

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 1993 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
as receivers of Ebert Construction Limited (in receivership and liquidation) each being
Chartered Accountants of Auckland or Wellington

Applicants

and

Ebert Construction Limited (in receivership and liquidation)
a duly incorporated company having its registered office at 188 Quay Street, Auckland
Respondent

Originating Application by Applicants 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

Dated: 23 October 2018

For hearing: 8 November 2018



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Case Manager	
Next Event:	/ /
23 OCT 2018	
THE HIGH COURT WELLINGTON	

To: The Registrar of the High Court at Wellington

And to: The subcontractor creditors of Ebert Construction Limited (in receivership and liquidation) (**Ebert**) listed in Schedule One (the **Subcontractors**)

The principals of Ebert's construction contracts listed in Schedule Two (the **Principals**)

David Ian Ruscoe and Timothy Wilson Downes as liquidators of Ebert Construction Limited (in receivership and liquidation) (the **Liquidators**)

This document notifies you that -

1. The applicants, Lara Maree Bennett, John Howard Ross Fisk and Richard Michael Longman as receivers of Ebert (the **Receivers**) will on 8 November 2018 at 10:00am apply for orders:

Procedural orders

- (a) permitting these proceedings to be commenced by way of originating application, if leave is required;
- (b) appointing the Applicants as joint and several Court appointed receivers to the retention fund held by Ebert in a bank account (number) titled "Ebert SC Retentions" (the **Retentions Account**) (the **Fund**);
- (c) that service of this Application on the Subcontractors and Principals be deemed to have occurred upon the following steps:
 - (i) publishing this Application (together with accompanying memoranda and affidavits) on the PricewaterhouseCoopers (**PwC**) webpage dedicated to the Ebert receivership <https://www.pwc.co.nz/ebert> (the **Website**);

- (ii) emailing Principals and Subcontractors for whom the Applicants have an email address to advise of the Application and providing a link to the Website; and
 - (iii) for the Subcontractor for whom the Applicants do not have an email address, or for any Subcontractors or Principals for whom an email is returned undelivered, couriering a letter to their registered office or last known address advising of the Application and informing them that the Application and associated documents are available on the Website;
- (d) as to the timetabling of the Application as follows:
- (i) any application by a Subcontractor, Principal or other interested party for joinder to the Application be filed by 31 October 2018;
 - (ii) the Applicants to file written submissions by 2 November 2018 and serve those submissions on the Subcontractors and Principals in accordance with paragraphs 1(c)(i) and (ii) above;
 - (iii) any submissions by any person joined to these proceedings be filed and served by 6 November 2018;
 - (iv) the Application be set down for hearing on 8 November 2018; and
 - (v) a telephone conference with the Judge who is to hear the application be held on 25 or 26 October 2018 to discuss various procedural matters in advance of the hearing and the key issues to be determined at the hearing.

Substantive Orders

- (e) directing whether the Fund is held by Ebert on trust in accordance with sections 18A to 18I of the Construction Contracts Act 2002 (the **Act**) for:

- (i) the Subcontractors in respect of whom, and in proportion to amounts in respect of which:
- (A) Ebert issued and sent a Buyer Created Tax Invoice (BCTI) to that subcontractor, which showed a deduction for retention monies from the amounts otherwise payable to that subcontractor under that BCTI;
 - (B) Ebert subsequently transferred retention monies relating to that BCTI into the Retention Account; and
 - (C) those retention monies did not cease to be retention monies pursuant to section 18C(3) of the Act;

(Subcontractors with Reconciled and Transferred Retentions);

OR

- (ii) both:
- (A) Subcontractors with Reconciled and Transferred Retentions; and
 - (B) Subcontractors in respect of whom, and in proportion to amounts in respect of which Ebert:
 - created a BCTI which showed a calculation of the retention monies from the amounts otherwise payable under that BCTI;
 - but did not transfer any retention monies in respect of that BCTI into the Retention Account

(Subcontractors with Calculated but Not Transferred Retentions); or

OR

- (iii) all of:

- (A) Subcontractors with Reconciled and Transferred Retentions;
- (B) Subcontractors with Calculated but Not Transferred Retentions; and
- (C) those amounts which Ebert was entitled to retain in respect of services performed under a commercial construction contract (**CCC**) dated after 31 March 2017 but for which Ebert has not:
 - issued any BCTIs in respect of those services; and/or
 - calculated any retention monies in respect of those services; and/or
 - transferred any retention monies in respect of those services into the Retention Account

(Subcontractors with Uncalculated and Not Transferred Retentions).

