

**In the High Court of New Zealand  
Wellington Registry  
I Te Kōti Matua o Aotearoa  
Te Whanganui-ā-Tara Rohe**

**CIV-2018-485-792**

Under the Receiverships Act 2007 and Part 19 of the High Court Rules  
In the matter of Ebert Construction Limited (in receivership and liquidation)

Between

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

Applicants

and

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

Respondent

and

**Auckland Ventilation Services Ltd**

First Interested Party

and

**Taslo Steel Security Limited**

Second Interested Party

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**Memorandum of counsel for the Receivers in support of Receivers'  
application for final directions as to receivership of the Retentions  
Fund**

**29 November 2019**

**Judicial Officer: Justice Churchman**

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May it please the Court:

1. **Introduction and overview of directions sought**

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- 1.1. The Applicants are the court appointed receivers of a fund held by Ebert Construction Limited (in receivership and liquidation) (**Ebert**) comprising retentions held on trust for Ebert's subcontractors (the **Fund**) and interest accruing on the Fund. They seek further directions to finalise the receivership.
- 1.2. By way of brief background:
- (a) Ebert, as its name suggests, was a construction company. It entered into construction contracts with principals and, in the usual way, subcontracted some of the work required to complete those construction contracts.
  - (b) On 31 July 2018 Ebert's Board passed a resolution requesting that its bank appoint receivers pursuant to its General Security Agreement. The applicants were appointed receivers to the company (the **GSA Receivers**) later that day.
  - (c) It was apparent to the GSA Receivers that the Fund was held by Ebert pursuant to the terms of the new retentions regime provided for in the Construction Contracts Act 2002 (the **Act**).
  - (d) This appeared to be the first time the application of the retentions regime was considered in an insolvency situation where a fund was present, giving rise to a number of novel legal and practical issues.
  - (e) On 23 October 2018 the applicants applied to the Court for orders:
    - (i) appointing them receivers of the Fund; and
    - (ii) for directions as to how to manage and distribute the Fund.
  - (f) By order dated 12 November 2018 (varied on 28 November 2018 ([2018] NZHC 2934; the **Court Order**) Justice Churchman appointed the applicants as receivers of the Fund (the **Receivers**) and gave various directions as to how to manage and distribute the Fund, including which of Ebert's subcontractors had a claim to the Fund.
- 1.3. The Court left two matters to be resolved at the conclusion of the receivership:

- (g) While the Receivers were entitled to deduct their fees, costs and expenses from the Fund, they were required to obtain the approval of the Court for their account (at [140(c)]).
  - (h) The issue of whether interest accruing on the Fund belonged to Ebert or the subcontractors with claims to the Fund was expressly reserved for determination at a later date (at [135] –[137]).
- 1.4. The Receivers are now in a position to conclude the receivership of the Fund and pay out the final amounts to Subcontractors who are entitled to make a claim to the Fund (**Eligible Subcontractors**). They therefore seek directions as follows:
- (i) that accrued interest on the Fund held by the Receivers can be applied to the Receivers' fees, costs and expenses;
  - (j) that the Receivers be entitled to make a distribution from the Fund to Ebert of \$30,253.98 (to be adjusted for the pro-rated rate) relating to defective work carried out by six specified subcontractors;
  - (k) that \$1,561.07 (to be adjusted for the pro-rated rate) from the Fund comprising entitlements waived by two subcontractors be applied to the Receivers' fees, costs and expenses;
  - (l) that \$5,590.44 (to be adjusted for the pro-rated rate) be paid to the Commissioner of Inland Revenue as unclaimed monies owing to two subcontractors; and
  - (m) that the Receivers' fees, costs and expenses be approved.
- 1.5. The specific directions now sought are detailed in Schedule One to this memorandum and explained in more detail below.
- 1.6. It is not anticipated that these directions will be contentious. If the orders sought are granted, Eligible Subcontractors will be paid approximately 96 cents in the dollar on valid claims to the Fund.
- 1.7. In accordance with the Court Order, this memorandum and the affidavit of Lara Bennett in support sworn 29 November 2019 (the **Bennett Affidavit**) will be served on all Subcontractors in accordance with the manner approved in the Court Order, save that the Receivers do not intend to serve schedule one to the Bennett Affidavit and pages 26 to 72 of the bundle of exhibits to the Bennett Affidavit on all Subcontractors. Those pages identify

specific creditors to which the orders at paragraphs 1.4 above relate. This approach is consistent with orders granted by Associate Judge Johnston on 26 October 2018 in this proceeding permitting a redacted version of the initial application and supporting affidavits to be served on affected principals and subcontractors, keeping the identities of specific subcontractors confidential. This application for directions can be readily understood without those documents. However, the specific subcontractors to which the orders at paragraphs 1.4(b) to 1.4(d) above relate will be advised that they are the subcontractor identified as “subcontractor x” in the application and will be provided with all exhibits relevant to them (save for Subcontractor I who cannot be located).

