

Retentions in the construction sector: Ebert Construction - a case study

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Overview of CCA retentions provisions

For all applicable contracts entered into (or renewed) on or after 31 March 2017, retentions must be held “on trust” in the form of cash or other liquid assets, or supported by a permitted financial instrument

Subpart 2A, sections 18A-18I

- Commercial contracts only – but distinction important
- Obligation for all parties in supply chain who withhold retentions
- Prohibits contractual terms intended to circumvent the provisions or make payment of retention monies conditional on anything other than performance
- Potential criminal liability if dishonestly or knowingly assist with a breach of trust obligations – again distinction important

Overview of CCA retentions provisions cont'd.

Those having retentions held back can request disclosure of records by holder

Key components

- No regulations issued (de-minimis, “liquid assets”, “proper records”)
- Financial instrument must be issued in favour of payee who has enforcement rights against the issuer
- No separate account required and “co-mingling”/investment permitted
- Disclosure
 - Holders need to consider what records they can maintain and release without disclosing commercially sensitive information
 - Those with retentions held need to consider what information will satisfy them that their retentions are secure

Ebert's usual processes



Step 1

Subcontractor lodges claim for work in previous period, usually previous month.

Step 2



Ebert considers claim



Step 3

Ebert issues payment schedule / BCTI

Step 4



Reconciliation Process

Step 5



Net movement of retentions paid into/out of Retentions Account

Ebert pays net amount owing under BCTI

If CCC entered into on or after 31 March 2017

Ebert receivership – status on appointment

Ebert maintained a separate bank account for retentions recorded as subject to the new requirements

Status on receivership

- May/June/July claims
- Funds in separate account \$3.7m

Total retentions \$9.3m (July est.) excluding GST

- Potentially subject to trust obligation c.\$4.6m
- Reasons for variance (timing, administrative)

Ebert – issues for the receivers

First material application of new regulations

Ability to manage the Fund

- Authority to manage the Fund as GSA holder appointed receivers
- How costs of managing fund would be met

Managing and distributing the Fund

- Timeframe for distribution
- How to determine entitlement
 - Eligibility to claim on fund
 - Satisfaction of contractual obligations to secure release
- How to distribute given likely shortfall

Ebert case study – Court application

Urgent hearing sought to facilitate distribution

Application sought initial orders only

- Application sought orders sufficient to start paying out valid claims to the Fund.
- Did not seek directions on how to resolve distribution where subcontractors' entitlement to claims were not clear.

Service

- Sought urgent directions as to service on affected parties.
- Served application on all 183 Subcontractors and Principals by email and published application on PwC website.

Ebert case study – Court application

Appointed receivers by the Court

Orders appointing receivers as court appointed receivers and managers obtained

- Court confirmed that a GSA holder appointed receiver could not administer the Fund pursuant to powers under GSA.
- High Court has inherent jurisdiction to appoint receivers.
- Here:
 - No-one presently administering the Fund.
 - Newly appointed liquidators coming up to speed on receivers' work would have involved duplication of time and cost.
- Costs as court-appointed receivers to be paid from the Fund.

Ebert case study – Court application

Determining claims to the Fund

Reconciled and Transferred

\$3.68 million
131 subcontractors
182 CCCs

Calculated but Not Transferred

\$475,000
80 Subcontractors
97 CCCs

Uncalculated and Not Transferred

\$380,000
70 subcontractors
83 CCCs

Wrongly Classified Subcontracts

\$170,340
14 CCCs

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Ebert case study – Court application

If invoice is unpaid, no retention moneys withheld?

- Definition of retention money in CCA is:

*an amount **withheld by a party** to a commercial construction contract (party A) from an amount **payable** to another party to the contract (party B) as security for the performance of party B's obligations under the contract.*

Ebert case study – Court application

Ascertaining whether a trust was created

Three certainties

- Court applied 3 certainties of establishing a trust: intention, subject matter and object (beneficiaries).

Processes matter

- If moneys were not reconciled to Retention Account, no intention by Ebert to create a trust.

Deemed Trust?

- Court rejected “deemed trust” argument. CCA simply created an obligation on party A to hold retention moneys on trust.

Ebert case study – Court application

Wrongly Classified Subcontracts

Intention to create a Trust?

- Arguable that there was an intention to create a trust –not reconciled to Retentions Account simply due to a data entry error.

Statutory prohibition

- CCA provides that retention moneys:
 - must not be appropriated by party A for any use other than to remedy defects in the performance of party B's obligations under the contract; and
 - is not available to pay the debts of any creditor of party A, other than party B.

Ebert case study – Court application

Distribution orders

- ***Pari Passu* approach confirmed**
- **No interest payable on claims to the Fund.**
- **Application of interest earned on Funds – an issue for another day.**
- **Interim distributions permitted.**
- **All affected subcontractors given leave to seek further directions from the Court within that proceeding.**

Ebert case study – post decision in practice

To minimise cost a principles based approach has been applied

Completion/entitlement status

- Completion status of both project and subcontract works
- Principal involvement in discussions
- Timeframes/subcontract conditions – initial/secondary entitlements

Process

- Principals proposed by individual subcontract
 - Where agreement cannot be reached, will revert to Court

Administration

- GST matters
- Distributions to date c\$2.3m

Questions



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