

DISTRICT COURT OF QUEENSLAND

CITATION: *Readiplumb Services Pty Ltd (ABN 68 614 407 800) v MKM Constructions (Aust) Pty Ltd (ABN 59 127 071 194)* [2009] QDC 67

PARTIES: **Readiplumb Services Pty Ltd**
(Applicant)

v

MKM Constructions (Aust) Pty Ltd
(Respondent)

FILE NO: 45 of 2009

PROCEEDING: Application for Judgment

DELIVERED ON: 19 March 2009

DELIVERED AT: Southport

HEARING DATE: 13 March 2009

JUDGE: C.F. Wall Q.C.

ORDER: Application dismissed, with costs.

CATCHWORDS: BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS ACT – entitlement to progress payments – where payment claims were not served by the applicant on the respondent – or directed to the respondent in accordance with the Act – application for judgment dismissed.

CASES: *Brodyn Pty Ltd trading as Time Cost in Quality v Davenport* [2004] NSWLR421 FAA
F K Gardner and Sons Pty Ltd v Dimin Pty Ltd [2007] 1 QR 10 FAA
J Hutchinson Pty Ltd v Galform Pty Ltd [2008] QSC 205 FAA

LEGISLATION: *Building and Construction Industry Payments Act 2004*, ss. 7, 8, 17, 18, 19.

COUNSEL: Plaintiffs: Mr AM Hoare
Defendant: Mr MA Ambrose

SOLICITORS: Plaintiffs: McKays Solicitors
Defendant: TVP Law

HIS HONOUR:

1. This is an application by Readiplumb Services Pty Ltd for judgment pursuant to section 19 of the Building and Construction Industry Payments Act in the sum of \$100,613.83. The application is opposed.

2. A valid payment claim is a pre-condition to the entitlement to judgment pursuant to section 19 of the Act.

3. **Statutory provisions**

The following are relevant sections or parts of sections of the Act:

"7 **Object of Act**

The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person -

- (a) undertakes to carry out construction work under a construction contract; or
- (b) undertakes to supply related goods and services under a construction contract.

8. **How object is to be achieved**

The object is to be achieved by -

- (a) granting an entitlement to progress payments whether or not the relevant contract makes provision for progress payments; and
- (b) establishing a procedure that involves -
 - (i) the making of a payment claim by the person claiming payment; and
 - (ii) the provision of a payment schedule by the person by whom the payment is payable.

17. Payment claims:

- (1) A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the respondent).
- (2) A payment claim -
 - (a) must identify the construction work or related goods and services to which the progress payment relates; and
 - (b) must state the amount of the progress payment that the claimant claims to be payable (the claimed amount); and
 - (c) must state that it is made under the Act.

18. Payment schedules

- (1) A respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant.
- (2) A payment schedule:-
 - (a) must identify the payment claim to which it relates; and
 - (b) must state the amount of the payment, if any, that the respondent proposes to make (the scheduled amount).
- (3) If the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment.
- (4) Subsection (5) applies if:-
 - (a) a claimant serves a payment claim on a respondent; and
 - (b) the respondent does not serve a payment schedule on the claimant within the earlier of:-

- (i) the time required by the relevant construction contract;
 - or
 - (ii) 10 business days after the payment claim is served.
- (5) The respondent becomes liable to pay the claimed amount to the claimant on the date due for the progress payment to which the payment claim relates.

19. Consequences of not paying claimant if no payment schedule

- (1) This section applies if the respondent:-
 - (a) becomes liable to pay the claimed amount to the claimant under section 18 because the respondent failed to serve a payment schedule on the claimant within the time allowed by the section; and
 - (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
- (2) The claimant -
 - (a) may -
 - (i) recover the unpaid portion of the claimed amount from the respondent, as a debt owing to the claimant, in any Court of competent jurisdiction;
 - or
 - (ii) make an adjudication application under section 21(1)(b) in relation to the payment claim;
- (4) If the claimant starts proceeding under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt -

- (a) judgment in favour of the claimant is not to be given by a Court unless the Court is satisfied of the existence or the circumstances referred to in subsection (1); and
- (b) The respondent is not, in those proceedings, entitled -
 - (i) to bring any counterclaim against the claimant; or
 - (ii) to raise any defence in relation to matters arising under the construction contract."