## **2. Work undertaken in the receivership**

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- 2.1. Since their appointment in November 2018, the Receivers have undertaken the following work:<sup>1</sup>
- (a) They wrote to each of the 130 Eligible Subcontractors (relating to 182 subcontracts) and the associated contract principals on 20 November 2018 setting out their calculated entitlement to the Fund and the Receivers’ proposed treatment of that entitlement seeking agreement/confirmation. The approach adopted was principles based, taking into account the level of completion of both the individual subcontract works and the wider project as at the date of Ebert’s receivership. This agreement was subject to any known defects, outstanding documentation and compliance with other obligations under the individual subcontracts.
  - (b) They reached agreement with 121 of the 130 Eligible Subcontractors and the associated principals promptly which enabled them to pay out interim distributions of 70 cents in the dollar of initial entitlements (totalling over \$1.5 million) prior to Christmas 2018. The remainder of the entitlements were retained, pending the expiry of relevant defects liability periods.
  - (c) They continued to negotiate with the remaining nine Eligible Subcontractors during 2019. They also considered more than 60 claims by principals in respect of defects in subcontracted works. This involved assessing the claims (which were in some cases very

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<sup>1</sup> Bennett Affidavit at [2.1] to [2.9]

detailed and complex) and negotiating with both principals and subcontractors on resolution.

- (d) They completed taxation analysis and issued invoice documentation to all Eligible Subcontractors in accordance with the conditions of their subcontract agreements with Ebert in order to facilitate the filing of a GST return. This ensured that GST on entitlements totalling \$551,824.88 was returned to Ebert for the benefit of Eligible Subcontractors.
  - (e) They continued to liaise with associated principals as relevant defect notification periods expired and released funds to Eligible Subcontractors, with a further 225 payments made in 2019 totalling over \$2.22 million.
  - (f) They liaised with subcontractors and other parties in respect of the retentions, including in respect of the impact of the Court Order, and undertook receivership administration tasks, including statutory reporting and accounting functions.
- 2.2. To date the Receivers have made 337 payments to Eligible Subcontractors from the Fund, totalling \$3,773,926.70. \$419,337.75 remains in the Retention Account (including accrued interest) pending the outcome of this application.<sup>2</sup>

### **3. Interest accruing on the Fund**

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- 3.1 The Fund has been held at all times in an interest bearing account. As at 31 October 2019 the Retention Account included \$44,742.15 of interest (net of Resident Withholding Tax), comprising:<sup>3</sup>
- (a) \$5,483.62 earned prior to the receivership of Ebert on 31 July 2018; and
  - (b) \$39,258.53 earned following Ebert being placed into receivership.
- 3.2 Section 18F of the Act provides that Party A (that is, Ebert) may retain the benefit of any interest earned on retention money on or before the date on which it is payable under the contract. Therefore, there is an argument that Ebert is entitled to at least some of the interest accruing on the Fund.

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<sup>2</sup> Bennett Affidavit at [2.10]

<sup>3</sup> Bennet Affidavit at [3.2]

- 3.3 In Ebert's receivership and liquidation, preferential entitlements have been paid in full and there is a material shortfall on the debt owed under the first ranking security.<sup>4</sup> Accordingly, if the interest (being the amounts at 3.1 above together with any interest accruing on the Fund from 1 November 2019) is required to be paid to Ebert, the first ranking security holders would be the interested/entitled party.
- 3.4 The first ranking security holders have confirmed to the Receivers that they will waive any rights they have to the Interest on the basis that the Interest will be applied to the Receivers' costs (thus reducing the amount of costs which need to be deducted from the retentions held in the Fund).<sup>5</sup>
- 3.5 This outcome is consistent with the Court's preliminary indication of the preferred pragmatic approach at [137] of the Court Order.

#### **4. Distribution to Ebert from the Fund relating to defective works by subcontractors**

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- 4.1 The Receivers are seeking directions permitting them to make a distribution to Ebert from the Fund in respect of remedial deductions of \$30,253.98 (with payment on a pro-rated basis reflecting the rate applicable for Eligible Subcontractors, being approximately 96 cents in the dollar). These amounts relate to defects in the subcontracted works, where the contract principal has withheld retentions due to those defects, which would otherwise have been payable to Ebert.
- 4.2 As is explained in the affidavit of Lara Bennett sworn 1 November 2018, retentions have a cascading effect in a supply chain.<sup>6</sup> This is because the terms of the subcontract are designed to dovetail with the provisions of the Head Contract.
- 4.3 In simple terms, where work which is subcontracted by Ebert to a subcontractor is defective, and that work is not remedied by the subcontractor, then either:
- (a) Ebert may remedy the defects and deduct the cost of remedying the defect from the retentions held for that subcontractor; or
  - (b) If Ebert does not remedy the defects:

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<sup>4</sup> Bennett Affidavit at [3.4]

<sup>5</sup> Bennet Affidavit at [3.5] and bundle of exhibits pages 26 to 29

<sup>6</sup> See part four of that affidavit

- (i) the contract principal will withhold costs associated with the defects from retentions it holds for Ebert; and
- (ii) Ebert will in turn withhold those costs from the retentions it holds for the subcontractor.<sup>7</sup>

4.4 There are six instances where a contract principal has withheld retentions which would otherwise be payable to Ebert because of defective work which was subcontracted by Ebert to subcontractors (identified in the Bennett Affidavit as Subcontractors A to F). In accordance with the usual process, the Receivers seek directions enabling them to deduct those amounts from retentions Ebert holds in the Fund for those specific subcontractors.

4.5 Subcontractors A to D have agreed to the deductions totalling \$19,226.05 being made from retentions held for them in the Fund.<sup>8</sup> Subcontractors E and F have been advised by the Receivers of the defects and their intention to deduct \$9,647.93 (including GST) and \$1,380.00 (including GST) respectively from retentions held by Ebert for that subcontractor in respect of that project and asked for their response to that proposal. No response has been received from these subcontractors.<sup>9</sup>

4.6 This distribution does not represent a windfall for Ebert (or, more relevantly, the first ranking secured creditor). This is because if the subcontracted works were not defective, the principal would have returned to Ebert (in liquidation, for the benefit of the first ranking secured creditor), retentions of \$30,253.98. Ebert's position is neutral.

## **5. Directions sought in respect of waived subcontractors' entitlements**

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5.1 The Receivers consider that two subcontractors referred to in the Bennett Affidavit as Subcontractors G and H have entitlements to the Fund totalling \$1,561.07. Both subcontractors have advised the Receivers that they do not consider they have a claim to the Fund and therefore waive any rights to claim to the Fund.<sup>10</sup>

5.2 There are two possible ways to apply these waived entitlements:

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<sup>7</sup> Bennett Affidavit at [4.3]

<sup>8</sup> Bennet Affidavit at [4.5]

<sup>9</sup> Bennett Affidavit at [4.6]

<sup>10</sup> Bennett Affidavit at [5.2]

- (a) These funds could be paid to Ebert on the basis that Ebert holds legal title and the beneficiaries have waived beneficial ownership. Unlike the distribution proposed above, such an approach would represent a (small) windfall for Ebert.
  - (b) Alternatively, these funds could be applied to the Receivers' fees, costs and expenses.
- 5.3 Given the sums involved, it is simply not cost-effective to consider and debate the correct legal approach in this instance. Rather, the Receivers submit that the fairest and most pragmatic approach is to apply these funds to their fees, costs and expenses.

## 6. **Unclaimed monies**

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- 6.1 There are two Eligible Subcontractors (identified as Subcontractors I and J) with claims to the Fund totalling \$5,590.44 in respect of whom the Receivers seek directions to enable them to pay these monies to the Commissioner of Inland Revenue as unclaimed monies. This is because the Receivers:
- (a) have been unable to locate Subcontractor I; and
  - (b) have contacted Subcontractor J, but Subcontractor J has failed to submit a formal claim form or engage with them substantively on the claim.<sup>11</sup>
- 6.2 The orders sought would enable the Receivers to conclude the receivership of the Fund promptly, without the need to incur further cost attempting to locate and/or requiring these subcontractors to submit formal claim forms.
- 6.3 Unclaimed moneys in a liquidation are dealt with in section 316 of the Companies Act 1993, which provides that:
- Moneys representing unclaimed assets of a company standing to the creditor of a liquidator shall, after completion of the liquidation, be paid to the Public Trust.
- 6.4 However, even though Ebert is in liquidation, these funds are held on trust and therefore are not "unclaimed assets of a company". This is because trust assets are not assets of a company and are not available in the liquidation to creditors.

