

In the High Court of New Zealand  
Wellington Registry

CIV-2018-485-

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

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**Memorandum of counsel for the Applicants in support of originating application seeking:**

- (a) **orders appointing the Applicants 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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May it please the Court:

***Introduction***

1. This is an application by the receivers of Ebert Construction Limited (in receivership and liquidation) (**Ebert**) for orders:
  - (a) appointing them as receivers to a fund of retention monies held by Ebert on trust for subcontractors (the **Fund**) pursuant to the terms of the Construction Contracts Act 2002 (the **Act**); and
  - (b) for directions as to the management and distribution of the Fund(the **Application**).
2. To the best of the Applicants' knowledge, this is the first insolvency to deal with the new retentions regime under the Act (which came into effect on 31 March 2017) and as such raises a number of important and novel issues.
3. The Applicants request that three orders be granted on the papers to facilitate the progress of the Application:
  - (a) leave to commence this Application by originating application, if such leave is required (order 1(a) of the Application);
  - (b) orders as to service of the Application (order 1(c) of the Application); and
  - (c) timetabling of the Application.
4. A list of the orders now sought to progress the Application are set out at Schedule One to this memorandum.

***Background to this Application***

5. Ebert is a large construction company. It became insolvent and had receivers appointed in July 2018 and liquidators appointed in October 2018. To give some indication of the scale of Ebert's business prior to receivership, it had 15 active project sites nationwide and offices in Auckland and Wellington. It employed approximately 100 staff and

had a forecast turnover for the year to 31 March 2019 of \$171 million.<sup>1</sup>

6. At the time of its receivership, Ebert held a fund of monies retained under commercial construction contracts as security for the performance of obligations under those contracts (known as **retentions**) totalling \$3.684 million (the **Fund**).<sup>2</sup>
7. The Act provides that where Ebert intends to withhold sums which would otherwise be required to be paid under a commercial construction contract (**CCC**) dated after 31 March 2017 to a subcontractor, those funds must be held on trust for the subcontractor.
8. Ebert's practice was to place funds in a separate bank account (the **Retentions Account**) in respect of retentions held on subcontracts entered into after 31 March 2017, in accordance with the Act. Its general practice was:
  - (a) The subcontractor would raise a claim for payment based on the prior period (generally the previous month).
  - (b) Ebert would consider whether the claim was in accordance with what it considered was owing under the CCC.
  - (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.
  - (d) Once the BCTIs were processed, Ebert would conduct a reconciliation process, taking into account "new" retentions to be paid into the Retentions Account and the amount of retentions to be released to subcontractors. Ebert would then

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<sup>1</sup> Affidavit of Lara Maree Bennett sworn 23 October 2018 (**Bennett Affidavit**), para 2.4

<sup>2</sup> Bennett Affidavit, para 1.7

transfer the sums amounting to the net additional retention monies from its general accounts to the Retention Account.<sup>3</sup>

9. However, in the month prior to the appointment of receivers, Ebert did not complete this process.<sup>4</sup>
- (a) Ebert followed its usual processes up to the end of June 2018 in respect of invoices for services performed in May 2018.
  - (b) The last transfer of retention payments from Ebert's general account to the Retention Account was on 22 June 2018. Following that transfer, the amounts in the Retention Account comprised retentions held (and reconciled) by Ebert up to the end of May 2018. In this Application those retentions calculated by Ebert and reconciled to the Retentions Account are referred to as the **Reconciled and Transferred Retentions**.
  - (c) The process in respect of June claims was not completed. Ebert issued BCTIs which calculated how much retentions were to be held for the month of June. However, it did not transfer any funds into the Retentions Account for those retentions. In this Application those amounts are referred to as **Calculated but Not Transferred Retentions**.
  - (d) Ebert did not commence the process for the month of July 2018 prior to the appointment of receivers on 31 July 2018. That is Ebert did not issue BCTIs for all claims, nor calculate retentions to be held, nor transfer any funds to the Retentions Account. In this Application the amounts Ebert was entitled to retain under the CCCs but in respect of which Ebert took no steps prior to receivership are referred to as the **Uncalculated and Not Transferred Retentions**.
10. The Receivers have carried out significant work attempting to reconcile Ebert's records, to establish which Subcontractors could have a claim to the Fund (based on any of the Reconciled and Transferred Retentions, Calculated but Not Transferred Retentions or

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<sup>3</sup> Bennett Affidavit, para 2.8

<sup>4</sup> Bennett Affidavit, paras 2.10 to 2.14

Uncalculated and Not Transferred Retentions) and the amount of any such claim. This shows:

- (a) 152 subcontractors could have a claim to the Fund pursuant to 213 separate CCCs (including 14 CCCs where Ebert may have incorrectly recorded the date on which the contract was entered into and therefore incorrectly treated them as not being subject to the retentions regime of the Act).
- (b) The claims to the Fund relate to 21 different Projects.<sup>5</sup>

