

*Receivers' final Report on the State of Affairs of*

***Ebert Construction Limited (in  
Receivership and in Liquidation)**  
Pursuant to Section 24 of the Receiverships Act 1993*

*September 2021*

*Company Number: 986366*

## Registrar of Companies

Companies Office  
Private Bag 92061  
Auckland Mail Centre

30 September 2021

## Ebert Construction Limited (in Receivership and in Liquidation) (Ebert or the Company)

Please find attached our final report in relation to the Company for the full receivership period from 31 July 2018 to 30 September 2021, pursuant to Section 24(1)(a) and 24(1)(b) of the Receiverships Act 1993 (the Act).

All information contained in this report is provided in accordance with Sections 26 and 27 of the Act. In preparing this report we have relied upon and not independently verified or audited information or explanations provided to us. In accordance with the requirement of section 24 of the Act, we report on:

- Property disposed of during the receivership;
- Amounts owing as at the date of this report to any person under whose interests the receiver was appointed;
- Amounts owing, as at the date of this report, to creditors of the Company having preferential claims;
- Amounts likely to be available, as at the date of this report, for payment to creditors other than those referred to above;
- Receipts and payments during the period of the receivership; and
- Such other information that we consider to be of relevance to readers of this report.

Should you or any reader of this report have any queries, please contact us via the details set out opposite.

We have now retired from our position and all further matters in respect of the Company should be addressed to the liquidators, Iain Shephard and Jessica Kellow of BDO Wellington Limited.

Yours faithfully

**Ebert Construction Limited (in Receivership and in Liquidation)**



Lara Bennett  
Receiver



Richard Longman  
Receiver



John Fisk  
Receiver



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## ***Introduction and events leading to our appointment***

### **Appointment of Receivers**

On 31 July 2018 the directors of the Company passed a resolution requesting that receivers be appointed. We, Lara Bennett, John Fisk, and Richard Longman, all Chartered Accountants Australia and New Zealand Accredited Insolvency Practitioners (NZ) of PwC, were appointed Receivers of Ebert on the evening of 31 July 2018.

The property in receivership originally comprised all of the assets, property and undertakings of the Company. By a deed dated 7 December 2020, the property in receivership was amended and from that date was limited to the following:

- A specific insurance contract and proceeds thereof;
- Any claims against third parties and proceeds thereof;
- All bank account balances of ECL or its receivers;
- Accounts receivable; and
- Any books and records not yet delivered to the liquidators of the Company

(all other property of the Company, being that in respect of which we are no longer receivers, is referred to as the “Excluded Property”).

This report has been prepared by us in accordance with and for the purpose of Section 24 of the Act and covers the period 31 July 2018 to 30 September 2021. It has been prepared for the sole purposes of reporting on the state of affairs with respect to the property in receivership and the conduct of the receivership.

This report is subject to the restrictions set out at Appendix 1. In particular, all information contained in this report is provided in accordance with Sections 26 and 27 of the Act. Furthermore, in preparing this report we have relied upon and not independently verified nor audited information or explanations provided to us.

### **Appointment of Liquidators**

On 3 October 2018, David Ruscoe and Timothy Downes of Grant Thornton NZ Ltd were appointed Liquidators of the Company by way of shareholder resolution.

Subsequently, on 13 November 2018, Iain Shephard and Jessica Kellow of BDO Wellington Ltd were appointed as replacement Liquidators of the Company by way of creditor resolution passed at the Creditor Meeting, at which point Mr Ruscoe and Mr Downes resigned from office.

Over the course of the receivership we worked with the Liquidators to provide information and assistance where appropriate.

### **Receivership of the Ebert Retentions Fund**

On 12 November 2018, we, Lara Bennett, John Fisk, and Richard Longman, were also appointed as Receivers of Ebert’s Retentions Fund (the **Retentions Fund**) by Court Order. This associated receivership was completed on 9 April 2020.

For further information in relation to the receivership of the Retentions Fund please refer to the final Receivers’ report filed with the Registrar on 15 April 2020.

