

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**

## Affidavit of Andrew Marchel Oorschot in Support of Originating Application

Sworn: 22 August 2019

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I, Andrew Marchel Oorschot of Christchurch, Chartered Accountant, swear—

1. I am the liquidator of Corbel Construction Limited (in liquidation) (**Corbel**) having been appointed by shareholders' resolution on 3 December 2018.
2. I have been a chartered accountant in public practice since 1997 as a partner with Ashton Wheelans, Chartered Accountants, Christchurch. I am a member of Chartered Accountants Australia & New Zealand (CAANZ) and hold a current Certificate of Public Practice with them, and I am also a CAANZ Accredited Insolvency Practitioner (NZ).
3. I joined Ashton Wheelans in 1995 and have been the partner in charge of the firm's insolvency team since 1997. I have extensive insolvency experience with particular focus on receiverships, liquidations and voluntary administrations, including numerous construction sector appointments. I am therefore familiar with insolvency issues in the construction sector and the Construction Contracts Act 2002 (**Act**).
4. I file this affidavit in support of my application seeking:
  - (a) Orders appointing me as liquidator of assets held on trust by Corbel.
  - (b) Directions on how to manage and distribute those assets.
5. In this affidavit I set out:
  - (a) The background to this application.
  - (b) The basis for the order and directions sought to facilitate the prompt and cost-effective determination of this application (given the modest sums involved).

### **Introduction and Overview of Application**

6. This application concerns \$109,846.47 held in a separate BNZ bank account by Corbel at the date of liquidation. In this application I refer to this bank account as the retentions account (**Retentions Account**).
7. The balance held in the Retentions Account represents monies currently held by Corbel on trust for subcontractors pursuant to the terms set out in Section 18C of the Act. Accordingly, the Retentions Account is not an



asset of Corbel and therefore is not available to meet the liabilities owing to Corbel's creditors generally, as it is held on trust for certain of Corbel's subcontractors.

8. There are issues regarding how the Retentions Account funds should be managed and distributed, as this is not clearly defined in the legislation, particularly in an insolvency context.
9. I have read the judgment of Churchman J dated 12 November 2018 regarding the application made by the receivers of Ebert Construction Limited (**Ebert Judgment**) for directions on how to manage and distribute their retention trust funds, which provides some useful interpretation and guidance.
10. The Ebert Judgment identified various retentions made from subcontractors' claims as falling into the following categories:
  - (a) Reconciled and Transferred Retentions.
  - (b) Calculated but Not Transferred Retentions.
  - (c) Uncalculated and Not Transferred Retentions.
  - (d) Released but Not Paid Retentions.
  - (e) Wrongly Classified Contracts.
11. I make reference to the equivalent five categories in Corbel's case below.

### **Corbel – Background**

12. Corbel had operated as a construction company, primarily in Christchurch and Auckland, for almost 20 years completing a range of light commercial and residential projects.
13. Corbel was involved in an adjudication dispute under the Act regarding a multi-million dollar weather tightness remediation project in Auckland. As the result of an unfavourable determination of this dispute in November 2018, the directors reviewed the anticipated losses from this project and the resulting impact on the financial position and cash flow of the company and determined that it was not feasible for the company to continue to



trade. On 3 December 2018 the shareholders resolved to place Corbel into liquidation.

14. My staff and I have carried out investigations into the affairs of Corbel. The outcome of those investigations in relation to subcontractor retentions is set out below.
15. At the date of liquidation Corbel had 6 active construction contracts in progress with a combined contract value of around \$10 million at various stages of completion. As a result of the liquidation the company was not in a position to complete these contracts, and control of these project sites was handed back to the principals.

### **Corbel's Retentions Process**

16. As is common practice in the construction industry, many of these projects involved principals withholding an agreed sum or percentage from the certified progress claims and final claims on each project for an agreed period after completion of the project (commonly called the retention period) to cover any defects or remedial work which may be required to be undertaken during the retention period.
17. Corbel, in turn, had similar arrangements with their own subcontractors, whereby Corbel would withhold an agreed percentage of the amounts claimed by subcontractors each month as subcontractor retentions until the expiry of the relevant retention period.
18. At the date of liquidation Corbel's records showed that there were subcontractor retentions held of \$1.635 million (excluding GST), including \$226,937 (excluding GST) subject to the retention regime under the Act.

### **The Retention Account Trust Fund**

19. The Act requires all retention monies which were withheld by Corbel from sums payable under commercial construction contracts (**CCCs**) entered into after 31 March 2017 to be held on trust for the subcontractor (**Qualifying Retentions**).
20. Corbel had implemented a system to identify the amounts of retentions which they considered were withheld on CCCs entered into after 31 March 2017. This retentions tracking system was based around recording the



date on which the head contract with the principal was entered into, with the presumption being that the contracts with the subcontractors were also entered into on or around the same date. As at the date of liquidation in December 2018 Corbel's system showed that there were 45 projects for which subcontractor retentions were being held but only 13 projects for which retentions fell under the new retentions regime of the Act. A list of these 13 projects is attached as Schedule 1 to this affidavit.

