

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CIV-2019-409-000505
[2020] NZHC 723**

UNDER Part 19 of the High Court Rules 2019

IN THE MATTER of Corbel Construction Limited
(in liquidation)

BETWEEN ANDREW MARCHEL OORSCHOT as
liquidator of Corbel Construction Limited
(in liquidation)
Applicant

AND CORBEL CONSTRUCTION LIMITED
(in liquidation)
Respondent

Hearing: 24 February 2020
(Further submissions filed on 11 March 2020 and 7 April 2020)

Appearances: B M Russell and M D W King for Applicant

Judgment: 8 April 2020

JUDGMENT OF ASSOCIATE JUDGE PAULSEN

This judgment was delivered by me on 8 April 2020 at 2.30 pm
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: 8 April 2020

The application

[1] The applicant (Mr Oorschot) is the liquidator of Corbel Construction Ltd (In Liquidation) (Corbel). Corbel is a construction company that was involved with projects primarily in Christchurch and Auckland. Corbel became insolvent. Mr Oorschot was appointed liquidator by a shareholders' resolution on 3 December 2018.

[2] At the date of liquidation, Corbel held a fund representing retentions under commercial construction contracts totalling \$109,871.76 (the Retention Fund). The Retention Fund was held in partial fulfilment of Corbel's obligations under the Construction Contracts Act 2002 (the Act).¹ Mr Oorschot has sought directions in relation to the administration and distribution of the Retention Fund in circumstances where there is insufficient money to satisfy the claims against the Retention Fund of all potentially entitled subcontractors.

[3] The application has been prepared with close attention to *Bennett v Ebert Construction Ltd*.² Mr Oorschot seeks orders/directions as follows:

- (a) That he is appointed receiver and manager of the Retention Fund.
- (b) That the Retention Fund is held by Corbel on trust in accordance with ss 18A to 18I of the Act for the subcontractors who:
 - (i) had a contract that was recorded in Corbel's retention tracking system as being entered into with Corbel after 31 March 2017; and
 - (ii) for whom Corbel subsequently transferred a portion of the retention moneys related to their contracts to the Retention Fund; and

¹ Construction Contracts Act 2002, pt 2, sub-pt 2A.

² *Bennett v Ebert Construction Ltd (in rec and liq)* [2018] NZHC 2934.

- (iii) for whom retention moneys did not cease to be retention moneys pursuant to s18C(3) of the Act.
- (c) As Receiver Mr Oorschot may determine and pay valid claims on the Retention Fund, including by way of interim distribution, in accordance with the terms of the relevant subcontract, the Act, and the orders granted herein.
- (d) That the Retention Fund is to be distributed to subcontractors with valid claims:
 - (i) on a pro rata basis in relation to their respective retention amounts; and
 - (ii) on a basis which does not pay any interest claims unless or until all valid (non-interest) claims on the Retention Fund are paid in full.
- (e) Allowing Mr Oorschot to deduct from the Retention Fund his costs and expenses relating to the management and administration of the Retention Fund, including those in respect of this application without further approval of the Court.

Background

[4] Corbel traded for almost 20 years. As a result of an unfavourable determination over weather-tightness issues it was put into liquidation by its shareholders.

[5] The Act requires all retention monies withheld by Corbel from sums payable under commercial construction contracts entered into after 31 March 2017 to be held on trust for the subcontractor (Qualifying Retentions). Corbel implemented a system to identify such amounts. Its retention tracking system was based around recording the date its head contract with a principal was entered into, with the presumption that

Corbel's contract with its subcontractors was entered into on or around the same date. This presumption was not always correct.

[6] As at the date of liquidation, Corbel's records showed that retentions were being held on 45 projects but, as detailed below, only 13 of those projects fell under the retention's regime of the Act.

[7] Corbel did not commence transferring retention amounts from its general account to a separate trust account until July 2018. The amounts concerned were transferred to an account with the Bank of New Zealand. Corbel's records showed there were 13 projects falling under the retentions regime of the Act and 51 subcontractors involved in those projects (the affected subcontractors).

[8] The Retention Fund is made up of the following:

- (a) a sum of \$88,322.47 transferred to the retentions account on 30 July 2018 for Qualifying Retentions to 30 June 2018; and
- (b) a sum of \$21,524 transferred to the retentions account on 31 August 2018 for Qualifying Retentions to 31 July 2018.

[9] The table below demonstrates Mr Oorschot's analysis of the July retention transfer and the August retention transfer.