## *Work undertaken*

As detailed in our previous reports, upon appointment our immediate priorities were to:

- Ensure adequate health and safety procedures and safeguards were in place and to secure assets of the Company and its stakeholders (including subcontractors and lease creditors, where they had assets located on Ebert's construction sites).
- Assess the financial position of the Company's 15 active projects, including engagement with contract principals, in order to establish whether it was feasible for work to recommence. As a result of this process we concluded that it was not feasible to continue construction work on any of the active projects, and accordingly we made arrangements to return control of the sites to the principals in a controlled manner.
- Assess the staffing requirements to assist with matters such as the orderly exit of construction sites, establishing the financial position of the Company's construction projects as at the appointment date, develop strategies to realise value from the property in receivership, which included:
  - developing negotiation strategies aimed at releasing retentions held against Ebert;
  - recovering trade receivables (comprising certified progress claims); and
  - Pursuing other avenues to realise value for Ebert's creditors.
- Evaluate and reconcile the positions of the Company's preferential creditors, these being employees and the Inland Revenue Department (**IRD**).

During the receivership key activities included:

- Completion of obligations and receipt of funds in respect of two construction projects in progress at the date of receivership;
- Pursuing other avenues for recovering value (e.g. insurance and other claims);
- Addressing creditor queries where appropriate (note that retentions queries in relation to sub-contracts entered into after 31 March 2017 have been addressed under the receivership of the Retentions Fund);
- Liaison with Ebert's Liquidators;
- Terminating the receivership as regards the Excluded Property; and
- Attending to financial and administrative requirements, including amendment of the receivership appointment.

### ***Particulars of assets and disposal of receivership property***

As detailed in our previous reports, the following table shows particulars of the Company’s key assets as at the date of our appointment, based on the Company’s records.

Type of Asset	Book Value (\$,000)
Cash held in respect of subcontractor retentions	3,683
Client receivables	18,605
Client retentions	4,826
GST	516
Income Tax	2,436
Other Assets	91
<b>Total</b>	<b>30,158</b>

Over the course of the receivership we have omitted certain details concerning the realisation of receivership assets from our statutory reports as we believe that their inclusion would have materially prejudiced the exercise of our functions, in particular, our duty to obtain the best recovery reasonably obtainable in respect of the Company’s assets.

#### **Cash held in separate account in respect of subcontractor retentions**

As detailed in our previous reports, Ebert had been placing funds in a separate bank account in respect of retentions held on subcontracts entered into from 31 March 2017. A separate receivership of these funds was undertaken upon application to the High Court.

#### **Contract receivables**

Ebert’s accounting records as at 31 July 2018 reported total receivables in respect of construction contracts of \$23.43m, represented by invoiced amounts and accruals (\$18.61m) and retentions held by principals (\$4.83m). These were in respect of both active and inactive (i.e. completed) construction contracts.

Projects and contracts were assessed on an individual basis to determine the facts and develop an appropriate strategy to maximise recovery prospects.

As outlined in our previous reports, in many instances resolution of outstanding receivables was a complex and lengthy exercise due to the nature and status of the physical contract works, detailed documentation required and guarantee/warranty issues outstanding and developing during our appointment.

A number of Ebert clients contacted us to notify ongoing defects in respect of the Company’s construction works. Some of these parties advised that the cost of remedying the alleged defects would exceed the value of the retentions held against Ebert and as such they did not intend to release any funds. Formal recovery action was pursued where it was assessed to be appropriate.

Funds totalling \$5.03m were recovered in respect of contract receivables during the receivership, comprising \$3.68m for amounts invoiced prior to receivership and \$1.35m relating to negotiations and recovery actions undertaken in respect of project matters.

***Particulars of assets and disposal of receivership property (cont'd)***

***GST and Income Tax***

As detailed in our previous reports, with the assistance of Ebert staff, the Company's accounting records were updated to 31 July 2018 and a GST return for the July 2018 period was filed.

The receivers subsequently undertook further reconciliations of the taxation position of the Company. As a result, additional recoveries were made in respect of GST.

The Company's records also showed a deferred tax asset of \$2.44m at the date of appointment. This was not considered a realisable asset.

***Other assets***

***Fixed assets***

On appointment, the Company's records showed fixed assets, intangibles and investments with a net book value of \$91k. Fixed assets on hand at appointment predominantly comprised office equipment, IT equipment and minor site plant and equipment.

\$225k has been recovered from the sale of fixed assets, as well as minor site plant and equipment not specifically recorded on the Company's central fixed asset register (i.e. costed directly to the project for which it was purchased). Third party valuations of these assets were obtained where appropriate to support the realisation strategies adopted.

