

**In the High Court of New Zealand
Wellington Registry**

CIV-2018-485- 792

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

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

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

Applicants

and

Ebert Construction Limited (in receivership and liquidation)

Respondent

Second affidavit of Lara Maree Bennett in support of Applicants' originating application seeking:

- (a) orders appointing them as receivers to assets held by Ebert Construction Limited (in receivership and liquidation) on trust; and**
- (b) for directions on how to manage and distribute those assets**

Sworn: 1 November 2018

For hearing: 8 November 2018

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I, **Lara Maree Bennett**, of Auckland, Accountant, swear that:

1. Introduction

- 1.1 I refer to my earlier affidavit filed in support of this Application (**my First Affidavit**).
- 1.2 My First Affidavit gave a brief overview of the background to this matter and the Application. This affidavit provides further details relating to the substantive orders sought. This affidavit adopts the same defined terms as my First Affidavit.
- 1.3 This affidavit has the following parts:
- (a) The Fund
 - (b) Our work in respect of the Fund to date.
 - (c) Relevant contractual framework.
 - (d) The reconciliation process – the usual process.
 - (e) The reconciliation process – June and July 2018.
 - (f) The Wrongly Classified Subcontracts.
 - (g) Distribution of the Fund.
 - (h) Interest claims.
 - (i) Costs of the Receivers.
- 1.4 I annex hereto and mark “**A**” a bundle of documents which I refer to in this affidavit. The bolded page references in my affidavit are reference to pages within this bundle.

2. The Fund

- 2.1 The Fund in issue in this proceeding is held in a bank account with a Wellington branch of BNZ; account number and titled “Ebert SC Retentions” (the **Retentions Account**).

- 2.2 Upon receivership, the amounts in the Retention Account totalled \$3,684,315.15, which comprised:
- (a) \$3,678,832.53 of retention monies (the **Fund**); and
 - (b) interest earned on the Fund between 1 July 2018 and 31 July 2018 of \$5,483.62.

Interest earned on the Fund prior to 1 July 2018 had been transferred to Ebert's general accounts prior to our appointment as receivers.

- 2.3 Interest continues to accrue on the Fund at a rate of approximately \$5,000 per month. Between our appointment on 31 July 2018 and 31 October 2018 \$16,083.51 of interest had accrued on the Fund. To date, we have retained this interest in the Retentions Account. However, when I refer to the Fund in this Application, this does not include interest accruing on the Fund.
- 2.4 Upon our appointment, Ebert had no other significant cash held. It's only bank account with credit funds had a balance of \$9,080.17 which was subject to offset against credit card debit balances in excess of this amount and was therefore not available to us as Receivers.
- 2.5 Pending the determination of this Application, neither we nor the Liquidators are administering the Fund. Accordingly, valid claims to the Fund are not being paid.

3. Our work in respect of the Fund to date

- 3.1 Our First Report as Receivers (annexed to my First Affidavit) detailed the steps we took upon our appointment. This part of my affidavit only focuses on those steps relevant to the Fund.
- 3.2 Upon our appointment as Receivers, we immediately attempted to ascertain Ebert's financial position and in particular, whether it could continue to trade. This involved determining the progress of each of Ebert's projects and its position in respect of creditors. Determining the level of potential claims in respect of the monies held in the Retentions Account was a necessary part of the assessment process.

3.3 We retained the services of Ebert's Quantity Surveyors for all relevant projects, as well as selected management and finance staff for a period of one to two weeks after our appointment as Receivers. During this period, we asked the Quantity Surveyors to assess the progress of each of the Projects, including the subcontractor position where there were claims pending. Ebert had completed these activities for work undertaken to the end of June 2018, but the position to 31 July 2018 (i.e. our appointment as receivers) was not clear to us.

3.4 The Quantity Surveyors and management staff:

- (a) advised us of the progress for each of the Projects (i.e. how complete each was as at 31 July 2018);
- (b) considered and advised us on any defects notified by the Principal to date in respect of completed projects; and
- (c) reviewed all subcontractor claims received to 31 July 2018 and advised us:
 - (i) how much was considered due under the relevant CCC to the subcontractor, based on their assessment of the progress of the subcontract works, to 31 July 2018; and
 - (ii) how much Ebert was entitled to retain under the terms of the CCC.

3.5 That is, the Quantity Surveyors and management staff carried out activities that would have represented their usual role in respect of subcontractor claims to 31 July 2018 had Ebert continued trading operations. The finance team then processed that information and produced for us two spreadsheets recording the retentions retained by Ebert to 31 July 2018: one spreadsheet recorded the retentions retained in respect of all CCCs; the other recorded those retentions held in respect of CCCs recorded by Ebert as entered into after 31 March 2017 (and therefore was subject to the Act's retentions regime).

- 3.6 These spreadsheets recorded that as at 31 July 2017 Ebert was entitled to retain \$9,34,209.17 of retentions from subcontractors, of which \$4,466,071.29 were related to CCCs subject to the Act's retentions regime.
- 3.7 The reason we carried out this reconciliation process was simply to:
- (a) ascertain the extent of Ebert's creditors; and
 - (b) establish which parties could have a claim to the Fund and the value of those claims for the purpose of this Application.
- 3.8 We reviewed these spreadsheets and noted some anomalies. For example, some of the reconciliations indicated that most subcontractors on a particular project were recorded as having entered into CCCs after 31 March 2017, but one or more subcontractor/s on the same project:
- (a) did not appear on the system generated report of post 31 March 2017 CCCs; or
 - (b) the date and progress claim number of a subcontractor indicated work may have commenced after 31 March 2017.
- This raised a question as to whether that particular CCC's date was correctly recorded.
- 3.9 In total we queried the relevant contract dates for 84 CCCs. Based on these queries we concluded that 14 CCCs were incorrectly recorded in, or treated by, Ebert's system as having been entered into prior to 31 March 2017 and therefore were treated by Ebert as not being subject to the retention regime under the Act. I refer to these subcontracts in this Application as the **Wrongly Classified Subcontracts**. The particular subcontracts are listed in Schedule Three of this Affidavit. This issue, and the ramifications of this is discussed in more detail in Part 7 of this affidavit below.
- 3.10 As part of our role as Receivers of Ebert we have spoken with a large number of subcontractors in respect of their creditor claims, including those who may have a claim to the Fund. As I mentioned in my First

Affidavit, prior to the filing of this application to the Court I had specifically spoken with 12 subcontractors with claims to approximately 47% of the Fund (assuming claims to the Fund is restricted to Reconciled and Transferred Retentions only). They indicated their general support to the Receivers seeking orders to enable them to manage the Fund and, following a request from us, a number indicated a willingness to assist with funding the costs of making this Application, if an alternative funding source was not secured.

