

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

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

*Pursuant to Section 23 of the Receiverships Act 1993*

*January 2019*

*Company Number: 986366*

**pwc**

## Registrar of Companies

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January 2019

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

Please find attached our report in relation to the Ebert Construction Limited Retentions Fund (the **Fund** or the **Retentions Account**) in Receivership pursuant to Section 23 of the Receiverships Act 1993 (the **Act**).

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. In preparing this report we have relied upon and not independently verified or audited information or explanations provided to us.

In accordance with the requirements of section 23 of the Act, we report on:

- the property in receivership;
- the liabilities that are to be satisfied from the property in receivership;
- amounts likely to be available for payment to creditors; 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.

Yours faithfully

**Ebert Construction Limited (in Receivership)**

A handwritten signature in black ink, appearing to read 'Lara Bennett', written over a light blue horizontal line.

Lara Bennett  
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.

Ebert had two principal areas of operation, being construction of processing facilities (predominantly in the dairy sector) and more general commercial (including multi-unit residential) construction.

For further information in relation to the Receivership of the Company please refer to the associated First Receivers Report dated 28 September 2018.

### 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 does not represent all retentions recorded as held for subcontracts entered into on or after 31 March 2017.

Ebert is one of the first significant insolvency events to which the new retentions regime applied. 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.

Due to the complexities in relation to eligibility to the Fund, ability to distribute and associated cost, the receivers of the Company submitted an application for directions from the Court including a request for 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 23 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 issue of claims to interest accruing on the Fund has not yet been resolved. The Receivers have given 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, as noted above, the issue of claims to interest accruing on the Fund has not yet been determined.

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 to date***

As previously noted, following the Court judgement and reconciliation of the Company's records it was established that 130 subcontractors have a claim against the Retentions Account and these claims arise 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 we established that \$2.05m (exclusive of GST) of entitlements would be eligible for an interim distribution prior to Christmas 2018 (**Initial Entitlements**), subject to confirmations from the associated subcontractors and contract principals regarding the proposed treatment.

The remaining \$1.63m (exclusive of GST) would be released over time as relevant defects liability periods reached their expiry date.

To date we have reached agreement with 121 subcontractors with regard to the proposed treatment of their claims and are awaiting confirmation or have ongoing discussions with the remaining 9.

### **Interim Distributions**

Interim distributions totalling **70 cents in dollar** (plus GST) of Initial Entitlements that had been agreed by both the subcontractor and the contract principal have been paid out. For any subcontracts where agreement had not been reached, we are continuing discussions to understand and resolve outstanding issues in order to reach an acceptable position for all relevant parties.

## **Other matters**

### **Distributions to date**

The orders issued by the Court gave the receivers the ability to make interim payments of entitlements that are due and payable on subcontracts with agreed entitlements.

Accordingly we have made interim distributions of **70 cents in dollar** (plus GST) for Initial Entitlements where amounts and treatment is agreed. To 31 December 2018, these distributions totalled c.\$1.54m (c.\$1.34m plus GST) as follows:

- NZ\$1.16m on 7 December 2018
- NZ\$0.31m on 14 December 2018
- NZ\$0.07m on 19 December 2018

Further distributions will be made in accordance with the principles applied and/or by agreement with the relevant parties, and once associated GST and cost issues are resolved.

### **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.

The return is currently under assessment by Inland Revenue.

### **Information provided by the Company**

As we are also receivers of the Company, we have had full access to Ebert's available financial records and associated information required to complete this report.

### **Communication**

We have received a high volume of correspondence from subcontractors and other parties both in respect of the retentions and the wider receivership of the Company which we have endeavoured to reply to in a timely manner.

This is an extremely difficult situation for the many people and businesses impacted and we are conscious that most subcontractors are likely to experience a significant shortfall in their wider claims for unpaid works and/or retentions not held in the Fund. Recognising that the Fund may be the only recovery for many subcontractors we aim to progress its distribution as cost and time efficiently as possible.

We would like to thank all parties for their ongoing patience and support as we work through the administration of the Fund and seek resolution of outstanding matters. Our next statutory report under Section 24 of the Act, covering the period from 12 November 2018 to 11 May 2019, will be issued in July 2019.

Material updates will be communicated either in writing to relevant parties or via our webpage. In the interim, should subcontractors or other stakeholders have any queries arising from this report, please contact us as follows:

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## *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. 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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