11. The 21 Projects were at various stages. By way of overview:

- (a) Ten Projects had achieved Practical Completion or Taking Over (including one of the active projects); nine of which are still within contractual defects notification periods.
- (b) Eleven were Projects which had not achieved Practical Completion or Taking Over at the time of Receivership: some were 95% completed, others had only just commenced. One project was days from Taking Over and subsequently achieved this with the co-operation and assistance of the Receivers.<sup>6</sup>

12. In this application, the Applicants seek the following directions:

- (a) that they be appointed receivers of the Fund. This is not expected to be contentious. It is in the interests of subcontractors that someone manage the Fund, so valid claims to the Fund can be paid. As the Applicants have already done a substantial amount of work reconciling the Fund, it makes sense that they assume this role. In the absence of the orders being made, there is a risk their appointment as receivers could come to an end before the Fund is distributed.
- (b) as to whether the Fund is held by Ebert on trust for subcontractors:

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<sup>5</sup> Bennett Affidavit, para 2.20

<sup>6</sup> Bennett Affidavit, para 2.21

- (i) only in respect of the Reconciled and Transferred Retentions (i.e. those where Ebert transferred funds into the Retention Account to be held on trust); or
- (ii) in respect of both the Reconciled and Transferred Retentions and the Calculated but Not Transferred Retentions; or
- (iii) in respect of any amounts Ebert was entitled to retain under a CCC regardless of whether those amounts were calculated by Ebert prior to receivership or transferred to the Retention Account.

This is expected to be the major focus of the submissions. These options will result in different recovery rates on amounts owing to individual subcontractors. The position of the incorrectly recorded CCCs (i.e. Ebert did not set aside retentions in respect of these CCCs when the Act required it to do so) will also form part of this.

- (c) that the Applicants may determine and pay valid claims to the Fund, including by way of interim distributions, in accordance with the terms of the relevant subcontract, the Act and the Court's orders. Again, this is not expected to be contentious – it is in the interests of, and is expected to be supported by, subcontractors.
- (d) Ancillary orders including as to service on interested parties and payment from the Fund of the Applicants' costs relating to this Application and administering the Fund.

***Application for leave to commence the Application as an originating application***

13. The Application can be split into two substantive parts:
- (a) an application to be appointed receivers of the Fund; and
  - (b) if so appointed, an application for directions as to the management and distribution of the Fund.

14. An application by a receiver for directions can be made as of right as an originating application – see High Court Rule 19.4(b). However, an application to be appointed receivers of the Fund is not an application expressly listed as one which can be commenced by way of originating application in High Court Rules 19.2 to 9.4.
15. There is an argument that as Ebert is the legal owner and trustee of the Fund (even though it does not have beneficial ownership) the Fund forms part of the assets to which the Receivers have been appointed, pursuant to the security instrument. On this basis:
  - (a) the Receivers would be entitled to manage the fund as agent of the trustee, Ebert; and
  - (b) therefore this application is, in its entirety, an application for directions by a receiver as to how to manage the Fund.
16. However, the Applicants consider that the matter is not clear, and therefore the prudent option is to make a separate application to be appointed as receiver of the Funds, to remove any doubt as to their ability to manage the Fund for the benefit of the subcontractors. Being appointed as receivers of the Fund will also ensure continuity of management of the Fund in the event they retire as receivers (i.e. receivers appointed by the secured creditor) prior to the Fund being fully distributed.
17. Rule 19.5 provides that:
  - (a) The Court may, in the interests of justice, permit any proceeding not mentioned in Rules 19.2 to 19.4 to be commenced by originating application.
  - (b) The Court's permission may be sought without notice.
18. In *Jones v H W Broe Ltd*<sup>7</sup>, McGechan J considered an application for leave to use the originating application procedure on a without notice

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<sup>7</sup> (1989) 5 PRNZ 206 (HC) at 207

basis. His Honour discussed the rationale underlying Rule 19.5 as follows:

*The ... originating application procedure was designed as a genuine exception, and as an expedient for cases where there was in reality no opposing party, avoiding clumsy and unnecessary use of a full statement of claim and notice of proceeding. It was not intended for routine use in cases where there was another likely party with contrary interests.*

