IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KOTI MATUA O AOTEAROA TE
TE WHANGANUI-A-TARA ROHE

CIV-2018-485-792

UNDER THE	Receiverships Act 1993 and Part 19 of the Height Court Rules
IN THE MATTER OF	Ebert Construction Limited (in receivership and liquidation)
BETWEEN	**LARA MAREE BENNETT, JOHN HOWARD FISK AND RICHARD MICHAEL LONGMAN** as receivers of Ebert Construction Limited (in receivership and liquidation) each being Chartered Accountants of Auckland or Wellington
	Applicants
AND	**EBERT CONSTRUCTION LIMITED (in receivership and liquidation)** a duly incorporated company having its registered office at 188 Quay Street, Auckland
	Respondent

MEMORANDUM OF COUNSEL FOR SUBCONTRACTOR IN RELATION TO ORIGINATING APPLICATION DATED 23 OCTOBER 2018

Dated 2 November 2018

Next Event: 8 November 2018
Judicial Officer:

Kevin A Badcock
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MAY IT PLEASE THE COURT

Introduction

1. Counsel acts for Taslo Steel Security Ltd (**TASLO**), a Subcontractor creditor of Ebert Construction Limited (in receivership and liquidation) (**Ebert**) as listed in Schedule One of this application.

2. TASLO has been served the Originating Application by Applicants (the **application**), the Affidavit of Lara Maree Bennett in support of Applicants' Originating Application and Memorandum of Counsel for the Applicants in support of Originating Application, all dated 23 October 2018, by virtue of the Courts minute issued 26 October 2018.

3. TASLO does not oppose the application in principle, but has serious concerns as to the extent of the Orders sought by the Applicants, and the unnecessary haste in which this application appears to be being brought on.

4. TASLO has raised its concerns with the solicitors for Applicants and has suggested amendments to the application that would appease TASLO's, and likely other Subcontractor's, concerns but the Applicants have refused to amend the application.

5. Whilst TASLO supports the application in principle as noted, it wishes the Court to take notice of the concerns it raises so that these are not unheard in an application that will otherwise go unchallenged.

6. The application raises serious issues not only for TASLO but for the wider construction sector as a whole. In all reality, the concerns of TASLO are likely to also be the concerns of many of the other Subcontractors who have not been contacted directly by the

Applicants, or those Subcontractors who are un-aware of the application by reason of the haste in which the proceeding is being disposed of.

7. Due to cost TASLO does not formally oppose the application (and importantly does not wish to unnecessarily delay in any way the distribution of the Fund to Subcontractors), but it wishes the Court to consider the concerns it raises.

Background

8. TASLO is one of the many Subcontractors affected by the Receivership of Ebert. At the time of being placed into Receivership TASLO was owed some near $500,000.00 by Ebert that related to unpaid progress payment claims and outstanding retentions. A good deal of TASLO's retentions are tied up in the Fund.

9. TASLO is a closely held husband-and-wife company and can ill afford any further losses.

10. On or about 14 October 2018 Counsel was approached by the Applicants so to obtain TASLO's support for the application, and importantly, to request financial support for the Applicants to make the application.

11. TASLO was advised by the Applicants at that time that there was a significant fund of retention monies held by Ebert on trust for Subcontractors, of which TASLO was one of the top 12 Subcontractors who had an entitlement to the Fund. Those 12 Subcontractors purportedly make up some 47% of the Fund so TASLO has a significant interest in the application.

12. TASLO initially supported in principle the Applicants' objective of an early distribution of the Fund to the rightful Subcontractors, and well understood that the current state of the Construction Contracts Act 2002 (**CCA**) did not adequately provide for the Applicants to be able to effectively do this.

13. As a result, TASLO indicated it would support the application, both in principle and financially, because it saw a real benefit to all Subcontractors.

14. Unfortunately, an insufficient number of the Subcontractors appear to have volunteered financial support and the only funds available for this application appear to be the Fund itself.

TASLO's now concerns as to the application

15. On 26 October 2018 the application and supporting documents were made available to TASLO for the first time.

16. On reviewing those documents TASLO became extremely concerned:

    a. Firstly, TASLO was concerned as to the haste in which the application has been brought on, given it is likely an unopposed application.

    b. Secondly, TASLO was extremely concerned as to the extent of the Orders sought by the Applicants. In particular in relation to the Order set out in paragraph 1(j) of the application that allows the Receivers to deduct from the Fund not only their costs and expenses in respect of the Application, but also their costs and expenses relating to the management and administration of the Fund. That latter part

had not initially been indicated to TASLO as be being an Orders sought.

17. As a result of these concerns on 29 October 2018 Counsel wrote to the solicitors for the Applicants expressing concern as to the extent of the Orders sought.