- (f) that for the avoidance of doubt a subcontractor may be included in more than one of the three categories above in respect of one or more CCC;
- (g) directing into which of the three categories of subcontractors, set out at paragraph (e) above, the subcontractors in respect of the Wrongly Classified Subcontracts (as defined in the affidavit of Lara Maree Bennett dated 23 October 2018) fall;
- (h) that the Receivers may determine and pay valid claims to the Fund, including by way of interim distribution, in accordance with the terms of the relevant subcontract, the Act and the Court's orders;
- (i) that the Fund is to be distributed to, for, or in respect of valid claims from the subcontractors:

- (i) on a *pari passu* basis in relation to their respective retention amounts; and
- (ii) on a basis which does not pay any interest claims on any retention monies unless or until all valid (non-interest) claims on the Fund are paid in full.
- (j) allowing the Receivers to deduct from the Fund their costs and expenses relating to the management and administration of the Fund, including those in respect of this Application; and
- (k) that leave to apply to the Court for further directions is reserved.

2. The grounds on which the orders are sought are as follows:

- (a) The Applicants were appointed receivers to Ebert on 31 July 2018.
- (b) On 3 October 2018 Ebert was placed into liquidation by shareholder resolution.
- (c) Upon receivership Ebert held \$3.684 million of retentions in the Retentions Account (i.e. the Fund).
- (d) Pursuant to the Act, Ebert was entitled to hold retentions relating to 213 CCCs between Ebert and 152 subcontractors.
- (e) Section 18C of the Act provides that retention monies must be held on trust by Ebert:
 - (i) as trustee for the benefit of the affected subcontractors; and
 - (ii) as cash or other liquid assets that are readily converted into cash.
- (f) Ebert's practice was to hold retention monies on trust in a separate bank account, being the **Retentions Account**.
- (g) Each month Ebert would issue Buyer Created Tax Invoices (**BCTIs**) in respect of payment claims made under its CCCs. The BCTIs would detail:

- (i) the amounts payable under the CCC to the subcontractor; and
 - (ii) of those amounts, the amounts which were retained by Ebert as retentions.
 - (h) The Retentions Account would then be reconciled, with (if necessary) funds representing the net increase in retentions held subject to the provisions of the Act being transferred from Ebert's general accounts to the Retentions Account.
 - (i) The Fund is funded by retentions monies transferred to the Retention Account as part of this process.
 - (j) Accordingly, the Fund is not an asset available to meet the liabilities of Ebert to its secured or general unsecured creditors. The Fund is held on trust for some or all of the Subcontractors.
 - (k) The last payment into the Retentions Account was made on 22 June 2018 in respect of BCTIs for work undertaken by subcontractors up to 31 May 2018.
 - (l) Accordingly, the Fund does not represent all retentions Ebert was entitled to retain under the Act.
 - (m) The Liquidators of Ebert support the Receivers making an application to the Court for appropriate orders.
3. The further grounds on which particular orders are sought are as follows:

Leave to commence as an originating application

- (a) As to the orders sought at paragraph 1(a):
 - (i) Application by receivers for directions from the Court is made as an originating application as of right under High Court Rule 19.4.
 - (ii) To the extent that leave is required to make this application pursuant to Part 19 of the High Court Rules, it

is in the interests of justice that the Court grant such leave.

- (A) The Application is not expected to be opposed.
- (B) All substantive orders save for the order appointing the Applicants as Receivers to the Fund are made as an application by Receivers (once appointed) for directions. If those orders were sought as a stand alone application, it would be made as an originating application as of right.
- (C) The order appointing the Applicants as Receivers is not adverse to the interests of Subcontractors and Principals who may have an interest in the Fund.
- (D) It is in the interests of justice that the Application be determined promptly and efficiently.

Appointment as receivers of the Fund

- (b) As to the orders sought in paragraphs 1(b) and 1(h):
 - (i) The Fund is not an asset of Ebert. As such:
 - (A) the ability of the Applicants, in their capacity as receivers appointed under the terms of a security agreement, to deal with the Fund is unclear; and
 - (B) the Fund is not available to general creditors in the liquidation of Ebert.
 - (ii) There are complex factual and legal issues relating to the Fund including:
 - (A) for whom the Fund is held;
 - (B) when Subcontractors are entitled to be paid from the Fund; and
 - (C) the quantum of any such payment from the Fund.