- 3.11 This illustrates the difficult position the Subcontractors are in. In the absence of the orders sought as to our appointment as Receivers to manage and distribute the Fund:
- (a) it is not clear who would manage the Fund for the benefit of subcontractors with a claim to the Fund; and
 - (b) valid claims to the Fund would not be able to be administered or paid promptly.
- 3.12 We have also corresponded with 19 of Ebert's 20 Principals in respect of the relevant Projects. These discussions related to progress of the projects, resolution of any defects raised to date and in some cases, proposals to deal with retention moneys held in respect of their projects.
- 3.13 I estimate that we have, to date, spent over 100 hours on matters relating specifically to the Fund. I address this in more detail in Part 10 of this Affidavit.
- 3.14 As I mentioned in my First Affidavit, liquidators were appointed to Ebert on 3 October 2018 by shareholder resolution. The Liquidators have consented to us continuing to act as agents of Ebert. I have spoken with David Ruscoe, one of the Liquidators, regarding the Fund in advance of making this Application to the Court. In my discussions with the Liquidators, they have advised that they support the Receivers making an application to the Court for appropriate orders to enable us to manage and distribute the Fund.

3.15 In terms of the outcome of the receivership process, the financial position of Ebert is such that subcontractors will not be paid amounts owing to them by Ebert unless they have a claim to the Fund (excluding the impact of any possible recoveries from third parties in the liquidation, from voidable transactions and the like). As our First Receivers' Report records, we expect that:

- (a) there will be a significant shortfall to secured creditors; and
- (b) aside from preferential unsecured creditors and creditors with a valid claim to the Fund (which under the Act is not available to meet any other creditor of Ebert), there will be no surplus funds available to unsecured creditors from the receivership process.

(See my First Affidavit, page 10 of Receivers' First Report.)

3.16 We expect the receivership, as it relates to assets subject to the security under which we were appointed, will be concluded in the first quarter of next year. However, we expect resolving the issues relating to the Fund may take longer – potentially up to September 2019 (based on defects liability periods on the relevant projects).

4. Relevant contractual framework

4.1 Generally, a construction project will have:

- (a) a contract between the principal and a contractor (the **Head Contractor**) relating to the construction of the development in question (the **Head Contract**); and
- (b) various subcontracts between the Head Contractor and contractors who are engaged by the Head Contractor to carry out various parts of the Head Contractors' obligations under the Head Contract (known as subcontractors).

4.2 On larger construction jobs, there may then be a further layer of subcontracts, with subcontractors engaging other subcontractors to perform some of the services the initial subcontractor was contracted to provide.

4.3 For most of Ebert's projects, it was the sole Head Contractor. However, in respect of projects in the processing sector the arrangements often involved another Head Contractor for the wider project, including five large projects relevant to the Fund that were in progress at the date of receivership. In these instances, Ebert was generally the "Lead" contractor for the building structure whilst the "Main" Head Contractor had responsibility for the overall project. The contractual framework may include a consortium arrangement or similar, with Ebert operating effectively as a subcontractor in that it did not have overall control of the project site, although unlike the usual subcontractor role, Ebert may have had a contract directly with the principal in respect of its contracted works.

The Head Contracts

- 4.4 The contracts with the principals that we have seen were generally based on industry standard form Head Contracts. While the particular form may change and special conditions would be incorporated specific to each Project, the Head Contracts generally provided for:
- (a) The principal to hold retentions. The retentions are generally a percentage of the total amount certified as payable – usually 10% although on larger projects the percentage may be staged.
 - (b) For those retentions to be released once the Head Contractors obligations were complete. Retentions are generally released in two stages - the first release being upon Practical Completion or Taking Over (usually 50% retentions released) and the second release being at the expiry of the defects liability period in the Head Contract (assuming no defects have been raised). The defects liability period would generally be 52 weeks after Practical Completion or Taking Over.
 - (c) In some instances, Ebert was paid via "milestone" rather than "progress" payments, but the arrangements would have a similar outcome. For example, by "Taking Over" Ebert would have been paid up to 95% of the contract value, with a further

2.5% on "Acceptance" (following an operational testing period) and the final 2.5% on expiry of the defects liability period.

Ebert's subcontracts

- 4.5 Ebert would then enter into a contract with a subcontractor to perform some of the services Ebert was required to perform under the Head Contract. Ebert utilised a standard form subcontract (which is a standard industry form subcontract known as SA 2009), a copy of which is at **page 1**. All of the subcontracts we have reviewed to date were on these terms.
- 4.6 The subcontract contains two parts:
- (a) the subcontract specific conditions (**Specific Conditions**); and
 - (b) the subcontract general conditions (**General Conditions**).
- 4.7 The Specific Conditions detail matters which are project and/or subcontractor specific. These include specific matters such as:
- (a) the type of work to be undertaken;
 - (b) insurance required;
 - (c) documentation required to be provided by the subcontractor (for example producer statements required for building compliance purposes and warranties); and
 - (d) relevant project deadlines, such as practical completion under the Head Contract, the defects liability periods and relevant payment dates; and
 - (e) retention amounts.
- 4.8 The terms of the subcontract are designed to dovetail with the terms of the Head Contract. See the example at **page 1**:
- (a) General Conditions, Clause 2.1 provides that the subcontractor agrees to comply with all the provisions of the Head Contract that apply to the Subcontract Works; and

- (b) General Conditions, Clause 2.2 provides that the subcontractor has the same obligations and liabilities to the Contractor for the Subcontract Works as those imposed on the Contractor by the terms of the Head Contract, except as modified in the subcontract.