We note that most of the significant construction plant and equipment used by Ebert was leased from a related entity or third parties.

***Insurance and other claims***

A small number of insurance and other claims were pending as at the date of receivership. Where possible we have resolved these matters, with insurance proceeds of \$261k recovered during the receivership.

## Overview and secured creditors

The following table shows the particulars of recorded outstanding debts and liabilities of the Company as at the date of appointment:

Class of Creditor	Note	Description	Amount (\$,000)
Secured - general	1	Bank of New Zealand/EIL	6,085
Secured - general		Kelvin Eric Hale	3,500
Secured - PMSI		Various	Unknown
Unsecured - preferential		Employees	640
		Inland Revenue	349
Unsecured - non-preferential	2	Trade creditors	24,517
		Subcontractor retentions	9,324
		Employees	1,238
		Contingent creditors	Unknown

### Notes

- This amount comprises principal and accrued interest to the date of appointment in respect of the following, and interest will continue to accrue on outstanding balances:
  - Net indemnity liability for bonds on issue prior to receivership
  - Credit card balances
- The Liquidators are handling all unsecured creditor claims in respect of the Company. Please refer to the Liquidators' reports for further detail.

### Creditors with a general security interest

#### First ranking general security

The Bank of New Zealand (**BNZ**) held a registered security interest over the Company in respect of a General Security Agreement (**GSA**) dated 12 July 2013.

On or about 7 December 2020 the BNZ GSA and any remaining secured amounts were assigned to Ebert Investments Limited (**EIL**). At that date the outstanding core amount owing under the first ranking GSA (prior to interest and costs) was \$1.39m.

Over the course of the receivership, direct distributions under the first ranking GSA totalling \$3.42m have been made. After adjusting for reduced bond exposures, including two bonds released during the course of the receivership, the remaining shortfall to the core amount owing under the first ranking GSA is \$0.57m.

#### Other general security claims

Kelvin Eric Hale registered a GSA on 24 July 2018 on behalf of himself and another shareholder in respect of a \$3.5m advance made to the Company. No payments have been made in respect of this security.

One further creditor had asserted a general security interest which was inconsistent with the Company's records and our subsequent investigations. This matter was resolved by agreement between the parties.

#### Creditors with PMSI registrations

On appointment there were 148 specific security financing statements for Purchase Money Security Interests (**PMSI**) registered against the Company.

During the receivership we sought to address the registered financing statements in the following ways:

- Goods/equipment being returned to the creditor;
- Where control of sites reverted to the contract principal, relevant contact details were provided to PMSI claimants to enable them to discuss with the principal any assets subject to security claims that remained on the sites; or
- Confirmation that the creditor did not hold a valid security interest.

We have provided the Liquidators with details of all claims filed with us in respect of outstanding registrations.



## ***Unsecured creditors***

### **Preferential Creditors**

Preferential claims against the Company comprised:

- Employee claims for wages arrears, accrued holiday leave and other entitlements afforded preferential status under section 7 of the Companies Act 1993.
- IRD claims for PAYE for the period from 16-31 July 2018 and GST relating to the month of June 2018.

### ***Employees***

At the date of receivership the Company had 113 employees. We calculated that employee preferential entitlements totalled \$642k (inclusive of PAYE, Kiwisaver and other taxes/deductions) and agreed each employee's claim directly with them. In October 2018 a full distribution of this amount was made to employees in respect of preferential entitlements.

Employees have been notified of their remaining claims that did not have preferential status and details of those claims have been passed on to the Liquidators.

### ***Inland Revenue Department***

IRD was owed pre-receivership GST and PAYE totalling \$1.1m (comprising its preferential claim and other amounts due under its set-off rights).

Upon appointment, we finalised and submitted the Company's pre-receivership GST returns with the assistance of Ebert staff, which reflected a refund due to Ebert of \$1.19m for the month of July 2018.

Following IRD's preferential claims and set-off rights, Ebert received a net refund of \$91k.

### **Unsecured Creditors**

The Company's accounting records as at 31 July 2018 reported unsecured trade creditors of \$33.84m comprising accounts payable (\$24.52m including GST) and retentions (\$9.32m excluding GST).

