

THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 0601 OF 2008

DEEN:

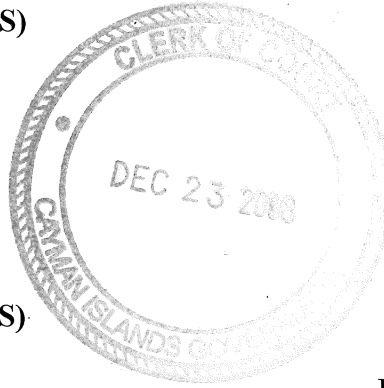
**ROGROUP LTD.**  
**CORPORATION FORMED UNDER**  
**THE LAWS OF THE CAYMAN ISLANDS)**

**PLAINTIFF**

AND:

**MCALPINE LTD.**  
**(A CORPORATION FORMED UNDER**  
**THE LAWS OF THE CAYMAN ISLANDS)**

**DEFENDANT**



**WRIT OF SUMMONS**



TO: McAlpine Ltd.  
Ogier Fiduciary Services (Cayman) Limited  
20 Genesis Close  
Grand Cayman, Cayman Islands

THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiff in respect of the claim set out on the next page.

Within 14 days after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office, P.O. Box 495GT, George Town, Grand Cayman, the accompanying Acknowledgment of Service stating therein whether you intend to contest these proceedings.

If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest the proceedings, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

ISSUED this 23<sup>rd</sup> day of December 2008

NOTE - This Writ may not be served later than 4 calendar months (or, if leave is required to effect service out of the jurisdiction, 6 months) beginning with the date of issue unless renewed by order of the Court.

**IMPORTANT**

Directions for Acknowledgment of Service are given with the accompanying form.

## STATEMENT OF CLAIM

1. The Plaintiff Androgroup Ltd. is a Cayman Islands ordinary resident company (“Andro”) providing services in the Islands in, *inter alia*, the installation, supply, construction, fixing and maintenance of mechanical, electrical, plumbing and fire protection materials, equipment and services to new and existing buildings (“MEPPFP Services”) since 1983. Andro has over 170 employees, provides a fundamental and necessary service to residents and businesses in the Cayman Islands and is generally regarded as being a well-experienced and knowledgeable MEPPFP Services provider by peers in the construction industry in the Cayman Islands.
2. The Defendant McAlpine Ltd. is a Cayman Islands ordinary resident company (“McAlpine”) providing services in the Islands as general contractor in the construction industry. McAlpine has been providing such services since the early 1970s and is generally considered as being an experienced and knowledgeable general contractor by peers in the construction industry in the Cayman Islands.
3. The parties have had a business relationship since 1986 during which time Andro has provided MEPPFP Services to McAlpine, for which services McAlpine has paid at such rates and prices as Andro has charged, as McAlpine’s subcontractor on at least twelve multi-million dollar construction projects in the Cayman Islands.
4. In or around January 2006 McAlpine as Design/Build general contractor entered into a contract (the “Head Contract”) with Butterfield Bank (Cayman) Ltd. (the “Owner”) to construct Butterfield Place Offices and Car Park Shell & Core in Georgetown, Grand Cayman (the “BP7 Project”).
5. In or around April 2006 McAlpine requested that Andro supply and perform MEPPFP Services, including providing all necessary labour, materials and equipment (the “MEPPFP Works”) to the BP7 Shell & Core Project. Andro called the Project Job Number 19303.

