

In the High Court of New Zealand
Christchurch Registry
I Te Kōti Matua O Aotearoa
Ōtautahi Rohe

CIV-2019-

Under Part 19 High Court Rules 2016
In the Matter of Corbel Construction Limited (in liquidation)
Between **ANDREW MARCHEL OORSCHOT** as liquidator of
Corbel Construction Limited (in liquidation),
Chartered Accountant of Christchurch

Applicant

And **CORBEL CONSTRUCTION LIMITED (IN LIQUIDATION)** a duly incorporated company having
its registered office at Level 2, 83 Victoria Street,
Christchurch

Respondent

Memorandum of Counsel in Support of Originating Application

Dated: 28 August 2019

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May it Please the Court:

1. This is an application by the liquidator of Corbel Construction Limited (in liquidation) (**Corbel**) for orders:
 - (a) Appointing him as liquidator of a fund of retention monies currently held by Corbel on trust for subcontractors (**Fund**) pursuant to the terms of the Construction Contracts Act 2002 (**Act**).
 - (b) For directions as to the management and distribution of the Fund.

(Application)

2. The applicant requests that three orders be granted on the papers to facilitate the progress of the Application:
 - (a) Leave to commence this Application by originating application, if such leave is required (Paragraph 2 of the Application).
 - (b) Orders as to service of the Application (Paragraph 4 of the Application).
 - (c) Timetabling of the Application.

Background to this Application

3. Corbel is a construction company that historically had projects based primarily in Christchurch and Auckland. It became insolvent and Mr Oorschot was appointed liquidator of Corbel by shareholders' resolution on 3 December 2018.
4. At the time of its liquidation, Corbel held a fund of monies retained under commercial construction contracts as security for the performance of obligations under those contracts (known as retentions) totalling \$109,871.76 (**Fund**).
5. The Act provides that where Corbel intends to withhold sums which would otherwise be required to be paid under a commercial construction contract (**CCC**) dated after 31 March 2017 to a subcontractor those funds must be held on trust for the subcontractor.

6. In respect of retentions held on subcontracts entered into after 31 March 2017, in accordance with the Act Corbel did not commence transferring funds from Corbel's general account to a separate trust account until July 2018 (**Retentions Account**).
7. According to Corbel's records the amounts which were physically transferred into or out of the Retentions Account up to the date of liquidation totalled \$109,846.47 made up as follows:
 - (a) The sum of \$88,322.47 on 30 July 2018 (**July Retention Transfer**).
 - (b) The sum of \$21,524.00 on 31 August 2018 (**August Retention Transfer**).
8. There were no transfers out of the Retentions Account since the account was opened.
9. The Liquidator has carried out significant work attempting to reconcile Corbel's records, to establish which subcontractors could have a claim to the Fund and the amount of any such claim. The outcome shows:
 - (a) The amount held in the Retentions Account was based on amounts withheld from subcontractors up to 31 July 2018 on 13 projects identified by Corbel as falling under the retentions regime of the Act (**Reconciled and Partly Transferred Retentions**). The reconciled and partially transferred retentions relate to retentions held on behalf of 51 subcontractors.
 - (b) No transfers were made to the Retentions Account in respect of:
 - (i) retentions withheld from subcontractor claims lodged for August 2018 to October 2018 (**Calculated but Not Transferred Retentions**); or
 - (ii) the retentions withheld from subcontractor claims lodged for November 2018 (**Uncalculated and Not Transferred Retentions**).
 - (c) Corbel's retention system shows that some of the retentions withheld from claims up to 31 July 2018 have since been released and paid from Corbel's general bank account, but some released

retention amounts remain as **Released but Not Paid** and therefore should remain part of the Reconciled and Transferred Retentions.

- (d) Based on the *Ebert* Judgement¹, the applicant considers that the only subcontractors entitled to a pro-rata share of the Retentions Account are the Reconciled and Partially Transferred Retentions subcontractors as at 31 July 2018 (net of any of these amounts released and paid from Corbel's general account since that date) (**Entitled Subcontractors**).

10. In this Application, the applicant seeks directions in relation to the following matters:

- (a) That he be appointed liquidator of the Fund. As the applicant has already done a substantial amount of work reconciling the Fund in his capacity as liquidator of Corbel, it is efficient that he assumes this role.
- (b) Confirmation that the Fund is held by Corbel on trust for subcontractors only in respect of the Reconciled and Partially Transferred Retentions (i.e. those where Corbel partially transferred funds into the Retention Account to be held on trust).
- (c) That the applicant may determine and pay valid claims to the Fund, including by way of interim distributions, in accordance with the terms of the relevant subcontract, the Act and the Court's orders.
- (d) Ancillary orders including as to service on interested parties and payment from the Fund of the applicant's costs relating to this Application and administering the Fund.

