for XL told them verbally that this additional stock would not be charged for.

[5] The parties agreed to deal with outstanding vouchers privately as they have been doing to date, with XL agreeing to honour any issued in their name that are presented to the applicants, as the numbers of vouchers and value are not able to be quantified until they are presented.

Issues

[6] The issues to determine are:

a. Was the chattels list provided by XL a complete list of all chattels used in connection with the business?

b. If not, was it required to be?

c. Does the fact that CP approved the chattels list mean that they have undertaken inadequate due diligence?

d. Does any failure of due diligence on CP's part mean that any breach of contract by XL relating to the chattels list is of no effect?

e. If not, what damages flow from any breach on XL's part?

f. Is the balance of stock-in-trade payable by CP?

g. What is the balance payable on the claim and counter-claim?

Was the chattels list provided by XL a complete list of all chattels used in connection with the business?

[7] I find that the chattels list provided was not a complete list of all chattels that had been used in the business when run by XL. AA for XL acknowledges that not all equipment he used in the operation of the restaurant was left for CP but he contends that all equipment necessary for running a restaurant was included in the chattels list, and that the restaurant could operate without the equipment he retained.

If not, was it required to be?

[8] As well as a chattels list being provided for in the contract, the contract includes the overarching requirement that "the Vendor agrees to sell and the Purchaser agrees to buy the business and all assets used in relation to the business as a going concern". That is the agreement. The contract then stipulates how that is to be effected, and that involves the common procedure of a chattels list being provided by XL and approved by CP.

[9] "Tangible assets" that the buyer will purchase are defined in clause 1.1(16) as "all of the plant, machinery, equipment, furniture, fittings, motor vehicles and other chattels owned by the vendor at the settlement date and used in connection with the business".

[10] "All assets used in relation to the business" and "used in connection with the business" in my view mean 'everything that XL used in running the particular restaurant', not 'equipment with which it is possible to run a restaurant'.

[11] AA for XL said that he sold the restaurant to CP for $417,000, well below the original asking price of $650,000, and he was therefore advised by his broker that it was possible to adjust the chattels to be provided to reflect the price. I note that XL presented CP with an invoice for the 'missing equipment' for $22,310.00 after settlement once CP had raised the issue.

[12] AA stated at the hearing that when there is such a huge difference (in the purchase price) from the asking price, you cannot expect everything to be included. However, the contract has not been changed to reflect that view. CP has entered into the written contract in good faith, and the contract states that all assets used in relation to the business will be sold.

[13] Therefore I find XL to be in breach of the contract by failing to list all assets that it used to run the business on the chattels list.

Does the fact that CP approved the chattels list mean that they have undertaken inadequate due diligence?

[14] I find that, notwithstanding the above, CP was obliged not only to 'check' the chattels list against what was present on the restaurant premises, which it did, but to "approve" the list. This is provided for in subclause 1.1(3) in Schedule 1 of the sale and purchase agreement. The use of the word "approve" places a broader burden on the purchaser than merely to check that what is on the list matches what is on the premises.

[15] CP acknowledges that it undertook no more extensive due diligence than to check the list against what it could see on the premises and that its completeness was 'taken on trust'. However, it is difficult to know how much CP could have discovered had it brought in a consultant chef to compare the chattels list with the menu because the cooking methods were not necessarily identifiable from the menu, but were known to regular customers and staff. For example, in one lamb dish, the lamb was cooked using the sous vide machine (removed by XL) but was not described as 'sous vide lamb' on the menu (which would have alerted the buyer to the absence of a sous vide machine).

[16] Neither party provided detailed evidence on the extent to which omissions from the assets list would have been discoverable by an experienced restaurant operator (CP owns another restaurant but says it is not involved in or experienced with restaurant operations).

[17] I note also that some of CP's complaints relate to the quality of the items provided by XL. For example, CP says there was the same number of plates provided at settlement as stated on the chattels list, but staff on their first day told CP they were not the quality plates usually used in the restaurant. This has not been specifically claimed for, but I accept that it demonstrates the constraints on CP to carry out due diligence in some instances and the requirement for good faith in the performance of this, and any, contract.

[18] For the above reasons, and in particular because no specific evidence has been provided by XL as to exactly what CP could have done to uncover the omissions, I accept CP's contention that it could not reasonably have known that all assets had not been included in the chattels list and so, even though they had to approve and not just check the list, there was no obvious reason for which to withhold their approval, the list being comprehensive and restaurant-related.

Does any failure of due diligence on CP's part mean that any breach of contract by XL relating to the chattels list is of no effect?

[19] This issue is not addressed as I have found above that a failure of due diligence by CP has not been established.

If not, what damages flow from any breach on XL's part?

[20] XL contends that CP has not suffered any loss because the restaurant could have operated without the additional equipment that it retained. It provides an email in support of this contention from the Executive Sous Chef at the time of handover, BB, that states that the "restaurant was able to operate as a going concern without the need of a sous vide, paco jet, vac pac etc, it was equipped with all of the required equipment to operate as going concern".

[21] CP states that BB was the chef who complained to them on the day they took over that a lot of equipment was missing and I note it is his name that appears on the bottom of the hand-written list of "missing items" that CP has presented in support of its claim. It also points out that this was one of the factors that caused difficulties between them, as new owners and that particular chef, and that he has only written the email quoted above, after he left their employment following these difficulties. CP has provided a written statement from one of its chefs to the effect that the restaurant cannot operate sustainably without the equipment.

[22] In the face of conflicting chef opinions, I turn to the fact that, as CP points out, AA, on CP's complaint about the missing equipment, loaned all the withheld equipment for a number of weeks during the handover period and offered to sell it to CP, as discussed above. This supports CP's contention that it was necessary for the operation of the restaurant, "as it had always operated". AA's argument in any event seems to be more that the restaurant could continue to operate without the equipment so long as menu changes were affected. This is not what was required by the contractual terms.

[23] It seems clear from all these circumstances, that the restaurant could not easily function in the same way it had the week before settlement, without the equipment in dispute. I therefore find that the remedy is damages for the replacement of the withheld equipment.

[24] CP has provided rental agreements that it entered into with a hire company for the equipment identified as missing by the chef at the time when CP took over the restaurant. There is no dispute as to what was removed, as evidenced by XL providing the invoice for its additional purchase to CP after settlement. Instead, CP has opted to hire the equipment and claims for the first year's hire, reduced to $15,000.00. The hire costs have not been challenged. They are detailed on written rental agreements and the maximum amount claimable of $15,000.00 is awarded, which I note would have been the same whether CP had opted to purchase or hire equipment.

Is the balance of stock-in-trade payable by CP?

[25] I find that, as discussed at the hearing, in the absence of evidence of a verbal forgiveness of this amount, the balance of stock-in-trade, being $2,447.31, is payable as per the contract and this amount is awarded on the counter-claim.

What is the balance payable on the claim and counter-claim?

[26] Set-off can only be made against ordered amounts, so even though CP's original claimed amount exceeds $15,000, the counter-claim of $2,447.31 must be set off against the reduced amount awarded on the claim of $15,000. The resulting order is therefore for XL Limited to pay CP Limited the sum of $12,552.69.