6. In or around January 2007 McAlpine as general contractor entered into a contract (the "FO Contract") with Butterfield Bank (Cayman) Ltd. (the "Owner") to complete the Tenant Fit-Out of the Butterfield Place Offices in George Town, Grand Cayman (the "BP7 Project").<sup>0</sup>
7. In or around February 2007 McAlpine requested that Andro supply and perform MEPFP Services, including providing all necessary labour, materials and equipment (the "MEPFP Works") to the BP7 Tenant Fit-Out Project. Andro called the Project Job Number 23955.
8. Andro supplied and performed the requested MEPFP Works and the subsequently changed MEPFP works to both of the BP7 Projects during the period from around April 2006 to around July 2008. Andro dedicated 30% of its labour resources in doing so.
9. McAlpine expressly agreed to pay all of Andro's reasonable and necessary costs for the MEPFP Works for the BP7 Shell & Core Project and provided an instruction to proceed with the MEPF Works for the Tenant Fit-Out Works and thereby expressly or impliedly agreed to pay Andro for the MEPFP Works for the BP7 Projects at Andro's standard rates and prices (the "Agreement").
10. The Agreement is in line with the parties' customary practice.
11. Alternatively, McAlpine is liable to pay Andro for the MEPFP Works to the BP7 Projects at fair rates and prices within the Cayman Islands market on a *quantum meruit* basis which permit Andro to make a fair profit.
12. During the course of the design and construction of the BP7 Shell & Core Project, McAlpine's agents and representatives negligently made several significant and costly errors or failed to act reasonably or fulfill their duties. Such errors or failures include but are not limited to the following:-
  - a. CGMJ Ltd., the architects contracted to McAlpine who designed Butterfield Place Shell & Core (the "Architects") made several design

flaws (the "Architect's Design Flaws"), some of which only became apparent as the construction progressed and which had to be rectified by adding new works, undoing works already performed, performing works out of sequence with the overall construction, or performing works in different and more difficult conditions to those planned. The Architect's Design Flaws and ensuing requests via McAlpine that Andro make changes to the MEPPF Works required for Andro to dedicate a great deal more time and skilled labour at higher costs than would have been required had there not been any Architect's Design Flaws. The Architects failed to reasonably and contemporaneously issue extensions of time to Andro in respect of any of the changed works.

- b. The Architects failed to issue proper change orders for the changed works with direction as to how such changed works will be paid, placing an unreasonable onus on Andro to attempt to maintain records of the changed works itself, which significantly increased Andro's administrative burden. McAlpine then neglected, omitted, refused or failed to acknowledge, certify or authorize payment for many of the changed works or the additional administrative burdens thus placed on Andro;

(collectively and each one or more of them referred to as "McAlpine's Negligence")

13. During the course of the design and construction of the BP7 Tenant Fit-Out Project, the Owner's agents and representatives negligently made several significant and costly errors or neglected, omitted, refused or failed to act reasonably or fulfill their duties. Such errors or failures include but are not limited to the following:-

- a. The Architects, who also designed the Butterfield Place Fit-Out made several design flaws (the "Architect's Fit-Out Design Flaws"), some of which only became apparent as the construction progressed and which had to be rectified by adding new works, undoing works already performed, performing works out of sequence with the overall construction, or

performing works in different and more difficult conditions to those planned. The Architect's Fit-Out Design Flaws and ensuing requests via McAlpine that Andro make changes to the MEPFP Works required Andro to dedicate a great deal more time and skilled labour at higher costs than would have been required had there not been any Architect's Fitout Design Flaws. The Architects neglected, omitted, refused or failed to reasonably and contemporaneously issue extensions of time to Andro in respect of any of the changed works.

b. BCQS Ltd. ("BCQS"), the cost consultants contracted to the Owner to measure the completed works and evaluate the cost of the said changed works and to certify for payment by the Owner sums due to Andro during the construction of the BP7 Tenant Fit-Out Project, failed to reasonably and contemporaneously evaluate and certify for payment sums due to Andro for changed works and neglected, omitted, refused or failed to reasonably and contemporaneously certify for payment costs to Andro for the loss of productivity caused by the changed works.

c. The Architects neglected, omitted, refused or failed to issue proper change orders for the said changed works with direction as to how such changed works will be paid, placing an unreasonable onus on Andro to attempt to maintain records of the changed works itself, which significantly increased Andro's administrative burden. BCQS neglected, omitted, refused or failed to acknowledge, certify or authorize payment for many of the changed works or the additional administrative burdens placed on Andro; (collectively and each one or more of them referred to as the "Owner's Negligence") The Owner's Negligence and McAlpine's Negligence caused extensive requested changes to the original scope of the MEPFP Works, delays and increased costs.

