IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-979
[2022] NZHC 168

IN THE MATTER	of Section 290 of the Companies Act 1993
BETWEEN	DEMPSEY WOOD CIVIL LIMITED Applicant
AND	CONCRETE STRUCTURES (NZ) LIMITED Respondent

Hearing: 7 October 2021

Appearances: E St John and S Maloney for the Applicant
K Badcock for the Respondent

Judgment: 17 February 2022

JUDGMENT OF ASSOCIATE JUDGE SUSSOCK

This judgment was delivered by me on 17 February 2022 at 3pm pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors/Counsel:
Alan Jones Law, Auckland
Badcock Law, Rotorua

E St John, Barrister, Auckland

Introduction

[1] The applicant, Dempsey Wood Civil Limited, applies to set aside a statutory demand served on 20 May 2021 on the grounds that there is a substantial dispute as to whether the amount set out in the demand is owing.

[2] The demand alleges that Dempsey Wood owes $1,819,254.14 to the respondent, Concrete Structures (NZ) Limited. The alleged debt is said to have arisen following a failure to issue a payment schedule in time in response to a payment claim served under a construction contract for the Whau Bridge in New Lynn, Auckland. The payment claim was described as Payment Claim No.9 in respect of that contract.

[3] Dempsey Wood is a civil works contractor engaged by Auckland Transport to construct the Whau Bridge.

[4] Dempsey Wood engaged Concrete Structures as a subcontractor for the construction of the bridge. It had entered into an umbrella agreement with Concrete Structures for a period of three years on 25 November 2019 ("Umbrella Agreement"). On 10 February 2020, pursuant to the Umbrella Agreement, Dempsey Wood and Concrete Structures entered into a specific subcontract agreement in relation to the construction of the Whau Bridge. This specific agreement is subject to the terms of the Umbrella Agreement including the following:

(a) Concrete Structures is to submit fully detailed payment claims prior to the 25th day of each month and payment claims are not able to be submitted for subcontract work carried out for periods of less than one month (clause 6.1).

(b) Dempsey Wood must either pay the amount of any payment claim or it may issue a payment schedule by the 20th day of the month following receipt of the payment claim showing the amount to be paid by the contractor (clause 6.2).

(c) the contract price must be paid in accordance with clause 6.1 or in such amount as contained in any payment schedule issued under clause 6.2 within 30 working days of receipt of the payment claim or the issue of the payment schedule (whichever is the later) (clause 6.6).

[5] Clause 20 of the Umbrella Agreement provides for the service of notices, stating:

> Except where otherwise expressly provided in this Agreement any notice necessary or required to be given through the delegated authority, shall be deemed to be sufficiently given if sent by post or facsimile or email or delivered to the address stated in this Agreement or as subsequently advised in writing.

[6] No address for service is specified in the Umbrella Agreement. Nor is the phrase "delegated authority" defined or used anywhere else in the Agreement.

[7] The first eight progress payment claims were sent by Concrete Structures to the email address for the accounts department for Dempsey Wood as well as to one of the project managers at Dempsey Wood, Dale Pickard, on or before the 25th day of each month from February through to October 2020.

[8] In contrast, the ninth payment claim for $1,954,853.78 ("Payment Claim No.9") was sent only to Mr Pickard's email address on 29 January 2021.

[9] Mr Pickard did not see the email until 1 April 2021. Following the claim coming to Mr Pickard's attention, a payment schedule was issued on 6 April 2021 certifying payment of only $135,599.64 (GST inclusive). This amount was paid on 7 April 2021.

[10] Relying on s 23 of the CCA, Concrete Structures served a statutory demand on Dempsey Wood for the remainder of the amount claimed of $1,819,254.14 on 20 May 2021. Section 23 of the CCA provides that, if a payment schedule is not provided within the timeframes provided for by the CCA, then the amount of the payment claim may be collected as a debt due.