4.9 The subcontract provides various obligations on the subcontractor to remedy or repair the Subcontract Works or indemnify the Contractor for the costs of doing so. In particular:

- (a) the subcontractor is responsible for the care and protection of the Subcontract works and must repair any Subcontract works that have been damaged prior to practical completion of the Head Contract Works (General Conditions, clause 5.1.1).
- (b) the subcontractor must not cause any damage to the site of the Head Contract Works and is responsible for the cost of repairing any such damage caused by them (General Conditions, clause 5.1.4).
- (c) the subcontractor must remedy at their own cost any defects or faults which appear in the Subcontract Works prior to practical completion of the Head Contract Works or during the defects liability period stipulated in the Head Contract (General Conditions, clause 11.2).
- (d) If the subcontractor fails to carry out any remedial work in accordance with a notice requiring such work by the Contractor, the Contractor may carry out such work on the subcontractors' behalf and may deduct the costs of carrying out this work from payment due to the subcontractor under the subcontract (General Conditions, clause 5.1.6 and 11.1.4).

4.10 Likewise, the subcontractor must:

- (a) comply with all statutes, regulations, by laws and the like which may be applicable to the subcontract works;
- (b) comply with all consents, approvals or other licences or authorities relating to the subcontract works; and

- (c) make applications and obtain any consents and approvals specified under the Specific Conditions;

(General Conditions, clause 5.2).

4.11 The subcontract further provides that the subcontractor indemnifies the Contractor against any loss, liability or cost suffered by the Contractor arising from or as a consequence of the subcontractor:

- (a) failing to carry out any of 4.10 (a) to (c) above;
- (b) failing to transfer full and unencumbered title for any materials, plants, equipment or other items supplied of the Head Contract Works and for which payment has been made; or

- (c) failing to comply with the subcontract;

(General Conditions, clause 7.1.1).

4.12 The Contractor is entitled to retain such amounts from any payments which would otherwise be payable to the subcontract under the subcontract (General Conditions, clause 7.1.3).

4.13 The retentions provide an effective “security” for these obligations.

4.14 The provisions relating to retentions in the subcontract generally mirror those in the Head Contract. That is, the retentions are a percentage of the total amount certified as payable – usually 10% although on larger projects the percentage may be staged. Retentions are generally released in two stages - the first release being upon Practical Completion or Taking Over (usually 50% retentions released) and the second release being at the expiry of the defects liability period in the Head Contract (assuming no defects have been raised) (General Conditions, clause 12.4).

4.15 This can be seen in the example subcontract at **page 6**, which sets out that:

- (a) The Defects liability period is 52 weeks from the date of practical completion of the Head Contract Works (Specific conditions, clause 11).

- (b) Retentions up to practical completion are:
 - (i) 10% of the first \$2 million; and
 - (ii) 10% of the remainder.
- (c) The percentage to be retained for the defects liability period is 50% of total retentions.
- (d) The due date for initial retention release (i.e. 50%) is 22 working days after the end of the month in which the practical completion certificate is issued.
- (e) The due date for final retention release is 25 working days after issue of the defects liability certificate under the Head Contract or seven working days after completion of maintenance or rectification of all defects in the subcontract works, whichever is later.

(Specific Conditions, 12.4.1 and 12.4.2)

4.16 The contractual arrangements in respect of retentions are illustrated as follows, by way of a straightforward example of a defect in the subcontract works.

- (a) The principal contracts with Head Contractor to construct a building which includes (amongst other matters) building a retaining wall. The total price is \$800,000, of which 10% of progress claims is to be withheld as a retention throughout the project (the Head Contractor retention). The cost of the works relating to the retaining wall is \$100,000.
- (b) The Head Contractor contracts with the subcontractor to build the retaining wall. The price for the subcontracted works is \$90,000 of which 10% is withheld as a retention (the Subcontractor retention).
- (c) The building, including the retaining wall is complete and 90% of the price of the works is paid (with the remaining 10%

withheld as retentions) under both the Head Contract and the subcontract.

- (d) A defect appears in the retaining wall during the contractual defects liability period.
 - (i) Under the Head Contract, the principal gives notice to the Head Contractor that the defect must be remedied, failing which the Principal will remedy the defect and recover the cost of remedying the defect from the Head Contractor by deducting it from the Head Contractor retention.
 - (ii) The Head Contractor then gives notice to the subcontractor that the defect must be remedied, failing which the Head Contractor will remedy the defect and recover the cost of remedying the defect from the Subcontractor by deducting it from the Subcontractor retention.

Deeds between principal and subcontractor

4.17 Generally the principal will not have any direct contractual relationship with the subcontractor, save for the warranty arrangements described below. However, on some projects, principals may require the subcontractor to sign a Deed of Continuity.

4.18 A Deed of Continuity is an agreement between the principal and a subcontractor, whereby the subcontractor agrees that:

- (a) in the event the employment of the Head Contractor is determined under the Head Contract; and
- (b) if so required by the principal;

the subcontractor will complete the Subcontract Works under the same conditions and for the same consideration as originally agreed between the Head Contractor and subcontractor.