14. McAlpine, knowing that its own Negligence and the Owner's Negligence would cause significant delays and increased costs, requested Andro to supply and perform

- such additional MEPFP Works as was reasonable and necessary to accommodate the changes made to the BP7 Projects as a result of both its own Negligence and the Owner's Negligence which request Andro complied with. McAlpine issued over 200 instructions for changes to the MEPFP Works to Andro in varying degrees of complexity (collectively, the "Changed Works").
15. Andro performed the Changed Works, which ultimately comprised approximately 59% more work than the MEPFP Works that McAlpine had submitted to Andro for the BP7 Projects.
  16. In order to perform the Changed Works and as quickly as possible to mitigate the delays to the schedule caused by McAlpine's and the Owner's Negligence, Andro provided such additional labour, additional skilled labour, overtime, additional supervision, additional administration, and additional materials and equipment on an expedited basis as was necessary (cumulatively, the "Additional MEPFP Works").
  17. McAlpine expressly or impliedly requested that Andro perform and provide the Additional MEPFP Works without differentiating between whether they were caused by its own Negligence or by the Owner's Negligence.
  18. McAlpine knew or should have known that its own Negligence and the Owner's Negligence and the Changed Works and the Additional MEPFP Works would significantly impact and extend the time required to complete the BP7 Projects.
  19. McAlpine knew or should have known that its own Negligence and the Owner's Negligence and the Changed Works and the Additional MEPFP Works would significantly increase the costs and expense to complete the BP7 Projects.
  20. In requesting the Changed Works and Additional MEPFP Works McAlpine knew or should have known that a natural consequence would be higher rates and prices to perform such Changed Works and Additional MEPFP Works.

21. In requesting the MEPFP Works, Changed Works and Additional MEPFP Works, McAlpine promised at all times to Andro that all of Andro's costs, rates and prices would be paid, affirming the Agreement, and on which basis Andro agreed to perform the MEPFP Works, Changed Works and Additional MEPFP Works.
22. Alternatively, in requesting the MEPFP Works, Changed Works and Additional MEPFP Works, McAlpine represented at all times to Andro that all of Andro's costs, rates and prices would be paid (the "Representations"). McAlpine owed Andro a duty to ensure that the Representations were true.
23. Contrary to McAlpine's Representations, McAlpine did not pay all of Andro's costs, rates and prices. McAlpine's Representations were false and were made recklessly or negligently.
24. McAlpine made the Representations intentionally, knowing that Andro would rely on them, in order to induce Andro to perform the MEPFP Works, Changed works and Additional MEPFP Works (collectively referred to as "All Andro Works"), and upon which Andro did in fact rely in performing All Andro Works, to the detriment of Andro.
25. Alternatively, McAlpine made the Representations recklessly, without caring whether the Representations were true or false, to induce Andro to perform All Andro Works, or intentionally, knowing that the Representations were not true or without an honestly held belief in the truth of the Representations.
26. At no time did McAlpine suggest or imply to Andro that Andro might have to bear any of the costs or would not be paid at Andro's standard or reasonable rates for any of All Andro Works.
27. Andro's price, in accordance with Andro's standard rates for all reasonable and necessary costs for the performed All Andro Works for the BP7 Projects is the sum of C1\$9,628,335.65.