[11] Dempsey Wood applies to set aside the statutory demand on the basis that s 23 does not apply because Payment Claim No.9 was not served on the applicant in accordance with the contract and the CCA, so there was no obligation to issue a payment schedule in response.

[12] Furthermore, Dempsey Woods submits, even if consent to receiving payment claims solely to Mr Pickard's email address can be inferred, service was only effected at the time the email came to Mr Pickard's attention on 1 April 2021. The payment schedule provided on 7 April 2021 was, therefore, served in time and so s 23 is not able to be relied on to establish there is a debt owing.

[13] For an application to set aside a statutory demand to succeed an applicant only needs to establish that it is reasonably arguable that there is no debt owing. In this case, Dempsey Wood, therefore, only needs to establish that it is reasonably arguable that s 23 cannot be relied on either because:

(a) the payment claim was not served in accordance with the CCA; or

(b) that service was effected at the time the email came to Mr Pickard's attention on 1 April 2021.

Issues

[14] The issues for determination therefore reduce to:

(a) Is it reasonably arguable that Payment Claim No.9 was properly served?

(b) Is it reasonably arguable that service was effected only when the email came to Mr Pickard's attention?

Relevant legal principles

[15] A party may serve a statutory demand on a company in respect of any debt owed that is not less than $1,000.[1]

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[1] Companies Act 1993, s 289; and Companies Act 1993 Liquidation Regulations 1994, reg 5.

[16] A company served with a statutory demand may apply to set it aside pursuant to s 290(4) of the Companies Act 1993 which states:

> **290 Court may set aside statutory demand**
>
> ...
>
> (4) The court may grant an application to set aside a statutory demand if it is satisfied that—
>
> (a) there is a substantial dispute whether or not the debt is owing or is due; or
>
> (b) the company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount; or
>
> (c) the demand ought to be set aside on other grounds.
>
> ...

[17] The Court of Appeal helpfully confirmed the principles a court should apply when exercising its s 290(4) discretion in *Confident Trustee Limited v Garden and Trees Limited*:[2]

> [16] The general principles under s 290(4) are well settled:
>
> (a) The onus is on the applicant seeking to set aside the statutory demand to show that there is arguably a genuine and substantial dispute as to the existence of the debt. The Court's task is not to resolve the dispute but to determine whether there is a substantial dispute that the debt is due.
>
> (b) The mere assertion that a dispute exists is not sufficient. Material short of proof is required to support the claim that the debt is disputed.
>
> (c) If such material is available, the dispute should normally be resolved first in ordinary civil proceedings before any statutory demand is issued.
>
> (d) If a counterclaim, cross-demand or set-off is suggested an applicant must establish that this is reasonably arguable in all the circumstances.
>
> (e) It is not usually possible to resolve disputed questions of fact on affidavit evidence alone, particularly when issues of credibility arise unless such evidence is contrary to the available documents or earlier statements made by the parties.
>
> (footnotes omitted)

[18] Statutory demands issued in respect of amounts owing under construction contracts must be considered in the context of the CCA provisions.

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2 *Confident Trustee Limited v Garden and Trees Limited* [2017] NZCA 578.

[19] Where a payment schedule is not issued in response to a payment claim or is not issued within the required time, s 23 of the CCA allows the party who issued the payment claim (referred to as the "payee") to recover the amount claimed as a debt due.

[20] For s 23 to create a debt due:

(a) the payment claim must comply with the statutory requirements set out in s 20 of the CCA;

(b) the payment claim must be served in accordance with s 80 of the CCA and regulations 9 and 10 of the Construction Contracts Regulations 2003; and

(c) the recipient of the payment claim must not have responded with a valid payment schedule in time or at all.[3]

[21] Because s 23 provides that where the above circumstances apply, the amount claimed can be recovered as a debt due, a party who fails to issue a valid payment schedule in time cannot rely on a dispute over whether the amounts included in the payment claim are properly owing as a "substantial dispute" for the purposes of s 290(4)(a) of the Companies Act.