The underlining is mine.

4. **Facts**

(1) The construction contract is dated the 23rd of November 2007, and is between the applicant as sub-contractor and the respondent as builder. Is it described as a housing subcontract agreement.

The applicant is a plumbing contractor, and pursuant to the contract the applicant was to supply plumbing services for townhouses being constructed by the respondent in stages 3-9 of the respondent's project at 266-284 Henty Drive, Redbank Plains.

The respondent's ABN is stated in the contract as 59 127 071 194, and its address as 11/76 Township Drive, West Burleigh, Queensland 4220.

(2) Clause 1 on page 1 of the contract provides (inter alia) as follows:

"Please see attached payment schedule for sub-contractors".

(3) Clause 4 of the general conditions of contract provides as follows:

"4. **Payment**

- (a) The subcontractor shall submit payment claims to the Builder by the following reference sales (sic):
 - (i) the times stated in the Schedule (or, if any time stated in the Schedule is not a Business Day, the next Business Day);
 - (ii) or the last Business Day of each month;
whichever is the earlier.
- (b) A payment claim shall set out:
 - (i) details of:
 - A. the work carried out by the Subcontractor to which the payment claim relates;
 - B. the amount that the Subcontractor claims for payment by the Builder for that work; and
 - C. any other amount arising out of, or in connection with, the Subcontractor that the Subcontractor claims for payment by the Builder, and
 - (ii) the total amount that the Subcontractor claims for payment by the Builder.
- (c) On the submission of a payment claim under clause 4(a), or the final Progress claim under Clause 17(d), the Builder shall:
 - i. pay to the Subcontractor the total amount of the payment claim, or the final progress claim, by the time stated in the Schedule for payment or the date 25 Business Days after Submission Date, whichever is the earlier; or
 - ii. if the Builder disputes all or any part of the total amount of the payment claim, or the final progress claim;
 - A. give the Subcontractor a written notice setting out the amount in dispute and details of the dispute by the time stated in the Schedule for payment or the sale (sic) 10

Business Days after the Submission Date, whichever is the earlier, and

- B. pay to the Subcontractor the amount of the payment claim, or the final progress claim, that is not disputed by the Builder by the time stated in the Schedule for payment or the date 25 Business Days after the Submission Date, whichever is the earlier.
- (d) If the Builder fails to give the Subcontractor a notice under Clause (c)(ii)(A) by the time required under Clause 4(c)(ii)A), the Builder shall pay the Subcontractor, under clause 4(c)(i), the total amount of the payment claim, or the final progress claim, without any deduction. The Builder shall pay interest, calculated on a daily basis to the Subcontractor on any overdue amount under this Clause, including any part of the amount of a payment claim, or the final progress claim, wrongly withheld by the Builder, up to and including the date on which the overdue amount is paid by the Builder at the rate stated in the Schedule or the rate comprising the annual rate, as published from time to time by the Reserve Bank of Australia, for 90 day bills plus 10% whichever is the higher.
- (f) Payment, other than (sic) payment of the Subcontractor's final progress claim, is payment on account only."

The underlining is mine.

Clause 4 clearly requires that the applicant submit payment claims to the respondent and that the claims set out the amounts claimed for payment by the respondent.

- (4) The schedule referred to in clauses 1 and 4 is in the following terms:

"MKM Fortnightly Payment Schedule for Subcontractors

All invoices/claims dated between 1st and 15th of the month will be processed and paid on the 30th of the month. These must be received by MKM Group no later than the 15th of the month or they will get processed/paid for the 15th of the next month.

All invoices/claims dated between 16th to 30th will be processed and paid on the 15th of the next month. These invoices must be received by MKM Group no later than 30th of the month or they will get processed/paid for the 30th of the next month.

To enable us to process your invoices/claims, please mail your invoices on time - claiming FINISHED WORK ONLY. We will NOT accept faxed invoices/claims.