4.19 The form of continuity deed may vary depending on the Project. In the case of Ebert, we have seen three types of continuity deeds on its

files, although the terms of these deeds are very similar. An example of the most common form of Continuity Deed on Ebert's projects is at **page 22.**

- 4.20 Continuity Deeds were not required on all Projects – generally they would only be provided if required by the principal. Of Ebert's 21 projects relevant to the Fund, continuity deeds appear to have only been on required on seven projects, and not all subcontractors on these projects with a potential claim on the retention funds were required to provide such deeds. I note however that the position in respect of three of these projects is unclear as a number of relevant subcontracts provide that Deeds of Continuity are required, however copies of the executed deeds have not been located in Ebert's records.
- 4.21 All Projects also required a Subcontractor Deed of Warranty from many of the subcontractors. A Subcontractor Deed of Warranty is most often an agreement between the principal and subcontractor whereby the subcontractor warrants directly to the principal that:
- (a) the material used in the Subcontract works or supplied by the Subcontractor shall be fit for purpose, new and of good quality; and
 - (b) that all work involved in carrying out the Subcontract Works will be carried out in a good, professional and workmanlike manner;
- and that the subcontractor shall:
- (c) repair all defects in the Subcontract Works;
 - (d) make good any damage to buildings and structures in which the Subcontract Works are performed or situated caused by any defect or repairs or replacements in or to the Subcontract Works;
- during the period specified in the Deed.
- 4.22 The period specified in the Deed would generally run from the end of the contractual defects liability periods in the Head Contract and

Subcontract. This ensured that after the contractual defects liability period had expired, the Principal had direct contractual recourse to the Subcontractor in respect of any material or work which was substandard. However, in some instances the warranty period would commence upon Practical Completion or Taking Over.

- 4.23 An example of the Subcontractor Deed of Warranty is at **page 24**. This example does not mention any security for the Subcontractors' obligations under the Deed of Warranty, including any retentions held by the Head Contractor in respect of the Subcontract Works. This is not surprising. Generally, if a claim had not been raised during the contractual defects period, the retentions would be released (and paid to the subcontractor by Ebert) at the expiry of the period.

5. The Reconciliation process – the usual process

- 5.1 I provided a brief overview of our understanding of the Reconciliation process of Ebert in my First Affidavit. I now provide further detail of this process.
- 5.2 Ebert's process for processing subcontractor retentions for CCCs is detailed below. The initial part of the process set out below is the same for CCCs entered into on or after 31 March 2017 (and therefore subject to the retention regime under the Act) and those entered into prior to 31 March 2017 (and therefore not subject to that regime).
- (a) The subcontractor would raise a claim for payment based on work completed during the prior period. This was generally the previous month, although some subcontractors may have been on a fortnightly cycle.

The form of payment claim would vary between subcontractors, but would generally detail the subcontract works which had been provided up to the end of the relevant period, the total amount the subcontractor considered was payable under the CCC, the level of retentions, if applicable, any prior payments made under the CCC, and the net amount which the subcontractor considered was due and owing. The payment claim should also have included a notice pursuant to section 20

of the Act, but this was not always the case. Sometimes the payment claim would simply be in the form of a detailed invoice. I attach at page **27** an example payment claim issued to Ebert by a subcontractor.

- (b) Ebert would then consider whether the claim was in accordance with what it considered was owing under the CCC. This would involve its Quantity Surveyors considering, amongst other matters, progress of the Subcontract Works to date.
- (c) Once Ebert had determined how much it considered was payable under the CCC, it created a buyer created tax invoice (BCTI), which recorded the amount to be paid to the subcontractor and the amount which was being retained. An example BCTI is at **page 32**.
- (d) These BCTIs would record if Ebert agreed with the subcontractor's assessment as to how much was payable and would record the reasons for any difference. See the following example:
 - (i) The BCTI at **page 32** records that the subcontractor sought certification for 9% of the subcontract works for the period, being \$220,000. Ebert agreed with this assessment, as recorded by the reference to "100%" and "This Payment" as being \$220,000.

This BCTI then records:

- (A) "Total Base Contract Certified" - \$220,000.00
- (B) "Total Variations Certified" - nil
- (C) "Gross Claim Certification" - \$220,000.00
- (D) "Less Retentions (10%)" - \$22,000.00
- (E) "Net Claim Certification" - \$198,000.00
- (F) "Less Previous Payments" - nil

- (G) "Net Payment (excluding GST)" - \$198,000.00
 - (H) "Add GST @15%" of \$29,700.00
 - (I) "Net Payment Amount (including GST) of \$227,700.00.
- (e) The BCTI at **page 33** related to a CCC which was entered into before 31 March 2017 and therefore is not subject to the retentions regime under the Act. In contrast, the BCTI at **page 32** relates to a CCC which is subject to that regime. As can be seen retentions are simply recorded in the BCTI as "less retentions -\$xxx.xx" (**page 33**) or "less retentions (10%) - \$xxx.xx" (**page 32**).

5.3 The BCTIs do not record whether retentions are to be held in trust or otherwise.

5.4 The process for payment of the BCTIs and initial processing of retentions were the same regardless of whether the CCC was treated by Ebert as subject to the retentions regime of the Act, in that Ebert would:

- (a) send the BCTIs to the subcontractors; and
- (b) pay the amounts due and owing under the BCTIs to the subcontractor from its general account.

The only difference was whether moneys were transferred into the Retentions Account representing the retention amounts.

Usual process for CCCs Ebert recorded as entered post 31 March 2017

5.5 For CCCs which were treated by Ebert as entered into after 31 March 2017, once the BCTIs were processed, Ebert would carry out a monthly reconciliation process for retentions which were required to be held on trust.

- 5.6 In undertaking the monthly reconciliation process Ebert would determine the net movement in retentions subject to the Act for the month, comprising:
- (a) the quantum of “new” retentions being held from that months’ invoices; and
 - (b) from the retentions already withheld and reconciled to the Retentions Account, the quantum which were to be released from trust under the terms of the relevant CCC and the Act through either:
 - (i) payment to the subcontractor; or
 - (ii) transfer back into Ebert’s general accounts as amounts Ebert was entitled to deduct from the retention in respect of defaults by the subcontractor

(Released Retentions).

- 5.7 To effect the reconciliation, Ebert would run a report in its accounting / job costing system (a system called “CHEOPS”) on retentions held in respect of CCCs which were recorded in the system as signed on or after 31 March 2017. This report would then be compared with the previous month’s figures to ascertain the net movement in retentions.
- 5.8 If the net movement was positive, funds comprising the net movement would be transferred from Ebert’s general account to the Retentions Account.
- 5.9 If the net movement was negative, funds comprising the net movement would be transferred from the Retentions Account into Ebert’s general accounts.
- 5.10 Accordingly, following this reconciliation payment to or from the Retentions Account, in theory the Retention Account would hold all Ebert’s recorded retentions on CCCs subject to the Act’s requirements (subject to some errors which are explained below).