[22] I record at this stage that the respondent relies solely on s 23 in opposing the application. If s 23 cannot be relied on to establish a debt, there appears to be no question that there is a substantial dispute as to whether the amount claimed is owing as there is a dispute between the parties as to the rates that should apply to the project. This dispute is ongoing and has been referred to arbitration.

[23] Where s 23 is relied on, a statutory demand may therefore only be set aside on the basis of s 290(4)(a) if it is reasonably arguable either that:

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3 Construction Contracts Act 2002, s 22.

(a) the payment claim issued was not valid;

(b) the payment claim was not properly served; or

(c) a valid payment schedule was issued in time.

[24] Section 20 of the CCA sets out the requirements for payment claims. The applicant does not rely on failure to comply with s 20.

[25] Section 80 of the CCA provides for service of notices or any other documents required to be served. It states:

> Any notice or any other document required to be served on, or given to, any person under this Act, or any regulation made under this Act, is sufficiently served if –
>
> (a) The notice or document is delivered to that person; or
>
> (b) The notice or document is left at that person's usual or last known place of residence or business in New Zealand; or
>
> (c) The notice or document is posted in a letter addressed to the person at that person's place of residence or business in New Zealand; or
>
> (d) The notice or document is sent in the manner (if any) prescribed in regulations made under this Act.

[26] As the payment claim in this case was sent by email, s 80(d) requires that email to have been sent in the manner prescribed in the Construction Contracts Regulations 2003. Regulation 9(1)(b) allows service by email if the requirements of regulation 10 are met. Regulation 10 provides:

> **Requirements of service by email or other means of electronic communication**
>
> (1) A notice or document may be sent by email or other means of electronic communication under Regulation 9(1)(b) only if –
>
> (a) the information in the notice or document is readily accessible so as to be useable for subsequent reference; and
>
> (b) the person to whom the information is required to be served or given consents to the information being given in electronic form and by means of electronic communication, if applicable.
>
> (2) For the purposes of subclause (1) –
>
> (a) a person may consent to use, provide, or accept information in an electronic form subject to conditions regarding the form of the information or the means by which the information is produced, sent, received, processed, stored, or displayed:
>
> (b) consent may be inferred from a person's conduct.

Was service of the payment claim in accordance with the CCA?

[27] The answer to this question depends on the application of s 80 of the CCA and regulations 9 and 10 of the Construction Contracts Regulations as referred to above.

[28] Dempsey Wood submits that sending the payment claim solely to Mr Pickard's email address is not service in accordance with Dempsey Wood's requirements (and, therefore, the Construction Contracts Regulations' requirements) and that consent to service only on Mr Pickard cannot be inferred. In Dempsey Wood's submission there was therefore no proper service and no requirement to respond with a payment schedule.

[29] Concrete Structures says in response that Dempsey Wood's requirement to serve on the accounts address was only in relation to invoices and not payment claims and that consent can be inferred.

[30] I set out a chronology of the payment claim correspondence below to assist in determining whether the applicant's position is reasonably arguable.

Chronology of Payment claim correspondence

[31] The first payment claim was issued on 25 February 2020: sent by email to Mr Dale Pickard at dale.pickard@dempseywood.co.nz, as well as to the Dempsey Wood accounts address, accounts@dempseywood.co.nz.

[32] Payment Claim No.2 was emailed on 25 March 2020 to the accounts address and copied to Mr Dale Pickard.

[33] On 29 March 2020 an email was sent by Dempsey Wood to all suppliers headed "Important Changes to Dempsey Wood Purchasing" and saying:

> Effective from **1 April 2020**, to ensure that invoices are automatically read correctly, please can you ensure:
>
> - Invoices and statements are sent as editable PDF's to our email at **accounts@dempseywood.co.nz** (please send only invoices/statements).

- Please send all other communication, intended for our Accounts team, to your usual Accounts contact.

...