21. At the date of liquidation Corbel's records showed that the amount of the Qualifying Retentions which should have been held in trust was \$226,937.81 (excluding GST) in respect of amounts withheld from subcontractors' claims on the 13 building projects, which Corbel had identified as having CCCs entered into after 31 March 2017.
22. As the subcontractors' claims on projects for the month of November 2018 had not been assessed and certified at the date of liquidation (defined as "*Uncalculated and Not Transferred Retentions*" in the Ebert Judgment), the amount of Qualifying Retentions which should have been held in trust at the date of liquidation only relates to amounts withheld from certified subcontractor claims lodged for periods up to 31 October 2018.
23. Corbel did not commence physically transferring funds from Corbel's general account to a separate trust account until July 2018. According to Corbel's records the amounts which were in fact 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**).
24. There were no transfers out of the Retentions Account since the account was opened.
25. A statement showing all transactions through the Retentions Account for the period 1 April 2017 to 30 November 2018 is **annexed** and marked "**A**". This shows that as at the date of liquidation the Retentions Account had only a balance of \$109,871.76 (including accrued interest). This is less than half the required amount according to Corbel's records at that time.



### The July Retention Transfer

26. I have been advised by Corbel personnel that the July Retention Transfer of \$88,322.47 was based on 50% of the amount that Corbel's system showed had been withheld from subcontractors in respect of Qualifying Retentions withheld from claims lodged up to **30 June 2018** which totalled \$176,644.94.
27. I understand that this was the first step towards creating a separate trust fund for the Qualifying Retentions, with the intention of the remaining 50% being transferred the following month.

### The August Retention Transfer

28. Corbel's retentions records show the Qualifying Retentions withheld from claims up to **31 July 2018** totalled \$214,206.16. The amount therefore which was required to be transferred to the Retentions Account in August 2018 to top up the Retentions Account to 100% fund the Qualifying Retentions for amounts withheld from subcontractors was a further \$125,884.16.
29. However, I understand that the company did not have sufficient cash flow available at that time, and the amount actually transferred to the Retentions Account on 31 August 2018 was only \$21,524.00 – which equated to approximately 50% of the movement in the Qualifying Retentions for the month of July 2018.
30. Therefore the amount held in the Retentions Account at 31 August 2018 of \$109,846.47 plus a small amount of accrued interest, equated to just over 50% of the \$214,206.16 of Qualifying Retentions to 31 July 2018 showing in Corbel's records (the "*Reconciled and (in this case partly) Transferred Retentions*" using the Ebert Judgment categories).
31. Since 31 August 2018 some of these retentions amounts have fallen due and been repaid from Corbel's main bank account thereby reducing the amount owing to Reconciled and (Partly) Transferred Retentions subcontractors reducing to \$183,027.59 by the date of liquidation.



### **Retentions from Subcontractor Claims for August 2018 to November 2018**

32. Further retentions were withheld by Corbel from subcontractor claims lodged and subsequently certified for the months of August 2018, September 2018 and October 2018. However, no physical transfers were made by Corbel to the Retentions Account for these retention claims. Accordingly, these retentions withheld from August to November 2018 claims appear to fall into the category of "*Calculated but Not Transferred Retentions*" referred to in the Ebert Judgment.

### **Retentions from Subcontractor Claims for Month of November 2018**

33. As noted earlier, the subcontractors' claims on projects for the month of November 2018 (i.e. the month immediately prior to liquidation) had not been assessed and certified by Corbel at the date of liquidation. Accordingly, it appears these claims fall into the category of "*Uncalculated and Not Transferred Retentions*" based on the Ebert Judgment.

### **Released but Not Paid Retentions**

34. Corbel's retention system shows certain retentions released for payment to subcontractors since 31 July 2018, but no funds transfer was made out of the Retentions Account, and according to Corbel's accounting system these amounts were not in fact paid out as they are still showing in Corbel's creditors' list as unpaid as at the date of liquidation.
35. As a result, these retentions remain due and payable as part of the "*Reconciled and (partly) Transferred Retentions*" as at 31 July 2018.

### **Wrongly Classified Contracts**

36. While the company had the best intentions in setting up and managing their retentions system to identify Qualifying Retentions in respect of subcontracts entered into after 31 March 2017, we have identified instances of wrongly classified contracts on a number of projects.
37. These wrongly classified contracts appear to have occurred where the head contract with the principal had been entered into before 31 March 2017 but the subcontract was entered into after that date.

38. To date we have identified four subcontractors whose retentions were wrongly classified on seven subcontracts, i.e. they were recorded in the Corbel system as being entered into before 31 March 2017, in line with the principal's head contract, but were in fact entered into after 31 March 2017. This predominantly appears to be because they were substitute subcontractors who were engaged to complete the work at a later date and therefore the replacement sub contract was entered into on a later date than the principal contract. The value of the retention claims for these wrongly classified contracts identified to date is \$147,536.41.
39. We have not carried out an exhaustive exercise to identify any other wrongly classified subcontracts, on the basis that the Ebert Judgment determined that the company's failure to correctly classify these contracts and transfer the retentions to the Retention Account means that the affected subcontractors do not share in the funds in the Retentions Account.

