

IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA  
TE WHANGANUI-Ā-TARA ROHE

CIV2018-485-792

**UNDER** the Receiverships Act 1993 and Part 19 of the High Court Rules

**IN THE MATTER** of Ebert Construction Limited (in Receivership and in Liquidation)

**BETWEEN** **Lara Maree Bennett, John Howard Ross Fisk, and Richard Michael Longman** as receivers of Ebert Construction Limited (in Receivership and in Liquidation)

**Applicants**

**AND** **Ebert Construction Limited (In Receivership and In Liquidation)**

**Respondent**

**AND** **Auckland Ventilation Services Limited**

**First Interested Party**

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**MEMORANDUM OF COUNSEL FOR FIRST INTERESTED PARTY,  
AUCKLAND VENTILATION SERVICES LIMITED, FOR HEARING ON  
8 NOVEMBER 2018 AT 10:00AM**

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**MEMORANDUM OF COUNSEL FOR FIRST INTERESTED PARTY,  
AUCKLAND VENTILATION SERVICES LIMITED, FOR HEARING ON  
8 NOVEMBER 2018 AT 10:00AM**

May it please the Court:

1. This memorandum is filed on behalf of Auckland Ventilation Services Limited ("AVS"), one of the erstwhile subcontractors of the Respondent, Ebert Construction Limited (in Receivership and in Liquidation) ("Ebert"). Counsel will be appearing at the hearing of the Applicants' current application on 8 November 2018. Accordingly a Notice of Appearance was filed and served on AVS's behalf, nominally as First Interested Party, on 31 October 2018.
2. As that Notice records, generally speaking, AVS either does not oppose, or it consents to, the orders sought by the Receivers in their originating application. AVS's appearance by its counsel is intended primarily to reserve its rights and ensure that it has standing to be heard in the event that it has issues with any particular directions sought or proposed by the Applicant Receivers, or any other person, in addition to, or in refinement of, those orders sought in the originating application.
3. Comparatively speaking, AVS has substantial claims against the subject retentions fund. The sum of that fund is \$3,684,000 as advised by the Receivers.<sup>1</sup> As it has been previously informed by Ms Bennett, AVS has the largest claim against the Fund among the 152 subcontractors referred to in paragraph 2.20 of her first affidavit.<sup>2</sup> Figures provided by Ms Bennett to AVS shortly prior to commencement of this application, based on records available to the Receivers, suggested that as at 31 May 2018 – being the date of "Reconciled and Transferred Retentions" adopting the terminology used by Ms Bennett at paragraph 2.11 of her first affidavit – \$546,808.34 of

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<sup>1</sup> Affidavit of Lara Bennett dated 20 October 2018 at [1.7].

<sup>2</sup> 20 October 2018.

retentions have been placed into the fund on AVS's account under six post-1 April 2017 subcontracts.<sup>3</sup>

4. AVS's total claims on the Receivers' figures as at 31 May 2018 therefore represent approximately 14.84% of the Reconciled and Transferred Retentions fund. All of AVS's subcontracts with Ebert are in the Master Builders Association Subcontract Agreement SA-2009 format and content, a copy of which has been produced to this Court in this application as Exhibit "A" to Lara Bennett's second affidavit sworn 1 November 2018. Indeed, that exhibit produces one of AVS's own subcontracts.
5. Under the terms of the SA-2009 subcontracts, in August of this year AVS gave notice to Ebert that, pursuant to clause 14.2.1 of the subcontract, it was terminating all subcontracts. This was on the grounds that Ebert had committed an Act of Insolvency, as defined in the Definitions provision at clause 1.1.
6. It is therefore AVS's position that no further performance of any of the subcontracts is required of it, they having been lawfully terminated due to Ebert's contractually defined default. AVS says therefore that its entire share of the retained retentions is immediately payable to it. AVS appreciates however, that in the present circumstances, some time will need to be allowed to whoever takes responsibility, or is assigned responsibility, for administration and disbursement of the trust fund to assess competing claims and finally distribute the fund, seeking directions as needed.
7. None of the orders or directions sought by the Applicants in their originating application are overtly or expressly at odds with AVS's position in this regard. Therefore, it has not yet proved necessary for AVS to take a stance in this proceeding in opposition to any part of the subject application.