19. Since then, the Courts have acknowledged that the procedure is no longer limited to applications where there is no opposing party, but that in relation to opposed substantive applications not expressly listed in Rules 19.2 to 19.4, it would be an exceptional procedure.<sup>8</sup>
20. It is clearly in the interests of justice that leave be granted pursuant to Rule 19.5.
21. Significantly, the only substantive order which does not expressly fall within Rule 19.2 to 19.4 - that is, the order to appoint the Applicants as Receivers to the Fund – is not expected to be opposed.
  - (a) The Liquidators of Ebert have advised the Applicants that they support their application to the Court for appropriate orders to facilitate distribution of the Fund.
  - (b) Subcontractors are not expected to oppose those orders. Rather, the appointment orders sought are in the interests of subcontractors, as they will expedite payment of claims to the Fund. Supporting this, the Applicants have already contacted 12 Subcontractors who have claims to approximately 47% of the Fund, to inform them of the intended Application. None indicated an objection to the Receivers seeking appropriate orders from the Court to facilitate distribution of the Fund and a number have indicated a willingness to provide funding support to enable the Application to be progressed in the event alternative funding cannot be secured.<sup>9</sup>

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<sup>8</sup> *Hong Kong & Shanghai Banking v Erceg* (2010) 20 PRNZ 652 at 659

<sup>9</sup> Bennett Affidavit, para 3.7



22. The Receivers ask that the Application be determined promptly and have asked the Registry to “pencil in” a hearing date of 8 November 2018. The insolvency of Ebert has put significant financial pressure on a large number of subcontractors. It is in the interests of all concerned that certainty as to which parties have a claim to the Fund, the basis for that claim and the likely quantum of that claim is provided promptly. The Receivers expect that following determination of the Application, they will be able to make, at least, an interim distribution from the Fund to a number of Subcontractors promptly- and ideally before Christmas
23. There is no need for a statement of claim to be filed nor any interlocutory applications. Rather, it is in the interests of all parties concerned and in the interests of justice that the Application progresses in the most efficient manner. The originating application procedure will enable that to happen.

***Service of the Application***

24. The Receivers also seek orders as to the service of the Application on Subcontractors and Principals who may have an interest in the Fund.
25. It is not in the best interests of affected Subcontractors and Principals that the Applicants be required to personally serve the Application on every person who may be affected by it:
  - (a) There are 152 affected subcontractors with a potential interest in the Fund, relating to 21 different construction projects. This means at least 173 persons (subcontractors and principals) would need to be served with the Application.
  - (b) There would be significant costs associated with personally serving each of those subcontractors and principals. If the Applicants’ costs of this Application were deducted from the Fund, the costs of service would deplete the Fund further, at the expense of affected subcontractors.

- (c) Service on all 173 persons would invariably delay determination of the Application. This matter is currently pencilled in for a hearing on 8 November 2018. Registry staff have advised that it is the only available hearing date before the Christmas shutdown period. Requiring personal service on all persons with an interest in the application would therefore significantly prejudice the likelihood of the matter being heard this year.
- (d) Service by:
  - (i) publishing the Application and associated court documents (including affidavits and memoranda) on the PwC webpage dedicated to the Ebert receivership (the **Website**); and
  - (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;

is most likely to bring the Application to the attention of all interested Principals and Subcontractors.


26. As is detailed in the affidavit of Lara Bennett, the Applicants:

- (a) have communicated by email with 20 of the 21 Principals and have an email address for the remaining one; and
- (b) have email contact details for 151 of the 152 subcontractors and a postal address for the remaining one. 97 of these email

contact details were provided to the Applicants specifically for the purpose of communications in the receivership.<sup>10</sup>

### **Timetabling the Application**

27. The Applicants seek the following timetabling directions in respect of the Application:
- (a) that any party who wishes to join the proceeding must file an application for joinder by Wednesday 31 October 2018;
  - (b) the Applicants to file their submissions by 2 November 2018 and serve them on the Subcontractors and Principals in accordance with the orders at paragraph 24(d)(i) and (ii) above;
  - (c) any other person joined as a party to file their submissions by 6 November 2018;
  - (d) the Application be set down for a one day hearing on 8 November 2018; and
  - (e) a telephone conference with the Judge be set down on 25 or 26 October 2018 to discuss various procedural matters in advance of the hearing.

  
M G Colson / R L Pinny  
Counsel for the Applicants

23 October 2018

<sup>10</sup> Bennett Affidavit, para 3.4

### **Schedule: Initial orders sought**

1. Permitting these proceedings to be commenced by way of originating application, if leave is required.
2. That service of this Application on the Subcontractors and Principals be deemed to have occurred upon the following steps:
  - (a) 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**);
  - (b) 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
  - (c) 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.
3. As to the timetabling of the Application as follows:
  - (a) any application by a Subcontractor, Principal or other interested party for joinder to the Application be filed by 31 October 2018;
  - (b) the Applicants to file written submissions by 2 November 2018 and serve those submissions on the Subcontractors and Principals in accordance with paragraphs 2(a) and (b) above;
  - (c) any submissions by any person joined to these proceedings be filed and served by 6 November 2018;
  - (d) the Application be set down for hearing on 8 November 2018; and
  - (e) 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.