### **Our Analysis**

40. My staff and I have carried out a significant amount of work attempting to reconcile Corbel's records, based on the Ebert Judgment, to establish which subcontractors could have a claim to the funds held in the Retentions Account at the date of liquidation.
41. Our enquiries and analysis have identified the following:
- (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 (in this case partly) Transferred Retentions"*).
  - (b) No transfers were made to the Retentions Account in respect of retentions withheld from subcontractor claims lodged for August 2018 to October 2018 (*"Calculated but Not Transferred Retentions"*) or 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 (in this case partly) Transferred Retentions*") subcontractor claimants.

- (d) Based on the Ebert Judgment, I consider 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)** with retention amounts still owing at the date of liquidation of \$183,027.59.

### Service


42. I have an email mailing list for all creditors, including all subcontractors that have filed a creditor claim form in the liquidation. This includes subcontractors that I consider to have claims under the Reconciled and Partially Transferred categories.
43. Ashton Wheelans have a dedicated webpage with links to the report I filed as liquidator on 10 December 2018 (**Website**).
44. I therefore consider that by emailing the subcontractors for whom I have an email address this application (together with accompanying memoranda and affidavits) the application will be brought to the attention of all of the subcontractors and assist in the application being brought before the Court for determination promptly.. In the email I will also include a link to the Ashton Wheelans web page where the application, memorandum, affidavit and any subsequent documents related to these proceedings will be available.
45. For any subcontractors for whom it should transpire that I do not have an email address, or for any Subcontractors for whom an email is returned undelivered, then I will send a letter to their registered office or last known address enclosing this application (together with accompanying memoranda and affidavits) by courier.



**My Costs**

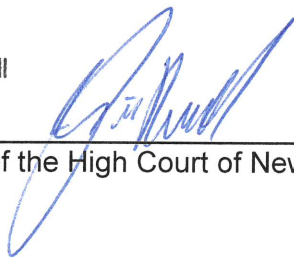
- 46. The funds held in the retention trust are \$109,846.47. I acknowledge this is a relatively modest amount. However, the work required to undertake the analysis above has been significant. I propose that the Court allows me to deduct my reasonable costs and disbursements from the funds in the retention account, in relation to this application, and the associated work that has been undertaken. I propose my reasonable costs and disbursements be capped at \$18,000.00 for preparation of this application and the administration and distribution of the Fund to entitled parties. If they exceed that I will seek further directions from the Court.
  
- 47. I have proposed a figure of \$18,000.00 as that is approximately 10% of the \$183,027.59 owed to the entitled subcontractors and would allow a pro-rata distribution to entitled subcontractors of around 50% of entitled claims against the retention account.

Sworn by Andrew Marchel Oorschot  
 at Christchurch this 22<sup>nd</sup> day of August 2019  
 before me:

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Andrew Marchel Oorschot

Graeme Grant Dill-Russell  
 Solicitor  
 Christchurch



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 A Solicitor of the High Court of New Zealand

**Schedule 1**List of the 13 Projects for which (Partial) Retention Trust Funds were Held

AIRC01	Air New Zealand Chiller Replacement
ANTR01	Air New Zealand Cargo Fitout
CMED01	Cashmere Medical Centre
EDEN01	Eden Gardens Townhouse Remediation
LINU02	Lincoln University - Hudson Building
LINU04	Lincoln University - Forbes Building
LINU05	Lincoln University - Hudson Building - Stage 2
MOEC01	Lincoln High School
MOEC03	Linwood North School
MOEC04	Opawa School Refurbishment
SALV01	Salvation Army Sydenham
STLU06	St Lukes Investigation Concrete Walls
SUMN01	Sumner School- Refurbishment & Alterations



# Retentions Transactions

## Corbel Construction Limited (In Liquidation) For the period 1 April 2017 to 30 November 2018

DATE	SOURCE	DESCRIPTION	REFERENCE	DEBIT	CREDIT	RUNNING BALANCE
<b>Retentions</b>						
<b>Opening Balance</b>				-	-	-
30 Jul 2018	Bank Transfer	Bank Transfer from BNZ Cheque Account to Retentions		88,322.47	-	88,322.47
31 Jul 2018	Receive Money	BNZ		0.17	-	88,322.64
31 Aug 2018	Bank Transfer	Bank Transfer from BNZ Cheque Account to Retentions		21,524.00	-	109,846.64
31 Aug 2018	Receive Money	BNZ		5.40	-	109,852.04
28 Sep 2018	Receive Money	BNZ		6.07	-	109,858.11
31 Oct 2018	Receive Money	BNZ		7.15	-	109,865.26
30 Nov 2018	Receive Money	BNZ		6.50	-	109,871.76
<b>Total Retentions</b>				<b>109,871.76</b>	-	<b>109,871.76</b>
<b>Closing Balance</b>				<b>109,871.76</b>	-	<b>109,871.76</b>
<b>Total</b>				<b>109,871.76</b>	-	<b>109,871.76</b>