ALL INVOICES MUST INCLUDE:

1. Your name, address and phone number.
2. Your ABN number .
3. Invoice date and invoice number and job order number.
4. Job address.
5. Total amount.

IF THE INVOICE IS A PROGRESS CLAIM, IT MUST STATE:

1. Contract Amount.
2. Progress Claim Number.
3. Previously claimed amount.
4. Balance of contract.

INVOICES WITHOUT THE ABOVE DETAILS WILL NOT BE PROCESSED

Any questions about your payments please do not hesitate to call our office on 5520 7400 and talk to our Accounts Person only. Please do not talk to our Site Foremen and/or Construction Managers as they will not be able to help you with your payment questions.

Thank you from the Team at MKM Group."

(5) The contract seems to require that invoices/payment claims be submitted to the respondent by sending them by mail to "MKM Group", who would process them. It does not purport to substitute MKM Group for the respondent. For present purposes though what is important is what the Act, not the contract, requires.

(6) The MKM Group consists of a number of related companies. Those companies include (with details of the work performed by each within the group):

- MKM Group of Companies Pty Ltd
- MKM Group Pty Ltd (Viability and Completion)
- MKM Design Pty Ltd (Design)
- A-Class Plasterboards Pty Ltd (Supply)
- MKM Earthworks Pty Ltd (Earthworks)
- MKM Constructions (Aust) Pty Ltd (the Respondent) (Construction)
- MKM Homes (Aust) Pty Ltd
- Quadrant Property (Holdings) Pty Ltd.

See Exhibit MMK02 to the affidavit of Michael Kljaic.

(7) In relation to the MKM corporate structure and the present contract, Mr Kljaic, the director and secretary of the respondent and the director and secretary of MKM Group of Companies Pty Ltd, deposes:

- "4. In addition to the Respondent and the MKM Group of Companies Pty Ltd there are a number of other companies which have been incorporated to perform specific functions within the MKM Group. The tasks performed by these various companies include assessing viability for developments design, supply of materials, earthworks, commercial construction, residential construction, property management and completion.

6. The Respondent is the entity responsible for construction within the MKM Group and it was the builder of residential units located at a site in Henty Drive, Redbank Plains. The Respondent was the entity that entered into the Housing Subcontract Agreement with the Applicant in November 2007. The MKM Group of Companies Pty Ltd has never entered into a written contract, or any other contract or arrangement with the Applicant.

8. The Respondent is and was at all material times the holder of a BSA Building Licence number 1126562 printed from the BSA website on 12 March 2009.

9. The MKM Group of Companies Pty Ltd does not have, nor has it ever had, a building licence. It has never held itself out to the Applicant as holding such a licence.

10. All the tax invoices delivered by the Applicant in this matter and exhibited to Mr Read's affidavit were addressed to the MKM Group of Companies Pty Ltd, and not to the Respondent. That course of conduct was undertaken by the Applicant for its own reasons and such action

was never suggested by either the Respondent or the MKM Group of Companies Pty Ltd or held out as being appropriate. Both the written contract and its covering letter were in the name of the Respondent.

15. There has never been any assignment or novation of the rights and liabilities of the Respondent under the Housing Subcontract Agreement to the MKM Group of Companies Pty Ltd. The MKM Group of Companies Pty Ltd has never agreed to take on the objection of payment under the construction contract and has never held itself out as having such an obligation."

(8) That MKM Group of Companies Pty Ltd performed work for other associated companies in the group is apparent from the letter to the applicant dated 16 November 2007 enclosing the subject contract. The letterhead is that of the respondent, address Unit 11, 76 Township Drive, West Burleigh, Queensland 4219, PO Box 9143, Gold Coast MC 9726, and the letter is signed by Paula Lee, MKM Group of Companies Limited. The applicant's facsimile response dated 23 November 2007 is addressed to Paula Lee, Company "MKM Cons." See Exhibit NRR1 to the first affidavit of Nigel Read.