Retention Deductions upon which Transfers to Trust Account were based	Total \$ Retention	Less Since Paid	Balance Owing	Transfers to Trust Account
Retentions up to 30 June 2018	-\$176,644.93	\$13,421.56	-\$163,223.37	\$88,322.47
Retentions for Month of July 2018	-\$37,561.23	\$3,511.72	-\$34,049.51	\$21,551.46
Total	-\$214,206.16	\$16,933.28	-\$197,272.88	\$109,873.93

[10] The July retention transfer of \$88,322.47 was based on 5 per cent of Qualifying Retentions up to 30 June 2018. The total of those Qualifying Retentions was \$176,644.94. Mr Oorschot has been able to identify the subcontractors which the July retention transfer relates to.

[11] The August retention transfer equated to a top-up of just over 10 per cent of the \$214,206.16 of all Qualifying Retentions to 31 July 2018. Corbel's directors had intended that sufficient funds would be transferred to the retentions account in August 2018 in order that 100 per cent of Qualifying Retentions to the end of July 2018 would be held in the retentions account. Corbel was unable to transfer the required \$125,884.16 and transferred only \$21,551.46 at the end of August 2018. Mr Oorschot has identified the subcontractors with Qualifying Retentions to 31 July 2018. He has not been able to establish how the sum of \$21,551.46 was calculated.

[12] As the movement in retention deductions for the month of July 2018 was \$37,561.23 the funds transferred equated to approximately 57 per cent of the retention deductions for the month of July's subcontractor's claims.

[13] After 31 August 2018, some of the retention amounts fell due for payment and were repaid from Corbel's general account. However, no further sums were transferred by Corbel from its general account to the retentions account for the months of August, September, October or November 2018.

[14] Based on *Ebert*, Mr Oorschot identified Qualifying Retentions as falling under the following categories:

- (a) Reconciled and (partly) Transferred Retentions, being the Qualifying Retentions paid to the retentions account with the Bank of New Zealand;
- (b) Calculated but not Transferred Retentions, being retentions withheld by Corbel from subcontractors' claims lodged and certified for the months of August to October 2018 but not transferred to the retentions account;

- (c) Uncalculated and not Transferred Retentions, being subcontractors claims for the month of November 2018 that had not been assessed by Corbel at the date of liquidation;
- (d) Released and Not Paid Retentions, being sums shown in Corbel's records as having been released for payment to subcontractors since 31 July 2018 but where no funds transfer was made out of the retentions account and no payment was made to the subcontractors prior to liquidation; and
- (e) Wrongly classified contracts, being retentions wrongly classified in Corbel's system as relating to commercial construction contracts entered into before 31 March 2017 and in respect of which no funds were transferred to the retentions account.

[15] Upon filing his application, Mr Oorschot sought directions as to service. An order was made on 6 September 2019 by Associate Judge Lester for service of the application on all 51 affected subcontractors.

[16] The affected subcontractors were served but none have taken any steps in the proceeding.

The appointment of a receiver and his costs

[17] The application originally sought the appointment of Mr Oorschot as a Court appointed liquidator of the Retention Fund. The jurisdictional basis for such an order was not clear. At the hearing, Mr Russell presented submissions that as liquidator, Mr Oorschot had the power and duty to take control and administer trust assets including the Retention Fund.³ However, in *Bennett v Ebert Construction Ltd*, Churchman J expressed doubt as to a liquidator's powers in respect of the administration of retention funds.⁴ Furthermore, as liquidator Mr Oorschot would be precluded by s 18E of the Act from deducting any fees or expenses. A liquidator would

³ *Levin v Ikiua* [2010] 1 NZLR 400 at [116].

⁴ *Bennett v Ebert Construction Ltd*, above n 2, at [91].

likely be unwilling to assume the responsibility and cost of administering and distributing retention funds if the costs of doing so were irrecoverable.

[18] For these reasons, Mr Russell sought to amend the application to have Mr Oorschot appointed as the receiver and manager of the Retention Fund in the exercise of the Court's inherent power. I do not consider there is any prejudice to the affected subcontractors in allowing the amendment. No subcontractors took any steps to oppose Mr Oorschot's application, although he sought to recover his costs and expenses from the Retention Fund. I allow the amendment.

[19] The Court's power to appoint a receiver was recognised by Katz J in *Rea v Omana Ranch Ltd*.⁵ In *Ebert Construction*, Churchman J relied upon *Rea v Omana Ltd* to appoint receivers to administer the retention account of a construction company that was in liquidation and receivership.⁶ Churchman J noted that one factor that is relevant in convincing the Court to exercise its jurisdiction is whether anyone else is actually managing the fund in question.⁷

[20] Here, there is no-one, other than Mr Oorschot, to administer the Retention Fund. He, and his staff, have investigated the affairs of Corbel including the subcontractors' retentions. He has done a great deal of work in relation to this application. I do not perceive any obvious conflict in his role as liquidator and as a receiver administering the Retention Fund.