[34] The information sheet attached explained that Dempsey Wood had installed new software which would electronically read PDFs directly from emails and push the invoices through to the finance system for payment. The email went on to say:

> Please note if you are a sub-contractor requiring a certified claim, there are additional changes being made, and you will be receiving a separate communication on this soon.

[35] On 19 May 2020 a member of Dempsey Wood's accounts team, Ms Carmen Tsao, emailed Ms Kylie Mackie of Concrete Structures attaching a memorandum for subcontractors regarding buyer created tax invoices ("BCTIs"). The memorandum advised that Dempsey Wood was changing its processes to enable it to issue BCTI's for the value of approved claims. To be able to make this change in respect of Concrete Structures' invoices, Dempsey Wood needed Concrete Structures to agree to stop sending payment claims as invoices. As the memorandum stated, the benefit of agreeing to Dempsey Wood creating the invoices was that Concrete Structures would no longer have to issue a credit note where the amount certified in the payment schedule was less than the amount claimed. Concrete Structures did not agree to this change.

[36] The next payment claim, Payment Claim No.3, was emailed on 20 May 2020 to the accounts address and to Mr Dale Pickard.

[37] Payment Claim No.4 was emailed on 22 June 2020 to both Mr Pickard and the accounts address. Payment Claim No.4 was amended and re-sent on 2 July 2020 to the accounts email address and copied to Mr Pickard.

[38] Payment Claims No.5, No.6 and No.7 were emailed to both the accounts address and Mr Pickard on 24 July 2020, 25 August 2020, and 25 September 2020 respectively.

[39] Payment Claim No.8 was emailed on 23 October 2020 to the accounts address and, this time, copied to Mr Pickard.

[40] As set out above, Payment Claim No.9 was sent on 29 January 2021 to Mr Pickard's email address only.

[41] No payment schedule was issued in response to Payment Claim No.9 until 6 April 2021, just over two months after the payment claim was emailed. The payment schedule was issued following an email from Ms Mackie of Concrete Structures, following up on Dempsey Wood's response to the ninth payment claim. Mr Pickard's evidence is that this email prompted him to search his emails and discover the email of 29 January 2021 attaching Payment Claim No.9.

[42] Following the provision of the payment schedule by Dempsey Wood on 6 April 2021, Dempsey Wood paid the scheduled amount of $135,599.64 on 7 April 2021.

[43] Concrete Structures deducted this amount from the amount claimed in Payment Claim No.9 and issued a statutory demand for $1,819.254.14 on 20 May 2021.

[44] Solicitors for Dempsey Wood wrote to solicitors for Concrete Structures on 26 May 2021 requesting that the statutory demand be withdrawn including on the basis that it had not been properly served. Concrete Structures declined to do so and so Dempsey Wood has applied to set aside the statutory demand.

Cases applying regulations 9 and 10

[45] There is limited caselaw on the application of regulations 9 and 10.

[46] Counsel for the applicant relies on *Buchanan Construction Limited v Watson*[4] where the plaintiff sent its payment claim to the email address used by the defendant for day-to-day communications with Buchanan Construction. The defendant, Ms Watson, did not see the payment claim. Buchanan Construction claimed it was entitled to rely on s 23 of the CCA to recover the amount claimed in the payment claim as a debt due.

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4 *Buchanan Construction Limited v Watson* [2018] NZDC 4570.

[47] Judge Sinclair rejected Buchanan Construction's submission that consent could be inferred from Ms Watson's conduct and held:

> [28] In my view the consent is not intended to simply be a general consent but rather, it is one which contemplates service of the notice or document containing particular information…
>
> …
>
> [29] … While the parties used email to communicate on day-to-day matters related to the contract, I do not accept that it follows under Reg 10(2)(b), that it can be reasonably inferred from such conduct, that Ms Watson consented to the service of a payment claim by email.