(9) The payment claims submitted by the applicant said to support the present application and its entitlement to judgment under the Act are each addressed to MKM Group of Companies Pty Ltd, Unit 11, 76 Township Drive, West Burleigh, 4219, ABN 850 820 510 634, and were apparently posted. That ABN is the ABN referred to on the letterhead of MKM Group of Companies Pty Ltd, but is in fact, the ABN of MKM Group Pty Ltd.

At the foot of each is a payment slip to be detached and returned to the applicant with payment. These each appear to state that the payment relates to or is by, or about MKM Group of Companies Pty Ltd.

Mr Read, in his first affidavit, deposes that each payment claim was "delivered to the respondent", but, in fact, each was addressed to MKM Group of Companies Pty Ltd and not the respondent.

(10) The respondent contends that the payment claims by the applicant are not valid for the purposes of the Act because they are not directed to the respondent and were not served on it. The relevant payment claims are numbers 10, 12, 13, 14, 15 and 16.

Emails from Paula Lee of relevance to payment claim number 10 and dated 19 June 2008 refer to her email address as, "paula.lee@mkmconstructions.com.au."

A later email by Paula Lee (Exhibit NRR2 to Mr Read's second affidavit) apparently from her on behalf of MKM Group of Companies Pty Ltd relating to the present contract refers to her email address as "paula@mkmgroupp.com.au." The disclaimer at the foot of the email seems to suggest that it is sent on behalf of MKM Group Pty Ltd.

Payment claim number 10 was paid less \$418.51 The payment notice/invoice seems to refer to MKM Group as the entity paying the claim.

Payment claim number 12 was for \$103,716.37 exclusive of GST. Of this \$67,352.73 was paid, but it is not clear who made the payment.

Payment claims numbers 13, 14, 15 and 16 were not paid at all.

In his first affidavit Mr Read deposes in paragraphs 14 and 17 as follows:

- "14. Each of the payment claims was taken by me to site for the site foreman to approve and sign then the payment claim was sent by Elaine Read by email, fax and posted to MKM for processing by the due dates. Each of the payment claims bears the initials of the site foreman approving the payment.
17. The payment claims are directed to the MKM Group of Companies Pty Ltd. Whilst that is not strictly the entity named in the contract all correspondence from the respondent comes on a letterhead with the name MKM Group of Companies Pty Ltd on it so we adopted that practice. The respondent has never objected to accounts being rendered in that style."

In response, Mr Kljaic deposes in paragraphs 11, 12, 13, 14, 16-19 of his affidavit as follows:

- "11. In paragraph 17 of Mr Read's affidavit he states that the Respondent never objected to accounts being rendered in that style. His statement suggests that the Respondent accepted that the accounts delivered to the MKM Group of Companies Pty Ltd were accepted as properly delivered to the Respondent. That is not correct. The Respondent has never provided any written or verbal acknowledgement that this would be the case.
12. Furthermore, in paragraph 17 of Mr Read's affidavit he states that all correspondence from the respondent comes on a letterhead with the name MKM Group of Companies Pty Ltd. Once again this is not correct.

13. The letter which enclosed the draft Housing Subcontract Agreement for delivery to the applicant was sent on the respondent's letterhead.
14. Further, the only correspondence relied upon by the applicant in that regard is a letter written almost a month after the last payment claim sent by the applicant to the MKM Group of Companies, being Exhibit "NRR11" to the affidavit of Mr Read.
16. During the course of construction on site certain payments were made to the applicant, and to other sub-contractors on behalf of the respondent by MKM Group Pty Ltd from time to time as part of the dealing between the respondent and the MKM Group Pty Ltd. Those payments were made for and on behalf of the respondent and no representation was made by either the respondent or the MKM Group Pty Ltd that there was any change to the contractual relationship between the applicant and the respondent.
17. In paragraph 14 of Mr Read's affidavit he states that each of the Payment Claims was taken by him to site for the Site Foreman to approve and sign.
18. The respondent's site foreman is not authorised to sign and approve tax invoices or payment claims by subcontractors.
19. The fact that the respondent's site foreman and/or construction manager were not authorised to provide advice, assistance or certification of payments was communicated expressly to the applicant in the MKM fortnightly payment schedule for subcontractors delivered to the applicant together with the Housing

Subcontract Agreement and which is Exhibit "NRR2" to Mr Read's affidavit."