Usual process for CCCs Ebert had recorded as entered into on or prior to 31 March 2017

- 5.11 For CCCs which were treated by Ebert as entered into prior to 31 March 2017 once the BCTIs were processed, Ebert would record in its computer system the retentions held in respect of those BCTIs. However, no monies were separately set aside for retentions relating to those BCTIs.
- 5.12 Similarly, where retentions were required to be released to the subcontractor under the terms of the CCC, Ebert would:
- (a) pay the amount of retentions to be released to the subcontractor from Ebert 's general accounts; and
 - (b) update its computer system to record those Released Retentions.

6. The Reconciliations process in June and July 2018

- 6.1 Part 5 of my affidavit above sets out the usual process for reconciling retentions. However, in the month prior to the appointment of receivers, Ebert did not complete this process.

May Claims

- 6.2 Ebert followed its usual processes up to 22 June 2018 in respect of claims made by subcontractors in May for work completed up to and including in May 2018.
- 6.3 The last transfer of retention payments from Ebert's general account to the Retention Account was on 22 June 2018. On that day, \$332,680.58, being the net retention movement for the month to 31 May 2018 was transferred from Ebert's general account to the Retention Account.
- 6.4 Following that transfer, the amounts in the Retention Account comprised retentions held (and reconciled) by Ebert up to the end of May 2018. I refer to these as the **Reconciled and Transferred Retentions**. The amount of Reconciled and Transferred Retentions

is \$3,678,832.53. These amounts relate to 131 Subcontractors in respect of 182 CCCs on 19 projects.

June claims

- 6.5 Ebert did not complete the usual process in respect of claims made by subcontractors in June 2018 for work completed up to and including in June 2018.
- 6.6 During July Ebert had determined how much it considered was payable under the CCCs for such claims and had created the requisite BCTIs (the **June BCTIs**).
- 6.7 The June BCTIs recorded the amount to be paid to the subcontractor and the amount which was being retained in the usual way.
- 6.8 However:
- (a) the amounts payable to the subcontractor under the June BCTIs were (in most cases) not paid; and
 - (b) no amounts were transferred from the general account to the Retention Account in respect of these retentions.
- 6.9 I refer to these as the **Calculated but Not Transferred Retentions**. The amount of Calculated but Not Transferred Retentions is approximately \$475,000. These amounts relate to 80 Subcontractors in respect of 97 CCCs for 12 projects.

July Claims

- 6.10 Ebert did not complete the usual process in respect of claims made by subcontractors in July 2018 for work completed up to and including in July 2018. That is, Ebert did not do any of the following:
- (a) complete the assessment of all claims and issuance of BCTIs for services provided by its subcontractors in or around July 2018;
 - (b) pay amounts to associated Subcontractors in respect of those services;

- (c) calculate the confirmed retentions in respect of those services; and
- (d) pay any monies into the Retention Account relating to services provided by the Subcontractors in or around July 2018.

I refer to retentions which Ebert was entitled to hold in respect of these services as the **Uncalculated and Not Transferred Retentions**. As stated above, we have subsequently calculated, the amount of Uncalculated and Not Transferred Retentions as approximately \$380,000. These amounts relate to 70 Subcontractors in respect of 83 CCCs for 12 projects.

Released Retentions not paid for June and July Claims

6.11 Ebert did not pay to the subcontractors any amounts in respect of Released Retentions in relation to CCCs entered into on or after 31 March 2017 in respect of work undertaken in June or July 2018.

6.12 Ebert:

- (a) calculated such amounts to 30 June 2018; and
- (b) recorded them as Released Retentions in its financial accounts up to 30 June 2018;

but no amounts were in fact:

- (c) transferred out of the Retentions Account in respect of those Released Retentions; or
- (d) paid to the subcontractors concerned.

They were recorded in Ebert's system as part of unpaid BCTIs.

6.13 After our appointment, we asked the quantity surveyors and finance staff to identify and process into the accounting system Released Retentions in respect of the month of July 2018 to establish the estimated financial position of Ebert but took no further steps in respect of those Released Retentions.

6.14 The total Released Retentions in respect of June and July 2018 is \$68,901.95 owing to four subcontractors, which are still held in the Retention Account.

Summary of claims to the Fund

6.15 For completeness following the subsequent work undertaken by Ebert's quantity surveyors, management and finance staff on our instruction to establish the financial status of all projects, Ebert's financial accounts recorded "retentions held" as being \$9,324,209.17 (excluding GST). This represented all amounts Ebert was supposed to be holding as retentions as at 31 July 2018. That is, it included:

- (a) \$4,858,137.88 of retentions held on CCCs which were entered into before 31 March 2017 and therefore not subject to the Act's retentions regime;
- (b) \$4,466,071.29 of retentions held on CCCs which were entered into on or after 31 March 2017, of which:
 - (i) \$3,609,930.58 is the Reconciled and Transferred Retentions less the unpaid Released Retentions;
 - (ii) approximately \$475,000 is the Calculated but Not Transferred Retentions; and
 - (iii) approximately \$380,000 is the Uncalculated and Not Transferred Retentions.

6.16 However, this figure does not include:

- (a) those retentions totalling \$68,901.95 which were calculated by Ebert and us to be the Released Retentions in respect of four subcontractors as at 31 July 2018 but of which Ebert had not yet made payment; and
- (b) retentions of \$170,340.39 relating to the Wrongly Classified Subcontracts.

6.17 In total:

- (a) 152 subcontractors could potentially have a claim to the Fund based on 213 CCCs, based on any of:
 - (i) the Reconciled and Transferred Retentions;
 - (ii) the Calculated but Not Transferred Retentions;
 - (iii) the Uncalculated and Not Transferred Retentions; or
 - (iv) the Wrongly Classified Subcontracts.

These Subcontractors are listed in Schedule One to this Affidavit.

- (b) The claims to the Fund relate to 21 projects, and 20 Principals. (My First Affidavit and the Application referred to 21 Principals. This was incorrect – two projects had the same Principal parties). The Principal parties are listed in Schedule Two to this Affidavit.

