IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL LIST

No 2006 of 2008
F6180

B E T W E EN:

KEVIN HUNT PTY LTD (ACN 125 910 563)

Plaintiff

and

WALKER CORPORATION PTY LIMITED (ACN 001 176 263)

Defendant

DEFENCE

Date of document: 2 May 2008
Filed on behalf of: the Defendant
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To the Statement of Claim dated 13 March 2008, the Defendant says as follows:

1. It admits the allegations in paragraph 1.

2. It admits the allegations in paragraph 2.

3. As to paragraph 3, it:

   (a) admits that the Defendant entered into an agreement entitled "Agreement for the provision of Consulting Services" with the Defendant and Kevin Hunt ("**Hunt**") on or about 27 June 2007 ("**the Second Consultancy Agreement**");

   (b) otherwise denies the allegations in paragraph 3.

4. As to paragraph 4, it:

(a) admits the allegations in paragraph 4;

(b) will rely on the full terms of the Second Consultancy Agreement at trial;

(c) says further that there are terms of the Second Consultancy Agreement as follows:

(i) the Plaintiff, through Hunt, agreed to play an active role in the Kew and Lauderdale projects and devote as much of its time in providing the Services as any professional consultant would be expected to make using its best endeavours to make the projects a success (clause 3.2);

(ii) Hunt agreed to conduct himself at all times in an appropriate professional manner (clause 3.2);

(iii) the Plaintiff agreed that it would do all things necessary or convenient to ensure that Hunt carried out all duties within his competence so that the services were performed to the satisfaction of the Defendant (clause 4);

(iv) the Defendant was entitled to terminate the Agreement upon given written notice to the Plaintiff if, inter alia, the Plaintiff persistently failed to abide by any reasonable direction given to it by either the Chairman or Managing Director of the Defendant or the Plaintiff breached clause 11 of the Agreement (clause 10);

(v) the Plaintiff charged in favour of the Defendant any moneys due to the Plaintiff under clauses 5(b), (c) and (d) of the Agreement as security for payment of the Principal Outstanding and any interest accrued on the Principal Outstanding and the Defendant was entitled to apply such moneys in reduction and satisfaction of the Principal Outstanding and any interest accrued on the Principal Outstanding (clause 11).

5. As to paragraph 5, it:

   (a) admits that on or about 19 December 2007 it sent a letter to the Plaintiff giving notice of termination of the Second Consultancy Agreement;

   (b) otherwise denies the allegations in paragraph 5;

   (c) says further that by reason of the matters alleged in paragraphs 13 to 48 herein, the Defendant was entitled to terminate the Second Consultancy Agreement or alternatively to rescind the Second Consultancy Agreement;

   (d) says further that by the letter sent to the Plaintiff on or about 19 December 2007, the Defendant has lawfully terminated or alternatively rescinded the Second Consultancy Agreement.

6. As to paragraph 6, it:

   (a) admits that on or about 11 January 2008, the solicitors for the Plaintiff sent a letter to the solicitors for the Defendant purporting to affirm the Second Consultancy Agreement;

   (b) otherwise denies the allegations in paragraph 6.

7. It denies the allegations in paragraph 7.

8. It does not admit the allegations in paragraph 8.

9. It does not admit the allegations in paragraph 9.

10. As to paragraph 10, it:

   (a) admits that the Plaintiff has rendered tax invoices to Kew Development Corporation Pty Ltd in the amounts alleged in the particulars to paragraph 10 ("**Invoices**");

   (b) otherwise does not admit the allegations in paragraph 10.

11. As to paragraph 11, it:

(a) admits that the Defendant has not paid the amounts claimed in the Invoices;

(b) otherwise denies the allegations in paragraph 11.

12. It denies the allegations in paragraph 12.

13. On or about 2 October 2002, the Defendant (then named McRoss Developments Pty Ltd) entered into a contract of employment with Hunt ("**Employment Contract**").

PARTICULARS

The contract of employment is in writing.

14. There were terms of the Employment Contract as follows:

(a) Hunt commenced as an employee on 14 October 2002;

(b) Hunt was employed as the Business Development Manager for Victoria;

(c) Hunt's responsibilities included all facets of the Victorian operation of the Defendant;

(d) the remuneration payable to Hunt at commencement of the contract of employment was $400,000 per annum inclusive of superannuation.

15. Hunt remained an employee of the Defendant pursuant to the Employment Contract until 30 April 2007.

16. On 27 October 2006, Kew Development Corporation Pty Ltd, Walker Group Holdings Pty Ltd and the Secretary to the Department of Infrastructure for and on behalf of the Crown in right of the State of Victoria entered into an agreement entitled "Kew Residential Services Development Agreement" ("**the KRSD Agreement**").

PARTICULARS

The agreement is in writing.

