

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

CIV-2019-

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),
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

Originating Application

Dated: 28 August 2019

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To: The Registrar of the High Court at Christchurch

And

To: The subcontractor creditors of Corbel Construction Limited (In Liquidation) (**Corbel**) listed in Schedule 1 (**Subcontractors**)

This document notifies you that—

1. The applicant, Andrew Marchel Oorschot, as liquidator of Corbel (**Liquidator**) will on _____ 2019 at _____ am/pm apply for orders as follows:

Procedural Orders

2. Permitting these proceedings to be commenced by way of originating application (if leave is required).
3. Appointing the applicant as Court appointed liquidator to the retention fund currently held by Corbel in BNZ bank account 02-0820-0019153-002 (**Retentions Account**) (**Fund**).
4. That service on Subcontractors affected by this application be deemed to have occurred by:
 - (a) Sending the Subcontractors (the applicant has an email address for all of them) a copy of this Application together with accompanying memoranda and affidavits by email and providing a link to a webpage dedicated for the Ashton Wheelans website.
 - (b) For any Subcontractors an email is returned undelivered, sending a letter by courier to their registered office or last known address enclosing this Application (together with accompanying memoranda and affidavits).
5. As to the timetabling of the Application, directions as follows:
 - (a) Any application by a Subcontractor for joinder to the Application to be filed within 15 working days of service (in accordance with the directions as to service set out in paragraph 4 above).

- (b) The matter to be allocated a hearing date of up to half a day's duration on the most first available date after 1 October 2019.

Substantive Orders

6. An order directing that the funds in the Retention Account (i.e. the Fund) are held by the Liquidator on trust in accordance with sections 18A to 18I of the Construction Contracts Act 2002 (**Act**) for:
- (a) The Subcontractors which:
- (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 Account; and
 - (iii) for whom retention moneys did not cease to be retention moneys pursuant to section 18C(3) of the Act.
- (hereafter referred to as **Subcontractors with Reconciled and Partially Transferred Retentions**)
7. An order directing that the Liquidator may determine and pay valid claims on the Fund, including by way of interim distribution, in accordance with the terms of the relevant subcontract, the Act and the orders granted herein.
8. An order that the Fund is to be distributed to, for or in respect of valid claims from the Subcontractors:
- (a) On a *pari passu* basis in relation to their respective retention amounts.
 - (b) On a basis which does not pay any interest claims on any retention moneys unless or until all valid (non-interest) claims on the Fund are paid in full.
9. An order allowing the Liquidator to deduct from the Fund his costs and expenses relating to the management and administration of the Fund,

including those in respect of this Application to a limit of \$18,000 without further approval of the Court.

10. That leave to apply to the Court for further directions is reserved.

Grounds

11. The grounds on which the orders are sought are as follows:

- (a) On 3 December 2018 Corbel was placed into liquidation by shareholder resolution. The Applicant was appointed liquidator of Corbel on that same date.
- (b) Upon liquidation Corbel held \$109,846.47 of retentions in the Retentions Account (i.e. the Fund).
- (c) The applicant has identified 51 Subcontractors with Reconciled and Partially Transferred Retentions.
- (d) Section 18C of the Act provides that retention monies must be held on trust by Corbel:
 - (i) As trustee for the benefit of the affected subcontractors.
 - (ii) As cash or other liquid assets that are readily converted into cash.
- (e) Corbel's practice was to hold retention monies on trust in a separate bank account, being the Retentions Account.
- (f) Accordingly, the Fund is not an asset available to meet the liabilities of Corbel to its secured or general unsecured creditors. The Applicant considers the Fund is held on trust by Corbel for Subcontractors with Reconciled and Partially Transferred Retention claims.
- (g) The Fund does not represent all retentions Corbel was required to retain under the Act.
- (h) There are a number of subcontractors that Corbel entered into a commercial construction contract (**CCC**) with following 31 March 2017 whose retentions were not reconciled or partially transferred.

These subcontractors are unfortunately not entitled to share in the retention fund.

