

In the High Court of New Zealand  
Wellington Registry

CIV-2018-485-

I Te Kōti Matua o Aotearoa  
Te Whanganui-ā-Tara Rohe

Under the Receiverships Act 1993 and Part 19 of the High Court Rules

In the matter of Ebert Construction Limited (in receivership and liquidation)

Between

**Lara Maree Bennett, John Howard Ross Fisk and Richard Michael Longman**

Applicants

and

**Ebert Construction Limited (in receivership and liquidation)**

Respondent

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**Memorandum of counsel for the Applicants seeking orders to enable a redacted copy of the Second Affidavit of Lara Bennett to be served on Subcontractors and Principals**

**Dated:** 1 November 2018

**For hearing:** 8 November 2018

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May it please the Court:

1. Counsel refers to:
  - (a) the memorandum of counsel dated 26 October 2018 seeking orders including that the Applicants be permitted to serve a redacted copy of the Application on Subcontractors and Principals; and
  - (b) the minute of Associate Judge Johnston of 26 October 2018 granting those orders, including as to service of the redacted Application.
  
2. The Applicants have filed a second affidavit of Ms Lara Bennett, which provides further factual background to the Application (the **Second Affidavit**). The Applicants request that the copy of that Second Affidavit to be served on Subcontractors and Principals redact:
  - (a) the bank account number of the Retentions Account at paragraph 2.1;
  - (b) Schedules One, Two and Three which list the Subcontractors; Principals and subcontractors in respect of Wrongly Classified Subcontracts; and
  - (c) the exhibits to the affidavit in their entirety i.e. in effect withholding them (while this seems unusual for the reasons set out below there can be no real prejudice arising given the nature of the exhibits).


***The redaction of the schedules and the bank account number***
  
3. On 26 October 2018 Associate Judge Johnston ordered that the copy of the Application to be served would redact:
  - (a) the bank account number in issue; and
  - (b) the Schedules One and Two to the Application which listed the Subcontractors and Principles concerned.

4. The directions sought at paragraph 2(a) and (b) above are consistent with that order. It simply ensures the information the Judge ruled be redacted in the Application is not then published upon the Second Affidavit being served.

***Redaction of the Exhibits***

5. The exhibits fall into five categories:
  - (a) standard form contractual documents;
  - (b) payment documentation;
  - (c) standard form pre-contractual documents;
  - (d) a screenshot from Ebert's payment system "CHEOPS"; and
  - (e) an email from an affected subcontractor.
6. The grounds for withholding the exhibits from the copy of the Second Affidavit to be served are similar to that raised in respect of the redaction of the Application – namely to prevent the widespread publishing of:
  - (a) the identity of affected subcontractors; and
  - (b) commercially sensitive information, such as pricing for subcontractor works;to the detriment of the affected subcontractor.
7. The balance of the exhibits (i.e. apart from the information set out at paragraph 6 above) is simply the standard subcontract terms which all subcontractors will have in this, or a very similar, form. While these could obviously be provided there seems little point in doing so.
8. As detailed in the attached schedule, almost all of the exhibits are standard form documents that Subcontractors and Principals will be familiar with as they are parties to documentation on much the same terms. However, the exhibits are genuine examples and therefore identify the subcontractor involved and, in some cases, contain pricing information.

9. Accordingly, the Applicants:
- (a) do not consider that Subcontractors and Principals will need the exhibits to the Second Affidavit to understand the Application; and
  - (b) consider that disclosure of the exhibits could cause prejudice to the subcontractors to whom the documents relate.
10. The Applicants do not expect any Subcontractor or Principal to suffer prejudice as a result of the redactions. However, the Applicants propose that if any party considers they are prejudiced by these redactions, leave be granted for them to apply to the Court to have an unredacted copy of the Second Affidavit served on them.
11. The Applicants will provide a full copy of the Second Affidavit (including exhibits) to any party who applies to join the proceeding or files a notice of appearance, on a counsel only basis. That is, subject to counsel confirming that the exhibits will be kept confidential and will not be disclosed to their client.
12. Given the tight schedule to the hearing on 8 November 2018, the Applicants have taken the interim step of serving a copy of the redacted Second Affidavit, pending the Court's orders on this matter. If this Court were to decline the orders sought, or modify those orders, the Applicants will re-serve the Second Affidavit in accordance with those orders.