7. The Wrongly Classified Subcontracts

7.1 In the course of our reconciliation, we identified 14 subcontracts for which:

- (a) we consider Ebert incorrectly recorded in its computer system that it was entered into on or prior to 31 March 2017; or
- (b) Ebert failed to record a date of entry in its computer system.

I refer to these subcontracts as Wrongly Classified Subcontracts. The Wrongly Classified Subcontracts are detailed in Schedule Three to this Affidavit.

7.2 As I explained briefly in my First Affidavit, the effect of these errors was that Ebert incorrectly classified retentions held under these contracts as not being subject to the retentions regime under the Act and accordingly, no amounts representing retentions under these subcontracts were reconciled with the Retention Account.

- 7.3 Ebert's process for entering into subcontracts (once a preferred subcontractor had been identified) was generally as follows:
- (a) Ebert would usually meet with the intended subcontractor to discuss the subcontract works, including the various contractual requirements. The minutes from this meeting was recorded in the "Preferred Subcontractor Meeting" (sometimes also referred to as a "Pre-Let Meeting") document. An example document is at **page 37**.
 - (b) Once agreement on price and terms was reached, the subcontractor would then be sent an acceptance letter and the subcontract for execution. A copy of an acceptance letter is at **page 46**. The subcontract which accompanied it was subsequently signed and is at **page 1**.
 - (c) As can be seen at **page 48**, the acceptance letter provides that the subcontract agreement must be returned within five working days or prior to starting on site.
- 7.4 Once the subcontract agreement was returned signed, the core terms of the CCC would be entered into Ebert's computer system, in a programme called CHEOPS. At **page 49** is a screenshot of the programme showing the details recorded for a CCC.
- 7.5 I mentioned above that Ebert reconciled retentions to be held in the trust account by running a report in the CHEOPS system based on the record in CHEOPS as to when the contract was signed.
- 7.6 Unfortunately:
- (a) Ebert's system relied on all contract details being entered into CHEOPS accurately and completely; and
 - (b) it was possible to record the details of a contract in CHEOPS without recording the date that it was signed.
- 7.7 This meant that if a CCC was entered into the system without a date loaded into the "date signed" field, or if the date was loaded incorrectly, that error would not be picked up by the system.

7.8 At **page 49** I provide a screenshot from CHEOPS. As can be seen from this example, the “Agreement: Date Signed” field has been left blank. However, the “Agreement: Date Sent” records that the agreement was sent on 9 October 2017. Generally, the date sent figure is before the date signed figure, suggesting the date sent figure is the date the subcontract was sent for signing. Consistent with this, the acceptance letter for this subcontractor is dated 9 October 2017. Therefore, we have assumed that the CCC was entered into on or about October 2017 – but in any event after 31 March 2017 – and therefore is subject to the Act’s retention regime.

7.9 However, because this CCC’s “Date Signed” field was left blank, when Ebert ran its report through CHEOPS to list retentions held for CCCs entered into on or after 31 March 2017, this CCC was not included in the report. Accordingly, retentions held in respect of this CCC (totalling \$6,720.60) were not included in monthly reconciliations and transferred to the Retentions Account when they ought to have been.

7.10 I mentioned above that we queried the contract date for 84 subcontracts. We considered that if there was evidence that the earlier of:

- (a) the CCC being signed; or
- (b) the subcontract works commencing;

occurred on or after 31 March 2017, it was a subcontract to which the Act’s retentions regime would apply.

7.11 Based on this approach, we concluded that 14 CCCs had been incorrectly classified in Ebert’s system as having been entered into prior to 31 March 2017. Of those 14 subcontracts:

- (a) Only five CCCs had a date entered into the “Date signed” field CHEOPS. However, these dates entered were simply errors.
 - (i) One recorded a “Date signed” of 23 May 2015 and a “Date Sent” of 23 May 2018 – that is, it was simply a typo.

- (ii) Two simply recorded the date wrong – the “Date signed” in the system was recorded as prior to 31 March 2017 but the date on the signed agreement in Ebert’s files was post 31 March 2017.
- (iii) One recorded a “Date signed” of 20 March 2017, but also recorded that the letter of acceptance enclosing the subcontracts for execution was sent on 27 April 2017.
- (iv) One recorded a “Date signed” of 13 July 2015 with a “Date sent” of 16 May 2017 – almost two years later. We expect this is simply a typo.

In each case, we checked our initial conclusions with the progress of the Project and the period for which the first BCTI for the CCC was issued before concluding the dates entered into CHEOPS were incorrect.

- (b) Nine subcontracts had no entry recorded in the “Date signed” field. In determining whether these CCCs were entered into on or prior to 31 March 2017 we have considered:
 - (i) the date listed on the CCC as the date signed (if located);
 - (ii) if the CCC cannot be located, when it was recorded as sent to the subcontractor in CHEOPS or by reference to copies of acceptance letters sent;
 - (iii) the date the Project to which the CCC related commenced; and
 - (iv) the period for which the first BCTI under the CCC was issued.

These factors indicated that these nine remaining CCCs were in fact entered into (either signed or work commenced) after 31 March 2017.

7.12 The retentions as at 31 July 2018 in respect of these 14 Wrongly Classified Subcontracts totalled \$170,340.39.

- 7.13 It is not clear whether subcontractors with Wrongly Classified Subcontracts should be treated as having a claim to the Fund. As the Wrongly Classified Subcontracts were incorrectly treated by Ebert as not being subject to the Act's retentions regime, retentions in respect of these CCCs were processed as outlined at paragraphs 5.2 and 5.11 above. That is, Ebert did not:
- (a) include these retentions in the reconciliation to the Retentions Account; or
 - (b) transfer any monies in respect of these retentions to the Retentions Account.
- 7.14 We have advised affected subcontractors whether they are one of the 14 subcontractors with Wrongly Classified Subcontracts. We have received an email from one of those subcontractors advising their position that they should have a claim to the Fund for retentions in respect of the Wrongly Classified Subcontracts. That email is at **page 50**.