18. In particular, Counsel raised the issue that it appeared that the Applicants were attempting to obtain Orders to use the Fund to cover costs/fees that the Receiver/Liquidator would in any event ordinarily have to incur in the receivership/liquidation so to determine how much each creditor was owed.

19. That is, the cost of determining who in fact are the creditors, and in what proportion in the liquidation, is a cost that would ordinarily be born in the liquidation from any funds available in the liquidation.

20. Counsel pointed out that that potentially becomes a significant benefit to the secured creditors, to the detriment of those entitled to the Fund, and seemed completely averse to the very intention of the CCA in enacting the retention regime.

21. On 1 November 2018 TASLO was advised by the solicitors for Applicants that whilst the Applicants could not accurately estimate the cost of the administration – they anticipated it to be less than $150,000.00 (excluding GST and disbursements) for both the Application and the administration of the Fund.

22. Whilst reduction in the Fund in any way is to the detriment of those entitled to the Fund, it has been acknowledged to the solicitors for the Applicants that that figure does not appear to be unreasonable in the circumstances.

23. Given that position, Counsel advised the solicitors for the Applicants that TASLO would support the Application with the simple proviso that Order 1(j) be amended to say "allowing the Receivers to deduct from the Fund their costs and expenses relating to the management administration of the Fund, including those in respect of this Application *up to an approved limit of $150,000.00 plus disbursements plus GST. In the event that the cost of this Application and the administration of the Fund is likely to exceed this approved amount the Receivers seek leave to apply to the Court to increase the approved amount. In such circumstances the Receiver is to notify all Subcontractors and Principles of any intended further application*".

24. On 1 November 2011 the solicitors for the Applicants advised that the Receivers and its Counsel had considered that suggestion and would not be making the changes requested.

25. TASLO says that it is unfair and inequitable to those who are entitled to the Fund that the Applicants have free access to the Fund without some meaningful control. Whilst the Court will ultimately have to approve the costs/fees that the Applicants seek, it is TASLO's position that, in the interest of the Subcontractors who are entitled to the Fund, a far better control is that the Applicants access to the Fund is limited to the amount indicated by the Applicants, and should that amount subsequently become insufficient the Applicants can seek approval from the Court to increase that.

26. It seems apparent that a "request for permission" to access the Fund is a far better control on the spending of the Fund, than the Applicants "begging for forgiveness" approach if the anticipated cost is exceeded.

Conclusion

27. In the Applicants Memorandum of Counsel dated 23 October 2018 the Applicants say at paragraphs 12(a) and 12(c) that the application is not expected to be contentious and is expected to be supported by Subcontractors.

28. That is clearly not the case.

29. At paragraph 21(b) the Applicants go on to say that Subcontractors are not expected to oppose the orders and suggest the orders are in the interests of subcontractors. The Applicants go on to say that they have already contacted the 12 Subcontractors who have claims to approximately 47% of the Fund and that none indicated an objection to the Receiver seeking appropriate orders for the Court to facilitate distribution of the fund, but make no mention of those entitles to the other 53%.

30. Even before TASLO's withdraw of support the Applicants had less than 50% of apparent support.

31. In the Applicants' Submissions of Counsel dated 2 November 2018 the Applicants acknowledge at paragraph 10.13 TASLO's now objection, but not why TASLO objected, nor give any reasonable explanation why a cap is not a better control on the spending of the Fund.

32. It is unfortunate that the Applicants have not squarely put TASLO's concern before the Court in detail, meaning this Memorandum is now necessary.

33. The Applicants refusal to agree to what appears on its face to be a completely reasonable access cap, means Subcontractors may well become even more nervous as the extent that the Receiver is going to access, what is in reality, Subcontractors money.

34. It cannot be overlooked that the Applicants are the Receivers appointed by the secured creditor. It is difficult to see how the Applicants can serve the Subcontractors best interests when in that role, but the suggested cap puts a reasonable control in place.

35. In short, to put it metaphorically TASLO is willing to give the Applicants a cheque for a pre-determined amount, but it is not willing to give the Applicants a blank chequebook so that the Applicants just have to fill in the amounts.

36. Whilst TASLO is supportive of the intended purpose of the Application it remains extremely concerned as to the Receiver having free access to the Fund in this regard.

37. Accordingly, in the interests of fairness to the Subcontractors who are entitled to the Fund, TASLO urges the Court to cap the amount that is initially approved in Order 1(j). Should the Applicants require further funding the Applicants can be granted leave to make a further application to the Court, which sensibly would need to be on notice to all Subcontractors and Principals.

K Badcock
Counsel for Taslo Steel Security Limited

2 October 2018