[21] I am satisfied that Mr Oorschot should be appointed the receiver and manager of the Retention Fund for the purpose of distributing the fund and resolving any issues that may arise from that process.

[22] It is proper that a receiver appointed by the Court recover such reasonable costs as relate to the administration of a retention fund and that the costs are borne by the subcontractors who will benefit from the fund. I am, therefore, also satisfied that it is appropriate that Mr Oorschot's costs and expenses are met from the Retention Fund.

⁵ *Rea v Omana Ranch Ltd* [2012] NZHC 2639, [2013] 1 NZLR 587 at [7].

⁶ *Bennett v Ebert Construction*, above n 2, at [92]-[102].

⁷ At [98].

[23] In *Ebert Construction*, Churchman J ordered that the receivers were entitled to deduct their fees, costs and expenses from the retention fund.⁸ He also awarded them costs on their application on an indemnity basis.⁹ Mr Oorschot seeks an order that actual legal costs in relation to this application of \$18,698.64 be paid from the Retention Fund. This represents his legal costs up to 31 January 2020. Both he and his lawyers have had significant attendances in relation to this application since that date. Mr Oorschot expects that his additional costs may be paid by arrangement with secured creditors.¹⁰ The actual legal costs incurred appear reasonable and it is appropriate they be paid from the Retention Fund.

Distribution of the Retention Fund

[24] Having regard to reasoning in *Ebert*, I am satisfied that only subcontractors falling within the categories of Calculated and (partly) Transferred Retentions and Released but Not Paid Retentions have any claim on the Retention Fund.¹¹ In accordance with the table in [9] above the amount owing is \$197,272.88.

[25] It is known the July retention transfer was based on 50 per cent of the Qualifying Retentions from claims lodged to 30 June 2018. It is not known exactly how the August retention transfer was calculated. In the circumstances, I consider the fairest and most economic outcome is that the Retention Fund be distributed to the subcontractors with valid claims on a pro rata basis (net of a pro rata share of costs) determined as at the date of liquidation.

[26] I understand interest has been earned on the Retention Fund. I do not know the amount of interest earned, but it will be a modest amount. In *Ebert*, Churchman J identified issues that may arise as to whom might be entitled to interest earned on retention funds.¹² He did not resolve those issues, noting the benefit of a pragmatic approach. Here, the costs of investigating and resolving any dispute concerning interest will be greater than the sum at stake. I therefore adopt the approach that all claims on the Retention Fund are to be paid without interest unless or until all valid

⁸ At [140].

⁹ At [140].

¹⁰ At [140](b) and (f).

¹¹ Construction Contracts Act 2002, ss 18A, 18C(1) and (3).

¹² *Bennett v Ebert Construction*, above n 2, at [131]-[139].

(non-interest) claims on the Retention Fund are paid in full. I do not see any likelihood that upon payment of valid claims there will be funds remaining but, if so, Mr Oorschot will have leave to apply for further directions.

The result

[27] I make orders as follows:

- (a) The applicant, Andrew Marcel Oorschot, is appointed receiver and manager of the Retention Fund.
- (b) The Retention Fund is held by Corbel on trust in accordance with ss 18A to 18I of the Construction Contracts Act 2002 for the subcontractors who:
 - (i) had a contract that was recorded on Corbel's retention tracking system as being entered into with Corbel after 31 March 2017; and
 - (ii) for whom Corbel subsequently transferred a portion of the retention moneys related to their contracts to the Retention Fund; and
 - (iii) for whom retention moneys did not cease to be retention moneys pursuant to s 18C(3) of the Act.
- (c) Mr Oorschot may determine and pay valid claims on the Retention Fund, including by way of interim distribution, in accordance with the terms of the relevant subcontract, the Act, and the orders granted herein.
- (d) Mr Oorschot may make payments to those subcontractors entitled to share in the Retention Fund:

- (i) on a pro rata basis (in the relation the amount of a subcontractor's valid claims bear to the total of all valid claims as at the date of liquidation); and
 - (ii) on a basis which does not pay any interest claims on any retention moneys unless or until all valid (non-interest) claims on the Retention Fund are paid in full.
- (e) Mr Oorschot may deduct from the Retention Fund his costs and expenses relating to the management and administration of the Retention Fund, including those in respect of this application to a limit of \$18,698.64 without further approval of the Court.

[28] I reserve leave to Mr Oorschot to apply for such further directions as may be required to give effect to the orders made.

O G Paulsen
Associate Judge

Solicitors:
Lane Neave, Christchurch