Exhibit NRR2 is the Payment Schedule, part of the contract, already referred to.

The fact that the respondent's site foreman signed each payment claim does not amount to service on the respondent, and the fact that some payments were made by MKM Group Pty Ltd apparently on behalf of the respondent also does not establish service of the claims on the respondent.

The payment claims are not stated to be claims to the respondent or to MKM Group of Companies Pty Ltd on behalf of or as agent for the respondent.

(10) The Plumbing and Drainage Compliance Permit issued by the City of Ipswich for the contract plumbing works is issued to MKM Group, PO Box 9143, Gold Coast MC 9726.

Contract payments made to the applicant on 16 and 22 January 2008 and 13 and 25 March 2008 were made by cheques from MKM Group Pty Ltd.

In paragraph 8 of his second affidavit, Mr Read concludes by deposing as follows:

"I repeat as I said in my previous affidavit that no prior objection has been taken to the name of the entity as described on the payment claims. All the payment claims up until payment claim number 10 were paid by the respondent without objection."

5. Applicant's Case

The applicant contends that the payment claims have been validly served. It submits:

- (a) that the respondent does not swear that it did not receive the payment claims;
- (b) service may be effected by delivering the claims to the respondent's place of business and by post to that address, in fact, the contract schedule requires invoices/claims to be mailed;
- (c) the contract schedule requires the claims to be sent to MKM Group and does not require the claimant to nominate which company in the MKM Group the claim relates;
- (d) some of the claims were paid;
- (e) in no correspondence does the respondent raise the issue of service.

6. Conclusion

I am satisfied that the payment claims were served at the respondent's address which was also the address for all of the companies in the MKM Group, but I am not satisfied that they were served on the respondent. The claims were not addressed to or directed to the respondent, but to MKM Group of Companies Pty Ltd, which company was not a party to the contract or liable to make payments to the applicant under the contract, or able to reply to the claims by serving a payment schedule on the applicant.

No payment claim has been made by the applicant to the respondent, the other party to the contract, and the party who is or may be liable to make payment under the contract to the applicant. A payment claim not having been made to the respondent, the respondent was not able to serve a payment schedule on the applicant under section 18 of the Act.

A payment claim must satisfy "whatever are the conditions laid down by the Act as essential" for "legal effect" and therefore validity. The statutory regime requires "strict compliance" for liability to arise. The making of a valid payment claim "is an indispensable step" in that process. See Brodyn Pty Ltd trading as Time Cost and Quality v Davenport [2004] NSWLR421 at paragraph [52], F K Gardner and Sons Pty Ltd v Dimin Pty Ltd [2007] 1 QR 10 at paragraph [24], and J Hutchinson Pty Ltd v Galform Pty Ltd [2008] QSC 205 at paragraph [30].

In the present case for a payment claim to be valid, it needed to be directed to the builder named in the contract, the respondent, and served upon that builder.

Here the payment claims were not so directed and served. On the contrary, they were directed to MKM Group of Companies Pty Ltd at a common address. None of the

claims were served on the respondent. I agree with the respondent that, failing that, "no statutory debt under section 18(5) of the Act can arise."

As to the submissions made by the applicant:

- (a) This does not relieve the applicant from proving that the payment claims were made to the respondent.
- (b) The claims were posted to the address which the respondent shared with other companies in the MKM Group.
- (c) The Act requires the claimant to nominate the "person" who, under the construction contract, is or may be liable to make the payment, here the respondent, and this was not done.
- (d) Payment of some claims does not relieve the applicant of complying with the statutory pre-conditions before it can advantage itself of the statutory recovery process for the balance of the claims.
- (e) The respondent was not required to dispute service; the onus is on the applicant to comply with the statutory requirements.

6. **Result**

For these reasons, the application will be dismissed.

I order that the applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis unless agreed.