[48] Unlike in that case, the Umbrella Agreement here provided in clause 20 for service of "notices" by email. "Notices" is not defined in the subcontract. Nor is it defined in the CCA. It is reasonably arguable, however, that a payment claim and associated documents would be interpreted as a notice under the contract. In support of this argument, s 20(3)(a) of the CCA requires payment claims to be accompanied by information about the process for responding to those claims. Regulation 4 of the Construction Contract Regulations 2003 provides that the information required to accompany a payment claim under s 20 must be in form 1 as set out in schedule 1 of the Regulations. Form 1 is then headed "Important Notice" and begins by stating "This notice …"

[49] If a payment claim and associated documents are regarded as a notice, service by email would have been agreed. The question is then whether agreement has been reached on the email address payment claims are to be served to.

Is service on Mr Pickard's email address only and not the accounts email address sufficient?

[50] The Umbrella Agreement expressly states that notices can be delivered to the address stated in the agreement or as subsequently advised in writing. No address was stated in the Umbrella Agreement.

[51] The Dempsey Wood email sent to all Dempsey Wood suppliers on 29 March 2020 was a follow-up to an earlier communication on 26 February 2020 advising that all invoices were to be sent to the accounts email address, accounts@dempseywood.co.nz. This instruction is consistent with where Concrete

Structures had sent the first two progress payment claims. Following this advice, Concrete Structures continued to email the progress payment claims to the accounts address, either sending it to Mr Dale Pickard as well or copying him in.

[52] Counsel for Concrete Structures submits that payment claims are not invoices and therefore that Dempsey Wood's notice to suppliers did not apply in relation to the payment claims issued. I agree that payment claims are not necessarily invoices, but the payment claims in this case all state that they are a "Claims Invoice". Furthermore, the notice to suppliers referred to "additional changes" being made for subcontractors requiring a certified claim. Contrary to submissions for the applicant, this suggests that the requirement applied to contractors requiring certified claims (as Concrete Structures did) but that there would be "additional" or extra changes made for those suppliers as well.

[53] I consider therefore that it is reasonably arguable that the direction to send all invoices to the accounts email address applied to the payment claims sent by Concrete Structures.

[54] Furthermore, all previous progress payment claims had been sent by email to both the accounts and Mr Pickard's addresses. Regulation 10(2)(a) provides that consent to receive service by email may be qualified by conditions regarding the form or means by which the information is produced, sent, received, processed, or displayed. There is a reasonable argument that even if Mr Pickard's consent to receiving payment claims by email can be inferred, it was only on the basis that the email was also sent to the accounts address.

[55] Such a condition would be reasonable because, as Dempsey Woods submits, if the payment claim was only required to be served on Mr Pickard, the system was vulnerable to Mr Pickard not monitoring his email address due to illness, vacation or for other unforeseen reasons.

[56] The circumstances in this case highlight this vulnerability. Mr Pickard's evidence is that he was not expecting a payment claim at the time it was sent because all previous payment claims had been sent by the 25th day of the month (as required

by the contract). Payment Claim No.9 was, by contrast, sent on 29 January 2021. In addition, Mr Pickard explains that he was extremely busy as he was working on a large KiwiRail project and overseeing a 24-hour programme of works. Mr Pickard deposes that he was receiving up to 100 emails per day around this time with 106 emails received on 29 January 2021 (the Friday). He then went on leave the following week and came back to hundreds of unread emails.

[57] Furthermore, Concrete Structures' evidence is that the failure to send Payment Claim No.9 to the accounts address was by mistake. This is in response to Dempsey Wood suggesting that there was something underhand in Concrete Structures' actions in only sending the payment claim to Mr Pickard. But if it was a mistake, it does not support an inference that Dempsey Wood had consented to payment claims being sent only to Mr Pickard's address. The operation of the CCA can be draconian so it has to be clear that the CCA has been complied with before those consequences are borne out.

[58] It therefore appears reasonably arguable that, even aside from the notice to suppliers, any consent inferred would be on the basis that the payment claim was also emailed to the accounts address.