  
M G Colson / R L Pinny  
Counsel for the Applicants

1 November 2018

**Schedule: Grounds for Redaction**

Page numbers	Document Description	Confidential information therein	Basis for redaction
1 to 21	Ebert's standard form Subcontract "SA - 2009"	<ul style="list-style-type: none"> <li>• Identity of Subcontractor (although this Subcontractor has now filed a notice of appearance)</li> <li>• Description of Subcontract works and agreed price</li> </ul>	<ul style="list-style-type: none"> <li>• Commercially sensitive information for Subcontractor, especially as to price.</li> <li>• All of Ebert's subcontracts appear to be on the same form.</li> <li>• Subcontract is industry standard form, can be identified by its reference SA-2009 and key clauses are described in the Second Affidavit.</li> <li>• All Subcontractors would be expected to be familiar with, and have a copy or could access a generic copy, of this document.</li> </ul>
22-23	Deed of Continuity	<ul style="list-style-type: none"> <li>• Identity of Subcontractor</li> </ul>	<ul style="list-style-type: none"> <li>• Document is industry standard form, provided for overview of contractual arrangements only and is described in the Second Affidavit.</li> </ul>

24-26	Deed of Subcontractor Warranty	<ul style="list-style-type: none"> <li>• Identity of Subcontractor</li> </ul>	<ul style="list-style-type: none"> <li>• Document is industry standard form, provided for overview of contractual arrangements only and is described in the Second Affidavit.</li> </ul>
27-31	Subcontractor payment claim	<ul style="list-style-type: none"> <li>• Identity of Subcontractor</li> <li>• Description of Subcontract works and agreed price</li> </ul>	<ul style="list-style-type: none"> <li>• Commercially sensitive information for Subcontractor, especially as to price.</li> <li>• Each subcontractor will have their own form of payment claim, which will be relevant to their claim. No need to see other subcontractor payment claims.</li> </ul>
32 -36	Example BCTIs	<ul style="list-style-type: none"> <li>• Identity of Subcontractor</li> <li>• Description of Subcontract works and agreed price</li> </ul>	<ul style="list-style-type: none"> <li>• Commercially sensitive information for Subcontractor, especially as to price.</li> <li>• Ebert used a standard form BCTI, so each Subcontractor will have their own BCTIs which were issued by Ebert in this form.</li> <li>• Key terms relevant to this Application described in the Affidavit.</li> </ul>
37-48	Subcontractor pre-contractual information	<ul style="list-style-type: none"> <li>• Identity of Subcontractor (although the Subcontractor to which the acceptance letter relates has now filed a notice of</li> </ul>	<ul style="list-style-type: none"> <li>• Commercially sensitive information for Subcontractor, especially as to price.</li> <li>• Key terms relevant to this Application described in the Affidavit.</li> </ul>

		appearance) <ul style="list-style-type: none"> <li>Description of Subcontract works and agreed price</li> </ul>	<ul style="list-style-type: none"> <li>These were standard form documents from Ebert. Each subcontractor will have their own relevant contractual documents. No need to see other subcontractor contractual documentation.</li> </ul>
49	Screenshot from CHEOPS	<ul style="list-style-type: none"> <li>Identity of Subcontractor</li> <li>Some information as to pricing</li> </ul>	<ul style="list-style-type: none"> <li>Potentially commercially sensitive information (as to pricing, although extent of subcontract works to which it relates is not described).</li> </ul>
50	Email from affected Subcontractor	<ul style="list-style-type: none"> <li>Identity of Subcontractor and amount of retentions in issue for that subcontractor</li> </ul>	<ul style="list-style-type: none"> <li>Email is adequately described in Second Affidavit without identifying the subcontractor.</li> </ul>

