



EBERT CONSTRUCTION RECEIVERSHIP

What You Need To Know

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2 August 2018

What is currently known?

On 31 July 2018 Ebert Construction Ltd (**Ebert**) was placed into receivership. John Fisk, Lara Bennett, and Richard Longman from PwC have been appointed receivers. The receivership was announced the following day.

Ebert's troubles reflect wider fragility in New Zealand's construction sector, despite the current building boom. It follows the demise of Mainzeal in 2014 and more recent difficulties with Fletcher Building. The problem seems to be a combination of rising building costs overtaking lump sum prices, inappropriate risk allocation, and a lack of scale in the industry generally.

Ebert is one of New Zealand's larger contractors with a national presence. It is understood to have around 15 existing contracts, some of which are significant, as well as others in the pipeline. These include the Indian High Commission's new headquarters in Wellington, the Union Green apartment development in Auckland, a unit at Middlemore Hospital, a new commercial building for Premier in Carterton, and a diary processing factory in Pokeno.

John Fisk has indicated that Ebert will be unable to complete at least some projects, meaning principals will need to secure replacement contractors in a capacity-constrained market. Mr Fisk has also signaled the company owes "*tens of millions of dollars*".

Ebert's receivership is likely to have implications for those who are contracted to it, such as principals/developers, subcontractors, consultants, suppliers, and other trade creditors. The issues which affected parties may need to consider include:

- Recovery of plant, equipment and materials on site;
- Status of ongoing litigation/arbitration/adjudication;
- Enforcement of security interests;
- Availability and recoverability of retentions;
- Termination rights under existing contracts;
- Completion of projects, including procurement of alternative contractors; and
- Managing cash-flow and downstream obligations.

Early consideration of these types of issues may have significant future implications for affected businesses.

What is receivership?

A receivership can occur when a company is unable to pay its debts. Most commonly, a receiver is appointed by a secured creditor over all or part of the assets of a company. The receiver takes on the management and control of the assets of the company and will seek to realise those assets for the benefit of that secured creditor.

A receiver's primary duty is to exercise its powers in a manner that the receiver believes to be in the best interests of the appointing creditor. To the extent consistent with that primary duty, the receiver must have reasonable regard to the interests of others, including the company's unsecured creditors.

A receiver may seek to continue to operate the company in some circumstances. Unless there is a viable avenue for continued trading, the realisation of the company's assets will often mean the business of the company coming to an end.

What rights may creditors have?

Unsecured creditors have limited rights in relation to a company in receivership.

Unlike other corporate insolvency regimes (eg liquidation), there is no entitlement to a meeting of creditors. Creditors are able to access periodic reports by the receiver. Where a company in receivership continues to trade in some capacity, a receiver may seek to negotiate a payment arrangement with a creditor. Once the receiver sells inventory and recovers accounts receivable, that money is paid out in a specified order of priority. This means that the receiver's costs are paid first, followed by employee wages, and tax.

However, because the primary duty is to realise assets for the benefit of the appointing secured creditor, a company's unsecured creditors often have little prospect of recovery as there are generally few (if any) assets left to claim against. Ebert's receivers have announced that all construction sites will be closed for a limited period while the receivers consider the position in relation to those sites. Creditors will need to look carefully at their contractual arrangements to determine what rights they have to tools, equipment and materials that are on project sites. The receivers have issued a notice to creditors with a [specified form](#) to be filled out in relation to plant and materials on any Ebert project sites. This can be emailed to: restructuring@nz.pwc.com.

Ebert's receivers have said they will write to all recorded creditors "*in the next few days*" with further information and a creditor claim form. If you are a creditor but do not receive this you should consider informing the receivers that you are owed money and completing the form.

Beyond that, Ebert's receivers are required to issue a report within two months of the receivership commencing (ie by late September). That should provide further information about the financial health and future of the company.

Will retentions still be paid?

Since 31 March 2017 all new and renewed construction contracts have been subject to a retentions trust regime following amendments to the Construction Contracts Act 2002. Essentially, retention moneys are deemed to be held on trust, meaning they are not available to the general pool of creditors provided they can be traced. For further information about the regime, please see our [May 2017 Construction Law Update](#).

Ebert's receivers have indicated that over \$3.5m is held in a separate retentions trust account, which is encouraging although it is unknown whether this represents the full amount of retentions that may become payable to subcontractors. Principals will also presumably be holding upstream retentions for the benefit of Ebert. This is the first high profile insolvency event where the new regime will operate in an attempt to protect retentions.

The challenge for Ebert's receivers (and affected principals/subcontractors) will be establishing an entitlement to retentions as they fall due, which may be legally and administratively complex.

Can contracts be terminated for receivership?

It is relatively common for construction contracts to be terminable for an insolvency event, such as receivership or liquidation. NZS3910, for example, has a standard termination provision for this eventuality. There may, however, be a notice or consultation process to follow before any termination right can be exercised.

As always, it will depend on the particular contract terms, so it is important to check these and, given the serious consequences of termination, it may be prudent to seek professional advice before taking that step.

Where can I find more information?

- [Companies Office](#)
- [Ebert's Website](#)
- [Ebert's LinkedIn](#)
- [Receiver's Website](#)
- [Notice of Appointment of Receivers](#)
- [Notice to Subcontractors and Suppliers](#)

Our website also has a number of [Insights](#) that may be useful, including:

- [Limiting the flow-on effects of contractor insolvency](#)
- [The construction landscape in New Zealand](#)
- [Clarification of retentions requirements](#)

If you are affected by Ebert's receivership, Hesketh Henry can advise on your rights and options. We have one of New Zealand's leading construction law teams, with the necessary contractual, regulatory, and insolvency expertise to assist.

Key contacts

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