

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

***Ebert Construction Limited  
Retentions Fund (in  
Receivership)***

*Pursuant to Section 24 of the Receiverships Act 1993*

*April 2020*

***Company Number: 986366***

**pwc**



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Companies Office  
Private Bag 92061  
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9 April 2020

**Ebert Construction Limited Retentions Fund (in Receivership)**

Please find attached our final report in relation to the receivership of the Ebert Construction Limited Retentions Fund (the **Fund** or the **Retentions Account**), for the period of the receivership, pursuant to Section 24 of the Receiverships Act 1993 (the **Act**).

We have now retired from our position and all matters in respect of the Retentions Account have been finalised. Please be aware that we still act as Receivers of the main company, Ebert Construction Limited (in receivership and in liquidation).

Should you or any reader of this report have any queries, please contact us via the details set out opposite. We wish to thank all subcontractors for their patience and assistance throughout the receivership process.

Yours faithfully

**Ebert Construction Limited Retentions Fund (in Receivership)**

Handwritten signature of Lara Bennett in black ink.

Lara Bennett  
Receiver

Handwritten signature of John Fisk in black ink.

John Fisk  
Receiver

Handwritten signature of Richard Longman in blue ink.

Richard Longman  
Receiver

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***Events leading to our appointment and particulars of assets*****Receivership of the Company - 31 July 2018**

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 Construction Limited (**Ebert** or the **Company**) on the evening of 31 July 2018.

For further information in relation to the Receivership of the Company please refer to the Third Six Monthly Receivers' Report dated March 2020.

**Receivership of the Fund - 12 November 2018**

At the date of the Company's receivership, it held a separate bank account containing funds relating to certain subcontractor retentions. These funds were held aside by the Company in accordance with the requirements of Subpart 2A of the Construction Contracts Act 2002 (**CCA**) in respect of retentions owing on subcontracts entered into on or after 31 March 2017.

We were advised that the Company had been placing funds in the separate bank account with an adjustment made on a monthly basis once subcontractor claims for the prior period had been finalised, buyer created tax invoices (**BCTIs**) issued, and a reconciliation of the resulting obligations completed.

As at the date of the Company's receivership the balance of the separate account was \$3.68m (exclusive of GST) (the **Fund** or the **Retentions Account**), with the last adjustment taking place at the end of June 2018, in respect of Ebert's records of applicable retentions held up to the end of May 2018.

BCTIs for June claims had been processed but the adjusting transfer had not yet been made. The majority of July claims were yet to be processed. Accordingly, the balance of the Fund did not represent all retentions recorded as held for subcontracts entered into on or after 31 March 2017.

Following our appointment as receivers of the Company we determined that the provisions of the CCA did not provide sufficient clarity or guidance in respect of the basis for confirming entitlements or the methods by which such amounts could be distributed. In addition, there are no specific provisions for funding the cost of those activities in an insolvency scenario.

As receivers of the Company we applied for directions from the Court to address the complexities in relation to eligibility to the Fund, ability to distribute and associated cost to administer. We requested a separate receivership appointment over the Fund.

A hearing was held on 8 November 2018 and we, Lara Bennett, John Fisk, and Richard Longman, were appointed joint and several receivers and managers to the Fund by Court Order on 12 November 2018. The property in receivership comprises all funds held in the Retentions Account.

This report has been prepared by us in accordance with and for the purpose of Section 24 of the Act. It is prepared for the sole purpose of reporting on the state of affairs with respect to the property in receivership and the conduct of the receivership.

## ***Particulars of debts and liabilities***

### **Court Judgment**

In addition to the appointment of the receivers, the Court judgment of 12 November 2018 included the following:

- Entitlement to the Fund is limited to those subcontractors with Reconciled and Transferred retention balances, being the specific amounts for individual subcontracts reconciled by Ebert to the Retentions Account up to 22 June 2018, primarily relating to work up to the end of May 2018.
- Those with retention movements relating to claims for work which were processed after the last transfer to the Retention Account was made and those for which no monies were transferred to the Retention Account due to incorrect contractual dates being recorded in Ebert's accounting system (**Wrongly Classified Subcontracts**) do not have an entitlement to the monies contained in the Fund.
- The receivers are granted the ability to make interim payments of entitlements that are due and payable on the basis of a 75% entitlement or such other percentage they consider prudent to enable the receivers to distribute a portion of the fund before resolving associated GST and cost issues and distributing any balance.
- The associated fees, costs and expenses of the Court application were to be deducted from the Fund on an indemnity basis.
- The fees, costs and expenses associated with administration of the Fund are to be deducted from the Fund with a requirement for the receivers to obtain Court approval for those costs, including notification to subcontractors affected by the proceeding. Those affected subcontractors will then have an opportunity to make submissions if they wish to.

- Leave was granted to return to the Court for further directions if required.

In accordance with the judgment the debts and liabilities to be satisfied from the Fund comprise amounts owing to those subcontractors with Reconciled and Transferred retentions balances (being \$3.68m), and associated costs and expenses.

The Receivers gave an undertaking to the Court that the balance of the Retention Account will not fall below the level of interest earned on the Fund from time to time, pending determination of how that interest should be distributed.

### **Creditors with an interest in the property in receivership**

A reconciliation of the Company's records established that 130 subcontractors have an entitlement to the Retentions Account, arising from 182 subcontracts. There are no other creditors with preferential claims to the Fund.