12. The further grounds on which particular orders are sought are as follows:

Leave to Commence as an Originating Application

13. As to the orders sought at paragraph 2, an application by a liquidator for directions from the Court is made as an originating application pursuant to Rule 19.4 High Court Rules 2016.
14. If leave is required to make this application pursuant to Part 19 of the High Court Rules 2016, it is submitted it is in the interests of justice to do so as:
- (a) The application for the liquidator to be appointed to the retention trust fund is not expected to be opposed nor is it adverse to the interests of the subcontractors who have an interest in the fund.
 - (b) It is in the interests of justice that the application be determined promptly and efficiently.

Appointment of the Liquidator to the Retentions Account

15. As to the orders sought at paragraph 3, the Fund is not an asset of Corbel. As such:
- (a) The ability of the Applicant, in his capacity as liquidator appointed under the shareholder's resolution dated 3 December 2018, to deal with the Fund is unclear.
 - (b) The Fund is not available to general creditors in the liquidation of Corbel, because it was held on trust by Corbel for certain subcontractors.
 - (c) Issues relating to the Fund include ascertaining:
 - (i) Precisely for whom the Fund is held.
 - (ii) When the Subcontractors are entitled to be paid from the Fund.
 - (iii) The quantum of any such payment from the Fund.

- (d) In the absence of clarification as to the ability of the Liquidator to manage and distribute the Fund, and determine claims on the Fund, the Subcontractors will be prejudiced as they will not be paid any amounts owing to them from the Fund.
- (e) The applicant has already undertaken significant analysis of Corbel's records in order to ascertain which Subcontractors may have an interest in the Fund, the basis for that interest, and the likely quantum of such.
- (f) The applicant anticipates that the assets of Corbel are insufficient to clear all secured creditors and therefore no surplus will be available for transfer to the Liquidator to pay for him to manage the fund.

Service of the Application

- 16. As to the orders sought at paragraphs 4(a) and 4(b) there are 51 Subcontractors who may have an interest in the Fund.
- 17. Personal service of the Application on all Subcontractors would involve delay and would incur significant costs, which may ultimately be ordered to be deducted from the Fund, to the detriment of the Subcontractors.
- 18. The applicant has email addresses for 51 of the 51 Subcontractors, of which all were provided for the specific purpose of communication in the liquidation.
- 19. The applicant believes that service in the manner sought will be likely to:
 - (a) Bring the Application to the attention of all the affected Subcontractors.
 - (b) Assist in the Application being brought before the Court for determination promptly.

Orders as to Distribution of the Fund

- 20. There will be a shortfall of assets in the Fund to pay claims on the Fund. As such:
 - (a) The fairest and most efficient way to distribute the Fund would be on a *pari passu* basis for valid claims to the Fund.

- (b) Subcontractors may also have a claim to the Fund to pay interest on retention amounts owing to them at the rate provided for in the relevant CCC (if any).
21. If the applicant is required to pay interest claims from the Fund:
- (a) This would add complexity and additional costs to the processing of claims to the Fund.
- (b) The interest claims would deplete the recovery rate on valid claims to the Fund.
- (c) The ability to make an interim distribution will enable some payments to be made in respect of valid claims to the Fund promptly, alleviating financial pressure on Corbel's Subcontractors.
- (d) As further detailed in the affidavit of Andrew Marchel Oorschot filed herein.
22. This Application is made in reliance on sections 18A to 18G of the Construction Contracts Act 2002.

Date: 28 August 2019



B M Russell
Solicitor for the Applicant

This document is filed by **BENJAMIN MEADE RUSSELL**, solicitor for the applicant, of the firm Lane Neave. The address for service of the applicant is Lane Neave, Level 5, 141 Cambridge Terrace, Christchurch.

Documents for service on the filing party may be left at that address for service or may be—

- (a) posted to the solicitor at PO Box 2331, Christchurch 8140; or
- (b) emailed to the solicitor at ben.russell@laneneave.co.nz **and** mike.king@laneneave.co.nz.