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<sup>3</sup> There is some modest discrepancy between AVS's figures and the Receivers' figures, in terms of number of affected contracts and amount of retentions, but the difference will doubtlessly be resolved later and is not treated as significant for the purposes of this hearing.

8. AVS is however acutely conscious of references in the affidavits filed in support of the application to various contractual defects liability periods. It therefore strongly supports the making of the ancillary, but usual, order – at order 1(k) of the application – that leave be reserved to any party to the proceeding to apply to this Court for further directions. Indeed, it is AVS's position that its support of the Applicants' appointment as Receivers of the Fund is on the basis and conditional upon leave being granted to it and other parties to the proceeding to seek further directions from this Court on reasonably short notice.
9. This will address AVS's present concern that the Applicants, once appointed, might take a position in determining and paying valid claims "in accordance with the terms of the relevant subcontract", per order 1(h), inconsistently with what AVS says is the correct position for cancelled subcontracts. That is, that consistently with section 42(1) of the Contract and Commercial Law Act 2017,<sup>4</sup> distribution of the retention funds to entitled subcontract counterparties who have cancelled those subcontracts due to Ebert's default, should not be postponed or delayed for any reason other than administrative necessity.
10. In summary and by reference to AVS's Notice of Appearance, for those orders sought in the application that have not already been determined or dealt with in Associate Judge Johnson's Minute of 26 October 2018, AVS takes the position that:
  - 10.1 It consents to the order sought at subparagraph 1(b) – appointment of the Applicants as Court-appointed Receivers of the subject retention fund – but conditional upon the reservation of leave to all parties to seek further directions on short notice (refer to order 1(k));

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<sup>4</sup> to the extent that a contract remains unperformed at the time of cancellation, no party is obliged or entitled to perform it further.

- 10.2 It will abide the decision of the Court in respect to orders sought at subparagraphs 1(e) to 1(g) – categorisation and acceptance of claims by differently affected subcontractors;
- 10.3 In respect to the orders sought at subparagraph 1(h) – Receivers to determine and pay valid claims, including by way of interim distribution, in accordance with terms of relevant subcontracts, Act and Court orders – AVS does not oppose the granting of this order, but again takes the position that its non-opposition is conditional upon the reservation of leave to all parties to seek further directions on short notice (refer to order 1(k));
- 10.4 it does not oppose and will abide the decision of the Court in respect to the orders sought at subparagraphs (i) and (j) – *pari passu* distribution with accrued interest agglomerated into the Fund, and the Receivers' costs for management and administration of the Fund, including the current application, to be payable from the Fund (but as to which, see final paragraph of this memorandum);
- 10.5 it consents to, and indeed supports, the making of the order sought at subparagraph 1(k), but further seeks a direction that such leave is extended to any party to the proceeding, and that such application may be made on reasonably short prior notice to other parties, subject to the convenience of the Court: so say, 14 days' prior written notice to other parties.
11. Finally, Counsel notes the memorandum filed on behalf of another subcontractor, Taslo Steel Security Limited, on 5 November 2018 requesting that the Court place a 'cap' on the Applicants' costs, if appointed as Receivers of the Fund pursuant to proposed order 1(j). AVS considers that the Applicants' further proposal to meet that concern, that they be required to submit a final report to the Court on costs, and that those costs must be approved by the Court before being deducted, satisfactorily addresses Taslo's concern. This is on the basis that a copy of that costs report should also be directed to be served on the other parties who have filed

appearances in this proceeding, and that they be given a brief opportunity to make submission on costs – perhaps on the papers if necessary in order to keep costs down – before the Court determines the Receivers' final costs entitlement.

**DATED** at Auckland this 6th day of November 2018



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**C R Andrews**  
Counsel for the First Interested Party,  
Auckland Ventilation Services Limited