[59] There is one payment claim that was not sent to the accounts email address: the claim headed "Advance Entitlement Payment" emailed on 1 May 2020. Although relating to the Whau Bridge, this claim is not described as a progress payment claim or as a "Claims Invoice" as the other claims are, simply stating "Tax Invoice 2012AEP" in the header. Nor does the Advance Entitlement Payment claim refer to the previous amounts paid in respect of the Whau Bridge construction as the other progress payment claims do.

[60] The Advance Entitlement Payment was paid in full by Dempsey Wood on 29 May 2020 – less than a month after the claim was issued. Concrete Structures submits that this supports a finding that Mr Pickard consented to the use of his email address for the service of payment claims.

[61] Dempsey Wood only needs to establish, however, that it is reasonably arguable that Payment Claim No.9 was not served in accordance with the CCA. I consider that they have done so. The fact that the Advance Entitlement Payment appears to have been sent only to Mr Pickard and was accepted and paid by Dempsey Wood is not sufficient to outweigh the reasons discussed above for why it is reasonably arguable that Payment Claim No.9 was not validly served.

Is it reasonably arguable that service was only effected when it came to Mr Pickard's attention?

[62] Even if consent to receive the payment claim solely to Mr Pickard's email address could be inferred, there appears to be a reasonable argument that the payment claim may not be deemed to be received until it came to the attention of Mr Pickard.

[63] Mr Pickard's evidence is that the email attaching Payment Claim No.9 only came to his attention on 1 April 2021. If the time of service is when the email came to his attention, the provision of the payment schedule on 7 April 2021 would have been in time. There would therefore be no debt owing pursuant to s 23 and the statutory demand ought to be set aside. The question is whether there is a reasonable argument that this timing applies in this case.

[64] Regulation 9(3) of the Construction Contracts Regulations sets out the deemed timing of service:

> (3) A notice or document sent by email or other means of electronic communication under subclause (1)(b) is, in the absence of proof to the contrary, regarded as having been served or given, –
>
> (a) in the case of an addressee who has designated an information system for the purpose of receiving emails or other electronic communications, at the time the email or communication enters that information system; or
>
> (b) in any other case, at the time the email or communication comes to the attention of the addressee.
>
> (4) For the purposes of subclause (3), **information system** means a system for producing, sending, receiving, storing, displaying, or otherwise processing emails or other electronic communications.

[65] Regulation 9(3) therefore distinguishes, for the purposes of determining the time at which the email will be said to have been received, between a situation where an addressee has designated an information system for the purpose of receiving emails and, in the alternative, "in any other case" (s 9(3)(b)). In the former case, the relevant time is when the email enters the information system; in the latter, when the email comes to the attention of the addressee.

[66] The wording of regulation 9(3) is very similar to the wording of s 214 of the Contract and Commercial Law Act 2017 ("CCLA") which repeated the language of its predecessor, s 11 of the Electronic Transactions Act 2002. Section 11 is considered in *Petterson v Gothard* where Heath J commented that s 11 was based on art 15 of the UNCITRAL[5] Model Law on Electronic Commerce ("the Model Law").[6]

[67] Section 210 of the CCLA (as s 6 of the Electronic Transactions Act did previously), permits recourse to the Model Law and specified associated documents for the purpose of interpreting the electronic transactions provisions. Paragraph 102 of the UNCITRAL Guide to Enactment of the Model Law explains the meaning of "Designated Information System" as follows:

> 102. [Article 15(2)], the purpose of which is to define the time of receipt of a data message, addresses the situation where the addressee unilaterally designates a specific information system for the receipt of a message (in which case the designated system may or may not be an information system of the addressee), and the data message reaches an information system of the addressee that is not the designated system. In such a situation, receipt is deemed to occur when the data message is retrieved by the addressee. By "designated information system", the Model Law is intended to cover a system that has been specifically designated by a party, for instance in the case where an offer expressly specifies the address to which acceptance should be sent. The mere indication of an electronic mail or telecopy address on a letterhead or other document should not be regarded as express designation of one or more information systems.