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<sup>11</sup> Bennett Affidavit at [6.2] and [6.3]



- 6.5 Therefore, the default position under the Unclaimed Money Act 1971 must apply.
- 6.6 The position under the Unclaimed Money Act 1971 is that the Receivers would be required to retain the distribution for either:
- (c) six years following the date on which the money became payable; or
  - (d) as Ebert has ceased to carry on business for a period of at least six months following the cessation of its business.<sup>12</sup>
- 6.7 The Receivers therefore seek to clarify the position on unclaimed monies in the receivership.
- 6.8 The directions now sought are consistent with orders the High Court gave in *Re Fisk* [2018] NZHC 2007. That case involved an application for directions by the liquidators of the Ross Asset Management (**RAM**) Group of companies which including directions in respect of unclaimed monies held on trust by RAM for investors. The Court confirmed that the liquidators could pay the unclaimed monies held on trust to the Commissioner of Inland Revenue pursuant to section 4(3) of the Unclaimed Monies Act 1971.<sup>13</sup>
- 6.9 The Court in *Re Fisk* directed that the liquidators hold onto the funds for a further period of six months from the order before paying the funds to IRD. Such an order in that case did not have the effect of extending the liquidation and delaying final distribution to investor unnecessarily. The Receivers do not consider that a requirement to hold onto these funds for a further period should be ordered here given the small amount of unclaimed monies and because the effect of such an order would delay making a final distribution to Eligible Subcontractors and finalising the receivership.

## **7. Approval of costs and disbursements**

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- 7.1 This Court has already ordered that the Receivers are entitled to have their fees, costs and expenses deducted from the Fund, subject to those amounts being approved by the Court.<sup>14</sup>

<sup>12</sup> Unclaimed Money Act 1971, ss 4(1)(e) and 4(3)

<sup>13</sup> At [153]-[154].

<sup>14</sup> Court Order at [6(c)]

- 7.2 The amount for which the Receivers seek approval is \$135,428. This amount excludes the costs associated with the initial application to the Court in November 2018, which was covered by a costs order made at that time.
- 7.3 Assuming this Court permits the Receivers to apply interest accruing on the Fund to their fees, this would result in the total costs to be deducted from the Fund (being both application and receivership costs) of \$169,895.91. On this basis, the rate of recovery on claims to the Fund for Eligible Subcontractors is approximately 96 cents in the dollar. This can be seen in the table below.

<u>Outcome summary</u>		<u>\$</u>
<i>Costs</i>		
Application Costs		79,210
Receivership Costs		135,428
	<b>Subtotal</b>	<b>214,638</b>
<i>less Interest</i>		(44,742)
	<b>Net Total Costs (excluding GST)</b>	<b>169,895.91</b>
<i>Outcome</i>		
Total obligations of Fund at receivership		3,678,833
GST recovered		551,825
	<b>Total Fund and Total Obligations</b>	<b>4,230,657</b>
<i>less Net Total Costs</i>		(169,896)
	<b>Net Funds Available for Distribution</b>	<b>4,060,762</b>
	<b>Recovery for beneficiaries</b>	<b>95.98%</b>

- 7.4 The Bennett Affidavit provides a detailed breakdown of the work involved in the receivership, the levels of staff and costs incurred. Despite the complexity of the receivership – including dealing with a large number of complex defects claims – the Receivers have elected to recover their costs at the bottom of the range of court approved rates. This decision results in a cost saving to the Fund of over \$23,000.<sup>15</sup>
- 7.5 Finally, the fees, costs and disbursements for which the Receivers seek approval provide for some additional time for the final matters to conclude the receivership. That provision has been made on the basis that there are no unforeseen significant attendances required and that there is no substantive opposition to the orders sought in this application. This means the final amounts deducted from the Fund may be less than those for which approval is sought. However, if there are any unforeseen issues to be dealt with, the Receivers request leave be granted to return to the Court to vary this order.

<sup>15</sup> Bennett Affidavit at Schedule Two.

7.6 Unless there is opposition to the orders sought by Eligible Subcontractors, counsel respectfully request that this application be dealt with on the papers.

  
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M G Colson / R L Pinny  
Counsel for the Receivers of the Fund

29 November 2019

## **Schedule One: Directions now sought**

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1. The Receivers may apply interest of \$44,742.15 held in the Retention Account, together with any interest which accrues on the Fund from 1 November 2019 to their fees, costs and expenses;
2. The Receivers may make a distribution from the Fund to Ebert of \$30,253.98 (with such amount to be adjusted for the pro-rated rate) relating to defective work carried out by subcontractors identified as Subcontractors A to F in the Bennett Affidavit;
3. The Receivers may apply \$1,561.07 (with such amount to be adjusted for the pro-rated rate) from the Fund comprising entitlements waived by subcontractors identified in the Bennett Affidavit as Subcontractors G and H to their fees, costs and expenses;
4. The Receivers may pay \$5,590.44 (with such amounts to be adjusted for the pro-rated rate) to the Commissioner of Inland Revenue as unclaimed monies owing to subcontractors identified in the Bennett Affidavit as Subcontractors I and J; and
5. The Receivers' fees, costs and expenses in the receivership of up to \$135,428 are approved.