28. The last positive payment made by McAlpine to Andro in relation to the BP7 Projects was C1\$100,000 paid on 8 February 2008 bringing the total amount paid by McAlpine to Andro C1\$5,968,851.07.
29. On 11 July 2008 McAlpine made a payment on a different project “clawing back” approximately C1\$527,346.59 being a significant part of the money it had paid Andro on BP7 by 8 February 2008. This leaves owing from McAlpine to Andro the sum of C1\$4,186,831.17 (the “Balance”).
30. Since March 2008 McAlpine has omitted, neglected, refused or failed to make payment of the Balance to Andro, despite Andro’s numerous requests and demands.
31. At all times throughout the Agreement or from the moment McAlpine engaged Andro to the date this Writ of Summons is issued and beyond, McAlpine owed Andro a duty, as the general contractor, to pay Andro directly for All Andro Works and to do whatever was necessary to ensure that Andro was paid for All Andro Works. McAlpine breached its duty to Andro, causing Andro damages.
32. McAlpine knew or should have known that Andro continued to provide the MEPPF Works, Changed Works and Additional MEPPF Works since March 2008 notwithstanding McAlpine’s failures to make payment because it relied on McAlpine’s Representations as well as the parties’ twenty-year relationship and customs in doing business with each other.
33. At no time did McAlpine suggest or imply or do anything to disabuse Andro of its reasonably held expectation, which expectation was known or should have been known by McAlpine, that all of Andro’s costs, rates and prices for the MEPPF Works, Changed Works and Additional MEPPF Works would be fully paid.
34. McAlpine’s refusal to make payment to Andro is in breach of the Agreement and has caused Andro damages.
35. Alternatively, McAlpine’s refusal to make payment to Andro is in breach of the Representations and has caused Andro damages.

36. McAlpine knew or should have known that the requests for changes were not made in proper form and knew or should have known that this would create a large administrative burden on Andro by placing on Andro an unreasonable burden of attempting to maintain records that McAlpine was responsible to maintain. McAlpine owed Andro a duty to take reasonable precautions to ensure that records pertaining to the Changed Works were maintained properly by itself or by the Owner's Agents. McAlpine breached its duty to Andro in this regard, causing Andro damages.
37. Alternatively, McAlpine knew or should have known that the additional administration carried out by Andro was compensable as part of the Changed Works and McAlpine owed Andro a duty to take reasonable measures to ensure that proper compensation to Andro for the Changed Works as well as for the additional administration carried out by Andro was agreed with the Owner's Agents. McAlpine breached its duty to Andro in this regard, causing Andro damages.
38. Alternatively, McAlpine is liable to pay Andro for the MEPPF Works, Changed Works and Additional MEPPF Works that Andro provided at McAlpine's express or implied requests on a *quantum meruit* basis for the Cayman Islands market, which will be proven to be approximately the sum of the Balance namely CI\$4,186,831.17.
39. McAlpine's refusal to make payment to Andro when Andro completed the MEPPF Works, Changed Works and Additional MEPPF Works is wrongful, unreasonable and oppressive.
40. On numerous occasions Andro advised McAlpine that McAlpine's failure to pay Andro or make significant payments would cause and has caused Andro serious damage and may cause Andro to become insolvent and may even cause the failure of Andro as a business and essential service provider in the Cayman Islands (the "Warnings").

41. Despite the Warnings McAlpine has continued to wrongfully, without any contractual or lawful justification, unreasonably and oppressively withhold payment.
42. McAlpine's unreasonable refusal to pay Andro the balance due or any portion thereof such as to enable Andro to properly continue business is intentional, or malicious, knowing of the harm and economic duress that it would cause Andro.
43. McAlpine's unreasonable refusal to pay Andro the Balance or any portion thereof such as to enable Andro to continue business has caused damage to Andro's reputation and credibility among Andro's clients, suppliers and service providers, has caused loss of Andro's established credit facilities, loss of employees or loss of employee satisfaction and loss of productivity and other losses of a similar nature, which will be demonstrated on a balance of probabilities at the trial of this action.
44. McAlpine's unreasonable refusal to pay Andro the balance or any portion thereof has caused Andro to incur costs and make expenditures in Andro's attempts to mitigate the economic duress, damages and hardship that McAlpine's refusal to make payment has caused, such as legal fees, audit and accounting fees, obtaining loans and new credit facilities and time, effort and expenses incurred of a similar nature, which will be demonstrated on a balance of probabilities at the trial of this action.