[68] In *Petterson v Gothard*, Heath J comments:

> [39] Determination of whether an information system has been "designated", for the purposes of s 11(a), is a question of fact to be determined on the basis of available evidence …

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5 United Nations Commission on International Trade Law.

6 *Petterson v Gothard (No 3)* [2012] NZHC 666 at [35].

[69] Heath J says further that s 11(a) contemplates the possibility of designation being effected either through express words or by conduct. In his Honour's view this is consistent with para 102 of the Guide to Enactment to the Model Law and is also in line with the view taken by the Law Commission in its precursor work to the Electronic Transactions Act.[7] Heath J refers to the following passage from the Law Commission's report:

> 88 ... it should be necessary, consistent with the choice principle, for a person who wishes to give notice or to serve documents by email, in lieu of ordinary post to be able to establish to the satisfaction of the court both
>
> - that the intended recipient actually agreed to receipt of the notice by email; and
> - that a particular form of email used can be read by the intended recipient.
>
> In our view there should be no prescriptive legislation detailing how such agreement should be proved; that should be a matter left to the parties to determine. If documents are sent in lieu of statutory notice and these factors cannot be proved by the person who sent the documents, then the service will be invalid. That is a risk which the person seeking to use email runs. The onus will be on the person who wishes to serve or give notice by email to prove agreement on the points raised.

[70] In *Petterson*, Heath J was satisfied that email correspondence had historically been used between the parties and "that the evidence was sufficient to infer a "designation" that the "Ferrier Hodgson" address could be used for correspondence and official notices."[8]

[71] In *Petterson*, however, the timing of receipt of the email was not critical. Heath J did not consider whether consent could be inferred but not amount to "designation". Regulation 10(2)(b) of the Construction Contracts Regulations allows consent to service by email to be inferred but this does not necessarily mean that an information system has been designated.

[72] Paragraph 102 of the Guide to Enactment to the Model Law, as set out above, supports an argument that where consent to service is inferred it may not amount to designation of an information system. There is then an argument that even if Mr Pickard's consent to receiving payment claims by email could be inferred, regulation

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7 At [39], citing *Electronic Commerce Part Two: A Basic Legal Framework* (NZLC R 58, 1999).
8 At [40].

9(3)(b) would apply and the email would be regarded as having been served "at the time the email or communication comes to the attention of the addressee". On this basis, it is reasonably arguable that service was only effected when it came to Mr Pickard's attention. If that is the case, the payment schedule issued by Dempsey Wood would have been issued in time and no statutory demand ought to have been served as no debt could be said to be owing pursuant to s 23.

Validity of Payment Schedule

[73] Finally, I record that counsel for Concrete Structures raised issues with the validity of the payment schedule (although this had not been raised in its notice of opposition or affidavit in support). Because I have found that it is reasonably arguable that the payment claim was not properly served, I do not need to consider these submissions for the purposes of this application.

Result

[74] In my view it is reasonably arguable that Dempsey Wood's consent to receiving payment claims by email was on the basis that they were sent to the accounts address, accounts@dempseywood.co.nz.

[75] Furthermore, it is reasonably arguable that an information system has not been designated for the purposes of regulation 9 of the Construction Contracts Regulations and that, in those circumstances, the time at which the email will be deemed to have been served is the time at which the email or communication came to the attention of Mr Pickard. The payment schedule would then have been provided in time.

[76] On both these bases, the applicant has established that it is reasonably arguable that s 23 of the Construction Contracts Act cannot be relied upon to establish there is a debt owing.

[77] The statutory demand served on Dempsey Wood on 20 May 2021 is, therefore, set aside.

Costs

I record my preliminary view that the applicant is entitled to costs, having succeeded in its application. I ask the parties to confer and attempt to agree costs. If agreement cannot be reached, memoranda of no more than five pages may be filed on behalf of the defendants within **15 working days** of this judgment and on behalf of the plaintiff within **25 working days**.

Associate Judge Sussock