

## **Ebert Construction Limited (in receivership and liquidation): Retention Monies Fund: Summary of Application**

As mentioned in the Receivers' first report to creditors, Ebert Construction Limited (in receivership and liquidation) (**Ebert**) is holding a fund of retention monies on trust, on the terms specified in the Construction Contracts Act 2002 (the **Act**) (the **Fund**). Upon receivership the Fund was approximately \$3.68 million.

As the Fund is held on trust, it is not available to pay general secured and unsecured creditors of Ebert. It is only available to meet claims for failure by the subcontractor to meet their obligations under the subcontract (for defective workmanship or failure to produce documentation and the like) and in the absence of any such claims being raised during the period specified in the contract, must be returned to the subcontractor.

The Receivers would like to pay out valid claims to the Fund promptly and provide certainty as to the entitlements of beneficiaries of the Fund, the amount of each claim and how claims to the Fund will be managed. However, as the Act does not expressly provide how retentions are to be applied in an insolvency and given the circumstances leading up to Ebert's receivership, this means that resolution of claims to the Fund is complex.

On 23 October 2018 the Receivers filed an application with the High Court seeking orders appointing them as Receivers to the Fund and for directions as to the payment of claims to the Fund (the **Application**). The Application is expected to be heard by the Court on 8 November 2018. However, it is hoped that the Court will this week grant some of the procedural directions sought.

### **What orders are being sought?**

The orders sought are explained below:

- ***Orders appointing Ebert's Receivers as Receivers to the Fund***
  - As the Fund is held by Ebert on trust, there is a question as to whether the Receivers of Ebert, appointed pursuant to a security instrument by a secured creditor, can deal with the Fund. This is particularly an issue if the wider receivership comes to an end before the claims to the Fund are resolved. This order will enable the Receivers to manage the Fund and pay out claims to the Fund without interruption.
- ***Orders as to the basis for claims to the Fund***
  - Entitlement to make a claim on the Fund by a subcontractor could be based on three possible scenarios:
    - Monies which were retained by Ebert in respect of invoices it issued in respect of work undertaken to the end of May 2018. The monies which were retained by Ebert as retentions for work undertaken to the end of May were generally transferred from Ebert's general accounts to the bank account set up to hold retention monies on trust (the **Retentions Account**) in late June 2018. These retentions are defined in the Application as the Reconciled and Transferred Retentions.
    - Processing of retention monies for work undertaken up to the end of June 2018 was not completed by Ebert. During July 2018 Ebert calculated how much it considered was payable under its various subcontracts and how much would be retained and created the requisite invoices. However, no retention monies in respect of those invoices were subsequently transferred into the Retention Account. These retentions are defined in the Application as the Calculated but Not Transferred Retentions.

- Ebert did not calculate or process retention monies in respect of work undertaken by its subcontractors in or around July 2018. That is, it did not complete the claims assessment process to calculate how much it considered was owing under the subcontracts for those services and how much could be retained in respect of those services, nor did it create any invoices or transfer any amounts representing associated movements in retentions into the Retentions Account. These retentions are defined in the Application as Uncalculated and Not Transferred Retentions.

The lawyers for the Receivers will detail for the Court arguments both in favour of and against each category of retentions forming the basis of a valid claim to the Fund. However, their preliminary advice is that they will feel bound to advise the Court they consider the most legally sound approach is that only claims based on the Reconciled and Transferred Retentions should be paid from the Fund.

- In addition, in the course of conducting supporting reconciliations, the Receivers have so far identified 14 subcontracts for which incorrect contract dates were entered into Ebert's system. This resulted in Ebert treating such contracts as if they were entered into prior to the current retentions regime, and accordingly retentions in respect of those subcontracts were not transferred to the Retentions Account. These subcontracts are defined in the Application as "Wrongly Classified Subcontracts" and the Application seeks orders as to which of the above three categories these subcontracts would fall within. Again, the Receivers' lawyers will detail for the Court arguments both for and against the Wrongly Classified Subcontracts having a claim to the Fund.
- Depending on the Court's orders, it seems likely that the value of claims to the Fund will be greater than the value of the Fund. In such a case, the Receivers seek orders that the Fund be distributed so that each claim is paid a pro-rated share in the Fund. That is, valid claims would be paid out at x cents in the \$.
- That interest claims in respect of retentions due and owing are not paid from the Fund.
  - It is not clear whether any claims for interest on retentions due and owing by Ebert would be a claim against the Fund.
  - Even if such a claim was a claim against the Fund, ascertaining valid interest claims will be complex, time consuming and will simply increase the costs of administering the Fund (where such costs may be deducted from the Fund itself) and delay prompt payment of claims. Therefore, the Receivers consider it is not in the interests of claimants to the Fund to undertake such a time-consuming and costly task.
  - There will not be a surplus from the Fund. Accordingly, payment of interest claims will only reduce the likely recovery rate of valid claims for retentions for all affected subcontractors.

- **Ancillary Orders**

- The ability to make an interim payment from the Fund. This will ensure that a significant portion of the valid claims (ideally 75% or more) can be paid out promptly, with any surplus paid out upon the administration of the Fund being concluded

- The ability to serve the Application on sub-contractors and principals by way of email. There are 152 affected subcontractors and 21 principals with a potential interest in the Fund. If the Receivers are required to serve all persons personally, this would be costly and time-consuming.
- Leave to raise the application by way of originating application. This will enable the Application to be determined in a more speedy and efficient manner than the standard procedure.
- A timetable of next steps to advance the application as swiftly as possible,
- The Receivers' costs in administering and managing the Fund be deducted from the Fund itself.

If the Court grants the orders sought, the Receivers would contact each subcontractor or principal directly with regard to their individual position and the proposed treatment in respect of any entitlement to the fund.

### **Can a Sub-contractor or Principal oppose or participate in the Application?**

If you wish to oppose or participate in the application, we recommend you seek legal advice urgently. The timetable sought by the Receivers requires any application to join the application to be made by 31 October 2018.

### **Appeal rights**

The Receivers do not intend to appeal any decision of the Court on matters relating to which parties may have a claim to the Fund and on what basis, absent extraordinary reasons (for example if the approach ordered by the Court is not one in which the Receivers can, in practical terms, implement.)