There are no surplus funds available from the recoveries made during the receivership for distribution to the Liquidators on behalf of unsecured creditors. However, we note that \$3.7m of retentions held aside in trust (plus GST) were dealt with and distributed under the separate receivership of the Ebert Retentions Fund.

As claims continue to be received directly by the Liquidators, we are unable to advise the current balance of unsecured creditor claims. Please refer to the Liquidators for any updates in relation to this position.

## Receipts and Payments

The table opposite sets out the receipts and payments for the Company for the period of the receivership.

We note the following in respect of the payments summarised:

- Wages & Salaries includes payroll costs for Ebert employees whose services were retained after appointment. Certain employees were retained to assist with specific administrative project tasks and asset realisation strategies.
- Security costs relate primarily to the securing of active construction sites in the initial days following appointment. These costs were necessary for safety purposes, as well as the protection of assets of both Ebert and subcontractors/suppliers.
- Operational costs include utilities, lease costs and other administrative costs associated with the business.
- Legal fees predominantly comprise general legal advice to the Receivers, specific advice around security matters (whether GSA or PMSI creditors), employment law advice and litigation advice, where required.

### Ebert Construction Ltd (In Receivership & In Liquidation) Receipts and Payments For the full receivership period from 31 July 2018 to 30 September 2021

\$	Total
<b>Receipts</b>	
Contract receivables	5,028,198
Pre-receivership GST matters	1,919,171
Sale of fixed assets	224,626
Other income	272,189
<b>Total receipts</b>	<b>7,444,185</b>
<b>Payments</b>	
Wages & salaries	304,380
Security costs	115,838
IT costs	37,235
Professional fees	56,553
Insurance	13,668
Operating expenses	85,213
Legal fees	372,877
Payment in respect of security claims	750,000
Receivers' remuneration	1,158,427
Receivers' disbursements	65,769
Distributions to 1st ranking security	3,420,971
Preferential distribution - employees	642,235
Preferential distribution - Inland Revenue	421,001
<b>Total Receipts</b>	<b>7,444,185</b>
<b>Net funds on hand</b>	<b>Nil</b>

***Other matters*****Amounts likely to be available for payment to unsecured creditors**

As a material balance remains outstanding under the first ranking security interest, there are no surplus funds available for unsecured creditors from recoveries made during the receivership.

Any recoveries for, and (if applicable) distributions to, unsecured creditors will be determined by the Liquidators. Please refer to the Liquidators for any update in relation to this position.

**Communication**

We recognise that this has been an extremely difficult situation for the many people and businesses impacted and would again like to thank all parties for their patience and support as we worked through the complexities of the receivership.

As the receivership has now concluded all future correspondence and enquiries should be directed to the Liquidators of the Company as set out in their statutory report dated 30 September 2021. The contact details are as follows:

Attention: Brad Burness

Email: [brad.burness@bdo.co.nz](mailto:brad.burness@bdo.co.nz)

Ebert Construction Limited (in Liquidation)  
c/- BDO Wellington Limited  
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Level 1, Chartered Accountants House  
50 Customhouse Quay  
Wellington 6143

## ***Appendix 1 - Restrictions***

<b>Area</b>	<b>Detail</b>
<b>Statutory requirements</b>	All information contained in this report is provided in accordance with Sections 26 and 27 of the Receiverships Act 1993.
<b>Basis of reporting</b>	The statements and opinions expressed herein have been made in good faith, and on the basis that all information relied upon is true and accurate in all material respects, and not misleading by reason of omission or otherwise.
<b>Information available</b>	<p>We have not independently verified the accuracy of information provided to us, and have not conducted any form of audit in respect of the Company. Accordingly, we express no opinion on the reliability, accuracy, or completeness of the information provided to us and upon which we have relied. Whilst all care and attention has been taken in compiling this report, we do not accept any liability whatsoever arising from this report.</p> <p>The statements and opinions expressed in this report are based on information available as at the date of the report.</p> <p>We reserve the right, but will be under no obligation, to review or amend our report, if any additional information, which was in existence on the date of this report was not brought to our attention, or subsequently comes to light.</p>
<b>Other</b>	<p>Certain numbers in tables throughout this report have been rounded and therefore may not add up exactly.</p> <p>Unless otherwise stated all amounts are expressed in New Zealand dollars.</p>