8. Distributions from the Fund

- 8.1 As outlined in my First Affidavit, the 21 Projects are at differing stages of completion. However, the progress of some of these Projects - and progress of the Subcontract Works within them - mean that the Receivers could make prompt payment of some claims to the Fund.
- 8.2 By way of illustration:
- (a) Two Projects achieved Taking Over in July 2018 and, we understand, September 2018 (the latter with the assistance of the Receivers). As I explained in my First Affidavit, this means the projects were completed to the point where the building could be considered ready for use for its intended purpose. In both cases the achievement of this milestone would have triggered the release of 50% of the retentions held on subcontractors in respect of those Projects. 50% of the Reconciled and Transferred Retentions in the Fund in respect of these two projects is \$610,703.95. 39 of the Subcontractors

with 41 CCCs could have a claim to the Fund in respect of these two Projects. Accordingly, the orders sought could enable us to make a prompt payment of 50% of the retentions held in respect of these Projects, ideally before Christmas.

- (b) One Project has been completed and the defects notification period expires on 30 November 2018. Some defects have been notified in respect of this project. \$88,943.41 of the Fund relates to this Project and 14 of the Subcontractors could have a claim to the Fund in respect of this Project. Accordingly, assuming no existing defects for those subcontractors remain unremedied or new defects are further notified by 30 November 2018, these orders would enable us to distribute the retentions held in respect of this Project, ideally before Christmas.

8.3 These are of course straightforward examples and some of the Projects are more complex.

8.4 If the orders sought are granted, our intention is to:

- (a) write to each Subcontractor:
 - (i) setting out the position for each of their CCCs and our proposed treatment of the retentions relating to those CCCs; and
 - (ii) seeking their agreement to the proposed treatment of their retentions and/or inviting their comments if the position is not straightforward.
- (b) If the position is not straightforward, we may also write to the Principals, seeking a tripartite agreement as to how the relevant retentions be resolved.

8.5 Based on our initial assessments, we believe that we could make payments of approximately \$1.4 million to \$2.0 million in respect of specific Projects to affected subcontractors promptly, and ideally before Christmas. This is primarily based on claims to retentions in respect of:

- (a) projects for which Taking Over or Practical Completion has been achieved, triggering a contractual obligation to release 50% of retentions held;
- (b) projects where the defects liability period has expired or will expire by the end of November, triggering the contractual obligation to release remaining retentions held (where no defects have been notified); and
- (c) some circumstances where the affected subcontractor and the principal have agreed retentions can be released.

8.6 We appreciate there may be some further legal and practical issues which will need to be considered between the parties before some claims to the Fund can be paid out. This is particularly the case where the project is part finished or the project is concluded but the defects liability period still has some months to run.

8.7 In these instances, we will attempt to negotiate an agreement between the relevant parties and, if agreement cannot be reached, such issues may ultimately be the subject of a further application to the Court for directions in the New Year. We are not seeking to have these more difficult issues determined as part of this application. Rather, the purpose of this application is to enable us to manage the Fund and pay out straightforward valid claims or agreed claims to the Fund promptly, to alleviate financial pressure for subcontractors.

8.8 We have requested the power to make interim distributions of the Fund and to pay claims on a *pari passu* basis. The Fund is equivalent to the total Reconciled and Transferred Retentions. Accordingly, if the Court were to order any of the following orders:

- (a) the Fund was held on trust for subcontractors who had Calculated but Not Transferred Retentions and/or Uncalculated and Not Transferred Retentions also;
- (b) the Fund was held on trust for subcontractors in respect of the Wrongly Classified Subcontracts; or

- (c) our costs in administering and distributing the Fund are to be deducted from the Fund;

there will be a shortfall from the Fund. As I explained above, given the overall financial position of Ebert, payment of subcontractor claims from monies other than the Fund is very unlikely.

8.9 We have requested the power to make interim distributions from the Fund for two reasons:

- (a) The ability to make an interim payment may assist us to avoid a complex position in respect of GST.
- (b) In the event that our costs are to be deducted from the Fund, it will not be apparent what the final rate of recovery for claims will be until the administration of the Fund is near concluded.

8.10 The position in respect of GST on retentions is complex. The retentions held do not include any GST payable in respect of those amounts. In the usual course:

- (a) Once retentions are required to be released to a subcontractor, a BCTI will be issued for the Released Retentions to be paid to the subcontractor.
- (b) That BCTI will include GST payable by Ebert, as the Released Retentions relate to a taxable supply. Accordingly, Ebert will be obliged to pay the GST to the subcontractor who in turn will be required to account to Inland Revenue Department (**IRD**) for the GST paid by Ebert.
- (c) The GST paid by Ebert in respect of any Released Retentions will ultimately be returned to Ebert in the form of a GST refund. However, the associated GST return would not be able to be submitted for a refund until the month following the issuance of the associated BCTI.

8.11 There are insufficient funds in the Fund to pay valid claims (including GST) immediately.

- 8.12 The ability to make an interim distribution will assist in two ways:
- (a) We intend to contact IRD to discuss whether it is possible to enter into an arrangement whereby Ebert is not required to pay to Subcontractors GST on retentions paid out to the Subcontractors (and in turn Subcontractors would not be required to account for the GST in their own returns). This "GST offset" arrangement would happen with IRD's cooperation and IRD would, at the request of both parties, offset Ebert's GST entitlement with the Subcontractors' GST output tax payable. The ability to make interim distributions will give us sufficient time to complete negotiations with IRD, while still ensuring some prompt payment to Subcontractors from the Fund
 - (b) Even if we cannot reach an arrangement with IRD, the ability to make interim payments will enable us to pay some of the Released Retentions (plus GST) promptly, with the remainder of the Released Retentions to be paid after GST has been refunded from the initial payments.
- 8.13 Second, as I highlighted above, some claims to the Fund can be resolved promptly, other claims may take longer to resolve or may be subject to defects notification periods that are yet to expire. We are conscious that the insolvency of Ebert has placed a significant amount of financial pressure on a large number of subcontractors, and therefore wish to pay out valid claims as soon as possible. We expect the power to make payments as an interim distribution would enable us to make a payment of, say 75 or 85% of a valid claim that is due and payable (pro rated as per the Court's orders and excluding GST) promptly, with a further payment being made at the conclusion of the administration of the Fund.
- 8.14 Finally, the likely recovery rate on valid claims will depend on which subcontractors have a claim to the Fund. By way of illustration, I set out below an indication of the likely recovery rate on valid claims to the Fund in the various scenarios. This is based on claim figures in Ebert's records (which are still subject to confirmation) and assuming

our costs in managing the Fund are \$150,000 which are deducted from the Fund:

- (a) Reconciled and Transferred Retentions only - 96%
- (b) Reconciled and Transferred Retentions and retentions related to Wrongly Classified Subcontracts only – 92%
- (c) Reconciled and Transferred Retentions and Calculated but Not Transferred Retentions only – 85%
- (d) Reconciled and Transferred Retentions, Calculated but Not Transferred Retentions and retentions relating to Wrongly Classified Subcontracts only -82%
- (e) All four categories of retentions in issue: 75%

8.15 Accordingly, the expected recovery on valid claims to the Fund ranges from 95% (if only subcontractors with Reconciled and Transferred Retentions have a claim to the Fund) to 75% (if subcontractors have claims to the Fund in respect of all four categories of retentions in issue).

9. Claims for interest

9.1 It is not clear whether interest is required to be paid on retentions which were required to be paid by Ebert to the subcontractor.

- (a) Ebert's standard subcontract does not contain any provisions requiring it to pay interest on retentions which are released late. However, I have not reviewed all of the relevant subcontracts to confirm the position on a contractual right to interest.
- (b) However, I understand there could be an argument that the provisions of the Act provide that interest will be paid on retentions released late, even where there is no contractual entitlement to such interest.

9.2 In our view, it is not in the best interests of Subcontractors and Principals with an interest in the Fund that interest be paid on claims to the Fund.

- (a) As I mentioned above, there will be a shortfall from both the Fund and Ebert's assets as a whole. Therefore, even if there were claims for interest, payment of those claims would simply deplete the recovery rate further on valid claims to the Fund.
- (b) Processing interest claims could also require us to confirm the date on which the retentions were required to be released by Ebert. Establishing this could add additional cost to the processing of claims to the Fund, which may exceed the resulting interest calculation on individual claims. It also creates an additional layer of uncertainty for Subcontractors as to the quantum of any claim to the Fund.
- (c) Interest claims are not expected to be significant in value. Ebert's payments of Released Retentions were up to date as at 22 June 2018. Accordingly, in our view, the additional cost and potential complexity outweigh the benefit to subcontractor creditors.

10. Our costs and rates

- 10.1 I mentioned above that we have already done a significant amount of work in respect of reconciling the Fund, to place us in a position:
 - (a) to make this Application; and
 - (b) if we are appointed as Receivers of the Fund, to pay out some valid claims promptly.
- 10.2 While we received consent from the Secured Creditor to undertake initial work as part of the wider receivership process (which, in many cases overlapped to some extent with normal receivership activities) to enable us to ascertain the issues in respect of the Fund, much of this work to date has been carried out by us in circumstances where we do not know if we will recover our costs in doing so.
- 10.3 The appointing secured creditor is not entitled to be paid amounts from the Fund (potentially with the exception of amounts validly deducted by Ebert in the limited circumstance where a Principal has validly deducted amounts from retentions they hold from Ebert, due to

a subcontractor's default). Therefore, recovering the costs of managing and distributing the Fund from the wider secured property in the receivership would be contrary to our duties to act in the interests of the security under which we were appointed.

- 10.4 To date, in order for us to be in a position to make this Application, some of the Subcontractors with the largest claims to the Fund have advised they would make a financial contribution to the costs of this Application, if funding cannot be sourced from another means. That financial contribution requested and offered does not extend to our costs managing and distributing the Fund. Furthermore, whilst these funding commitments have enabled us to proceed with the application, we do not consider it to be equitable that a small number of subcontractors bear the costs involved. Rather, if no other source of funding is available, they should be shared equally by all beneficiaries of the fund.
- 10.5 As outlined above, there will be a shortfall to the secured creditors and the company has insufficient assets available to pay our costs in managing and administering the Fund (and likewise, any costs the liquidators would incur if they were to manage and administer the Fund). We do not wish to be in a position where we are appointed as Receivers to the Fund, but have no means to recover our costs in dealing with the Fund. If that position were to arise, we would need to reconsider our appointment as receivers to the Fund.
- 10.6 In a decision of January 2018,¹ Associate Judge Bell approved the following hourly rates for PwC personnel as remuneration for liquidators:
- (a) Liquidators and partners: \$485.00 to \$550.00
 - (b) Associate directors: \$395.00 to \$485.00
 - (c) Managers: \$315.00 to \$385.00
 - (d) Senior associates: \$250.00 to \$315.00

¹ *In re Apollo Bathroom and Kitchen Limited* [2018] NZHC 18

(e) Associates: \$190.00 to \$250.00

(f) Support staff: \$140.00

- 10.7 We propose the same rates be applied to our role as court appointed receivers of the Fund, if so ordered.
- 10.8 One subcontractor has raised a concern that the costs to be deducted from the Fund could be of such an amount that it would significantly deplete the funds available for subcontractors.
- 10.9 This is not the case. We estimate that the costs to be deducted from the Fund (being the costs of this Application and to administer and distribute the Fund) to be less than \$150,000. This estimate assumes that there are no significant disputes as to claims to the Fund, which need to be addressed.
- 10.10 However, to address any subcontractor concerns as to the quantum of costs to be deducted from the Fund, we would be happy to submit a final report to the Court for approval of our costs, if the Court considered that appropriate.

Sworn at Auckland

on 1 November 2018



Lara Maree Bennett

before me:



Laura Kate Adams
Solicitor
Auckland
A Solicitor of the High Court of New Zealand

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Schedule One: The Subcontractors



Schedule Two: The Principals

Schedule Three: The Wrongly Classified Subcontracts (identified by subcontractor and Project)

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