Application for Leave to Commence the Application as an Originating Application

11. The Application can be split into two substantive parts:

- (a) An application to be appointed liquidator of the Fund.
- (b) If so appointed, an application for directions as to the management and distribution of the Fund.

¹ *Bennett v Ebert Construction Ltd (In Receivership and Liquidation)* [2018] NZHC 2934

12. An application by a liquidator for directions can be made as of right as an originating application – see High Court Rule 19.4(b). However, an application to be appointed liquidator of the Fund is not an application expressly listed as one which can be commenced by way of originating application in High Court Rules 19.2 to 19.4.
13. There is an argument that, as Corbel is the legal owner and trustee of the Fund (even though it does not have beneficial ownership), the Fund forms part of the assets to which the liquidator has been appointed, pursuant to the shareholders' resolution. On this basis:
 - (a) The liquidator would be entitled to manage the Fund as agent of the trustee, Corbel.
 - (b) Therefore this Application could solely be an application by a liquidator for directions as to how to manage the Fund.
14. However, the matter is not entirely clear, and therefore the prudent option is to make a separate application for the Liquidator to be appointed as liquidator of the Fund to remove any doubt. Being appointed as liquidator of the Fund will also ensure continuity of management of the Fund in the event he retires as liquidator (i.e. liquidator appointed by the shareholders' resolution) prior to the Fund being fully distributed.
15. Rule 19.5 provides that:
 - (a) The Court may, in the interests of justice, permit any proceeding not mentioned in Rules 19.2 to 19.4 to be commenced by originating application.
 - (b) The Court's permission may be sought without notice.
16. In *Jones v H W Broe Ltd*,² McGechan J considered an application for leave to use the originating application procedure on a without notice basis. His Honour discussed the rationale underlying Rule 19.5 as follows:

“The ... originating application procedure was designed as a genuine exception, and as an expedient for cases where there was in reality no opposing party, avoiding clumsy and unnecessary use

² (1989) 5 PRNZ 206 (HC) at 207

of a full statement of claim and notice of proceeding. It was not intended for routine use in cases where there was another likely party with contrary interests.”

17. Since then, the Courts have acknowledged that the procedure is no longer limited to applications where there is no opposing party, but that in relation to opposed substantive applications not expressly listed in Rules 19.2 to 19.4 it would be an exceptional procedure.³
18. It is in the interests of justice that leave be granted pursuant to Rule 19.5.
19. Significantly, the only substantive order which does not expressly fall within Rules 19.2 to 19.4 – that is, the order to appoint the applicant as liquidator of the Fund – is not expected to be opposed. Rather, the appointment orders sought are in the interests of subcontractors, as they will expedite payment of claims to the Fund.
20. There is no need for a statement of claim to be filed or any interlocutory applications. Rather, it is in the interests of all parties concerned and in the interests of justice that the Application progresses in the most efficient manner. The originating application procedure will enable that to happen.

Service of the Application

21. The liquidator also seeks orders as to the service of the Application on subcontractors who may have an interest in the Fund.
22. It is not in the best interests of affected subcontractors that the applicant be required to personally serve the Application on every person who may be affected by it for the following reasons:
 - (a) There are 51 affected subcontractors with a potential interest in the Fund, relating to 13 different construction projects. This means at least 51 persons (subcontractors) would need to be served with the Application.
 - (b) There would be significant costs associated with personally serving each of those subcontractors. If the applicant’s costs of this Application were deducted from the Fund, the costs of service

³ *Hong Kong & Shanghai Banking v Erceg* (2010) 20 PRNZ 652 at 659

would deplete the Fund further at the expense of affected subcontractors.

- (c) Service on all 51 persons would inevitably delay determination of the Application.
- (d) Service by email and in accordance with the directions sought is most likely to bring the Application to the attention of all subcontractors.

23. As is set out in the affidavit of Andrew Marchel Oorschot, the applicant has email contact details for 51 of the 51 subcontractors with reconciled and partially transferred retention claimants. These email contact details were provided to the applicant specifically for the purpose of communications in the liquidation and/or have been obtained via creditor claim forms filed by the 51 subcontractors.

Timetable the Application

24. The applicant seeks the following timetabling directions in respect of the Application:
- (a) That any party who wishes to join the proceeding must file an application for joinder within 15 working days of service.
 - (b) That the Application be set down for a half day hearing on the first available date after 1 October 2019.

Date: 28 August 2019



B M Russell/M D W King
Counsel for the Applicant