There are no creditors with security interests registered against the Fund. However, the matter of claims to interest accruing on the Fund has not yet been determined and is awaiting the outcome of a current High Court application requesting that the interest be applied towards the costs of administering the Fund.

The Court issued initial procedural orders dated 26 October 2018 which included granting an application to redact creditor names and addresses from the publicly available Court documents in order to protect the commercial interests of the creditors affected. Consistent with this order we have also excluded those details from this report.

***Work undertaken during the receivership***

Following the Court judgment and reconciliation of the Company's records it was established that 130 subcontractors had a claim against the Retentions Account and these claims arose from 182 subcontracts. We wrote to each individual subcontractor (and associated contract principals) on 20 November 2018 setting out their calculated entitlement and the receivers' proposed treatment with respect to each relevant subcontract, seeking their agreement/ confirmation.

**Proposed treatment of claims**

The proposals sent to each subcontractor were made subject to consideration of any known defects or outstanding documentation or other obligations in respect of the specific subcontract works.

To ensure consistency and minimise the costs of administering the Fund, a principles based approach was applied for the proposed treatment of claims, taking into account the level of completion of both the individual subcontract works and the wider project as at the date of the Company's receivership.

Based on the principles applied it was established that \$2.05m (exclusive of GST) of entitlements were eligible for an interim distribution prior to Christmas 2018, subject to any outstanding defects or other obligations. The remaining entitlements of \$1.63m (exclusive of GST) became eligible for distribution during 2019 as the relevant defects periods on the associated subcontracts expired.

Agreement with regards to the proposed treatment of subcontractor claims was able to be reached with majority of subcontractors. This allowed distributions of 90 cents in the dollar in respect of entitlements agreed by subcontractors, to be released during the course of the receivership.

**Defects**

Through the course of the receivership more than 60 claims by principals in respect of defects in subcontracted works were considered. This involved assessing the claims (some of which were very detailed and complex) and negotiating with both principals and subcontractors on resolution. In most instances, issues were resolved and an acceptable position for all relevant parties was able to be reached.

**Application to the High Court**

In November 2019 the Receivers made an application to the High Court, seeking directions in relation to the final outstanding matters in the receivership including:

- The application of interest accruing on the fund;
- Deductions relating to defective works;
- Amounts relating to subcontractors who cannot be located or who have waived their claims to the Fund;
- Approval of Receivers' fees and expenses; and
- A proposed final distribution to subcontractors in respect of all remaining funds.

The Receivers have now been successfully granted all directions sought in relation to this application, including the ability to make a final distribution of approx. 6 cents in the dollar to eligible subcontractors (detailed on the following page). A copy of the High Court orders and other relevant documents are available on our webpage, [www.pwc.co.nz/ebert](http://www.pwc.co.nz/ebert).

As all matters in the Receivership have now been dealt with, the receivers have issued a Notice of End of Receivership which will be available on the Companies Office and also the above referred to webpage, bringing the receivership to a close.

## ***Receipts and Payments***

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

### **Distributions**

Distributions in the course of the receivership total \$4.06m being 96 cents in the dollar (plus GST) on all eligible entitlements where amounts and treatment were agreed, or Court orders granted. These distributions were made as follows:

- NZ\$1.54m in December 2018
- NZ\$0.67m in February 2019
- NZ\$0.05m in March 2019
- NZ\$0.04m in April 2019
- NZ\$0.46m in July 2019
- NZ\$0.68m in August 2019
- NZ\$0.01m in September 2019
- NZ\$0.25m in October 2019
- NZ\$0.07m in November 2019
- NZ\$0.29m in March 2020.

### **GST**

The amounts held in the Retentions Account were exclusive of GST. To facilitate recovery of the applicable GST and enable it to be passed on to the subcontractors, BCTIs were issued for the amounts with the GST component included in a GST return filed by the Company. As a result a further \$0.55m was able to be distributed to the creditors of the Fund (as detailed above).

## **Ebert Construction Limited - Retentions Fund (In Receivership)**

### **Receipts & Payments**

for the period 12 November 2018 to 9 April 2020

	\$
<b>Receipts</b>	
Retention funds on hand at appointment	3,678,833
GST received	551,825
Interest on hand at appointment	27,067
Interest received	25,963
<b>Total receipts</b>	<b>4,283,688</b>
<b>Payments</b>	
Distributions to creditors	4,059,403
Distribution to Unclaimed Monies Fund	3,550
Application costs (in accordance with Court Orders)	79,210
Receivers' Fees	118,705
Receivers' Disbursements	6,723
Legal Fees	8,827
RWT on interest	7,270
<b>Total payments</b>	<b>4,283,688</b>
<b>Net funds on hand</b>	<b>\$ -</b>

***Other matters*****Communication**

As the receivership has now concluded all future correspondence and enquires in relation to Ebert Construction Limited (“the Company”) should be directed to either PwC as Receivers of the Company, or to the liquidators of the Company, BDO Wellington.

The contact details for the liquidators are as follows:

Ebert Construction Limited (In Receivership and In Liquidation)  
c/- BDO Wellington  
PO Box 10340  
Level 1, Chartered Accountants House  
50 Customhouse Quay  
Wellington 6143  
Email: [ebert.liquidators@bdo.co.nz](mailto:ebert.liquidators@bdo.co.nz)



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

<b>Area</b>	<b>Detail</b>
<b>Statutory</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 throughout this report have been rounded and therefore may not add up exactly.</p> <p>Unless where otherwise stated all amounts are in New Zealand dollars.</p>



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