- (iii) Currently no-one is actively managing the Fund.
- (iv) In the absence of such active management, the Subcontractors will be prejudiced as they will not be paid any amounts owing to them from the Fund.
- (v) The Applicants have already undertaken significant analysis of Ebert's records in order to ascertain which Subcontractors may have an interest in the Fund, the basis for that interest and the likely quantum of any interest. If the Liquidators were required to manage the Fund, there would likely be significant duplication of work, with a resulting duplication in costs, to the detriment of the general creditors of Ebert and the Subcontractors.
- (vi) The Applicants anticipate that there will be a shortfall to secured creditors and therefore no surplus available for transfer to the Liquidators to pay for them to manage the fund.
- (vii) The receivership and subsequent liquidation of Ebert has caused significant financial pressure for a large number of the Subcontractors. The ability to manage the Fund and make payments to the Subcontractors from the Fund promptly will alleviate some of that pressure.
- (viii) The Liquidators support the Applicants seeking appropriate Court orders to facilitate distribution of the Fund.
- (ix) The Receivers have had discussions with 12 Subcontractors representing interest in approximately 47% of the amounts held in the Fund to inform them of the intent to make an Application to the Court to facilitate distribution of the Fund prior to it being filed. None of these subcontractors have objected to the Applicants' intention to proceed with the application and a number have confirmed a willingness to potentially provide

assistance with costs should no other funding source be secured.

- (x) It is appropriate that the Applicants' costs and expenses in administering the Fund be paid from the Fund.

Service of the Application

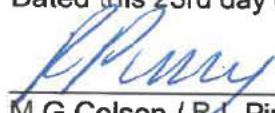
- (c) As to the orders sought at paragraph 1(c):
 - (i) There are 152 Subcontractors who may have an interest in the Fund and 21 Principals.
 - (ii) Personal service of the Application on all Subcontractors would significantly delay determination of the Application and would incur significant costs, which may ultimately be ordered to be deducted from the Fund, to the detriment of Subcontractors.
 - (iii) The Applicants have email addresses for:
 - (A) 151 of the 152 Subcontractors, 97 of which were provided for the specific purpose of communication in the receivership; and
 - (B) all 21 Principals, 20 of whom the Receivers have been actively in contact with.
 - (iv) Key information regarding the receivership has previously been communicated to creditors of Ebert, including the Subcontractors and Principals in the manner outlined at paragraph 1(c)(i) and (ii) above.
 - (v) The Applicants believe that service in the manner sought will be likely to:
 - (A) bring the Application to the attention of all of the Subcontractors and Principals; and
 - (B) assist for the Application to be brought before the Court for determination promptly.

As to the orders on distribution of the Fund

- (d) As to the orders sought at paragraphs 1(e), (f), (g), (h) and (i) above:
 - (i) In the event that this Court orders one or more of the following:
 - (A) that Ebert holds the Fund on trust in respect of Subcontractors with Reconciled and Transferred Retentions and either or both of Subcontractors with Calculated but Not Transferred Retentions and Subcontractors with Uncalculated and Not Transferred Retentions;
 - (B) the subcontractors in respect of the Wrongly Classified Subcontracts have a claim to the Fund;
 - (C) that the Receivers are entitled to be paid the costs of administering the Fund from the Fund;there will be a shortfall of assets in the Fund to pay claims on the Fund.
 - (ii) The fairest and most efficient way to distribute the Fund would be on a *pari passu* basis for valid claims to the Fund.
 - (iii) Subcontractors may also have a claim to the Fund to pay interest on retention amounts owing to them at the rate provided for in the relevant CCC (if any).
 - (iv) If the Applicants are required to pay interest claims from the Fund:
 - (A) this would add further complexity and associated additional costs to the processing of claims to the Fund;
 - (B) the interest claims would further deplete the recovery rate on valid claims to the Fund;

- (C) it is not in the interests of affected Subcontractors who have a claim to the Fund that interest claims be paid from the Fund.
- (v) The ability to make an interim distribution will enable some payments to be made in respect of valid claims to the Fund promptly, alleviating financial pressure on Ebert's Subcontractors.
- (e) As further detailed in:
 - (i) the affidavit of Lara Bennett filed herein; and
 - (ii) the further affidavit of Lara Bennett to be filed shortly.
- 4. The application is made in reliance on sections 18A to 18G of the Construction Contracts Act 2002, sections 2 and 34 of the Receiverships Act 1993, High Court Rules 19.4 and 19.5, the Court's inherent jurisdiction to appoint receivers to property, *Rea v Chix Products (California) Ltd* (1986) 3 NZCLC 99,852, *Steel v Matatoki International Ltd* (1988) 4 NZCLC 64710 and *Rea v Omana Ranch Ltd* [2013] 1 NZLR 587.

Dated this 23rd day of October 2018


M G Colson / R L Pinny
Counsel for the Applicants

This document is filed by Sally Virginia McKechnie of Simpson Grierson, solicitor for the Applicants. The address for service of the Applicants is Level 24, HSBC Tower, 195 Lambton Quay, Wellington.

Documents for service on the Applicants may be left at that address or may be:

- (a) posted to the solicitor at PO Box 2402, Wellington, 6140; or

(b) emailed to the solicitor at
sally.mckechnie@simpsongrierson.com /
josh.cairns@simpsongrierson.com

Documents served on the Applicants should be marked for the attention of
S McKechnie / J Cairns.

Schedule One: The Subcontractors

Schedule Two: The Principals