AND THE PLAINTIFF CLAIMS:-

- a) Judgment, or damages, in the sum of not less than CI\$4,186,831.17;
- b) Alternatively, damages in the sum of not less than CI\$4,186,831.17 or in such sum as may be assessed by this Honourable Court on a *quantum meruit* basis;
- c) Additional damages as may be proven at the trial of this action on a balance of probabilities;
- d) Pre-judgment interest on the sum of CI\$4,186,831.17 at such rates as the Court may award pursuant the Judicature Law s. 34;

- e) Post-judgment interest on all sums awarded at such rates as the Court may award pursuant to the Judicature Law s. 34 until such judgment is satisfied;
- f) Costs;
- g) Such other and further relief as may be requested and this Honourable Court may consider appropriate.

  
DIAMOND LAW ASSOCIATES

THIS WRIT OF SUMMONS was issued by DIAMOND LAW ASSOCIATES, Attorneys for the Plaintiff, whose address for service is 4<sup>th</sup> Floor, Cardinal Plaza, Cardinal Avenue, PO Box 2887, George Town, Cayman Islands, KY1-1112 (Ref: SND/1318).

**Acknowledgment of writ of summons (0.12, r.3)**

**DIRECTIONS FOR ACKNOWLEDGMENT OF SERVICE  
OF WRIT OF SUMMONS**

1. The accompanying form of Acknowledgment of Service should be completed by an Attorney acting on behalf of the Defendant or by the Defendant if acting in person.

After completion it must be delivered or sent by post to the Law Courts, P.O. Box 495GT, George Town, Grand Cayman.

2. A Defendant who states in his Acknowledgment of Service that he intends to contest the proceedings must also serve a defence on the Attorney for the Plaintiff (or on the Plaintiff if acting in person).

If a Statement of Claim is indorsed on the Writ (i.e. the words "Statement of Claim" appear on the top of page 2), the Defence must be served within 14 days after the time for acknowledging service of the Writ, unless in the meantime a summons for judgment is served on the Defendant.

If the Statement of Claim is not indorsed on the Writ, the Defence need not be served until 14 days after a Statement of Claim has been served on the Defendant.

If the Defendant fails to serve his defence within the appropriate time, the Plaintiff may enter judgment against him without further notice.

3. A Stay of Execution against the Defendant's goods may be applied for where the Defendant is unable to pay the money for which any judgment is entered. If a Defendant to an action for a debt or liquidated demand (i.e. a fixed sum) who does not intend to contest the proceedings states, in answer to Question 3 in the Acknowledgment of Service, that he intends to apply for a stay, execution will be stayed for 14 days after his Acknowledgment, but he must, within that time, issue a Summons for a stay of execution, supported by an affidavit of his means. The affidavit should state any offer which the Defendant desires to make for payment of the money by instalments or otherwise.

**See over for notes for guidance**

**Please complete overleaf**

## Notes for Guidance

1. Each Defendant (if there are more than one) is required to complete an Acknowledgment of Service and return it to the Courts Office.
2. For the purpose of calculating the period of 14 days for acknowledging service, a writ served on the Defendant personally is treated as having been served on the day it was delivered to him.
3. Where the Defendant is sued in a name different from his own, the form must be completed by him with the addition in paragraph 1 of the words "sued as (the name stated on the Writ of Summons)".
4. Where the Defendant is a FIRM and an attorney is not instructed, the form must be completed by a PARTNER by name, with the addition in paragraph 1 of the description "Partner in the firm of (.....)" after his name.
5. Where the Defendant is sued as an individual TRADING IN A NAME OTHER THAN HIS OWN, the form must be completed by him with the addition in paragraph 1 of the description "trading as (.....)" after his name.
6. Where the Defendant is a LIMITED COMPANY the form must be completed by an Attorney or by someone authorised to act on behalf of the Company, but the Company can take no further step in the proceedings without an Attorney acting on its behalf.
7. Where the Defendant is a MINOR or a MENTAL PATIENT, the form must be completed by an Attorney acting for a guardian ad litem.
8. A Defendant acting in person may obtain help in completing the form at the Courts Office.



Attorney for the Defendant

**Please complete overleaf**