17. Kew Development Corporation Pty Ltd is a wholly owned subsidiary of Walker Group Holdings Pty Ltd.

18. Lang Walker is the registered holder of:

    (a) all of the issued shares in Walker Group Holdings Pty Ltd; and

    (b) 18 of the 24 issued shares in the Defendant.

19. There are terms of the KRSD Agreement as follows:

    (a) the State of Victoria appointed Kew Development Corporation Pty Ltd to undertake the Project, being the redevelopment of the Kew Residential Services Site generally in accordance with the Development Plan, the Demolition Permit and the Financial Model including the construction of the Community Houses and the Community Facilities, all of which terms are defined in the KRSD Agreement (the "**KRSD Project**"), in accordance with the KRSD Agreement and Kew Development Corporation Pty Ltd accepted that appointment (clauses A3.1 and A3.2);

    (b) Kew Development Corporation Pty Ltd agrees to comply with the Construction Works Program by which the development was to be undertaken in two stages, with Stage 1 scheduled to be completed by 30 November 2007 (clause B7.1 and schedule 8);

    (c) the State of Victoria agrees to pay Kew Development Corporation Pty Ltd specified amounts for the construction of Community Houses on the Site as calculated under schedule 12 (clause D1.1);

    (d) the State of Victoria agrees to pay Kew Development Corporation Pty Ltd the proceeds of settlement of the sale of each developed Lot on the Site to an End Purchaser less amounts to be retained by the State for the land as calculated in accordance with schedule 12 (clause D1.2);

    (e) the expected expenditure and returns in respect of the Project are set out in the Financial Model forming schedule 9 (clause D2.1);

(f) Kew Development Corporation Pty Ltd agreed with the State of Victoria that it employed or had contracted with Hunt to perform the function of advisor regarding the design, implementation and marketing of the Project and interface and liaison with the Department of Health Services in relation to Community House and KRS issues and, subject to the right to replace him, Kew Development Corporation Pty Ltd was obliged to employ or contract with Hunt during the term of the KRSD Agreement (clause A8.3 and schedule 4);

(g) Kew Development Corporation Pty Ltd agreed with the State of Victoria that it would ensure that Hunt devoted sufficient time to the services described in paragraph (f) above so that the Project is completed efficiently and in accordance with the provisions of the KRSD Agreement (clause A8.4).

20. At all relevant times until 1 November 2007, pursuant to the Employment Contract, the First Consultancy Agreement and the Second Consultancy Agreement, the Defendant required Hunt to:

(a) supervise and advise in respect of the design, implementation and marketing of the Project;

(b) prepare the Financial Model that was included in the KRSD Agreement; and

(c) report to the Defendant concerning the implementation of the Project and the achievement of the Financial Model.

21. Hunt prepared the Financial Model that was included in the KRSD Agreement.

22. From in or about June 2006 until 31 May 2007, Hunt sought to enter into a consultancy agreement with the Defendant, pursuant to which Hunt or a company to be established by Hunt would provide consultancy services to the Defendant in relation to the KRSD Project as an independent contractor and Hunt would cease to be an employee of the Defendant.

PARTICULARS

(a) On 12 September 2006, Hunt sent an email to the Defendant proposing terms for a consultancy agreement.

(b) On 9 March 2007, Hunt sent a letter to the Defendant again proposing terms for a consultancy agreement.

23. On or about 26 April 2007, Hunt represented to the Defendant that Stage 1 of the KRSD Project was proceeding satisfactorily and that the profit for Kew Development Corporation Pty Ltd from Stage 1 of the KRSD Project would be $5,453,000.

PARTICULARS

The representation was oral and in writing. Insofar as it was oral, it was made in the Project Control Group meeting held on 26 April 2007. Insofar as it was in writing, it was recorded in the Report of the Project Control Group meeting held on 26 April 2007.

24. On or about 31 May 2007, Hunt represented to the Defendant that Stage 1 of the KRSD Project was proceeding satisfactorily and that the profit for Kew Development Corporation Pty Ltd from Stage 1 of the KRSD Project would be $4,231,000.

PARTICULARS

The representation was oral and in writing. Insofar as it was oral, it was made in the Project Control Group meeting held on 31 May 2007. Insofar as it was in writing, it was recorded in the Report of the Project Control Group meeting held on 31 May 2007.

25. In making the representations referred to in paragraphs 23 and 24 herein, Hunt implicitly represented that:

(a) he had a reasonable basis for the representations; and

(b) other than as reported at the Project Control Group Meetings on 26 April and 31 May 2007, the Project was proceeding in accordance with the Financial Model and the KRSD Agreement.

26. Hunt made the representations referred to in paragraphs 23, 24 and 25 herein to induce the Defendant to engage him or a company to be established by him as a consultant.

27. Stage 1 of the KRSD Project will generate a loss for Kew Development Corporation Pty Ltd.

PARTICULARS

The Defendant estimates that Kew Development Corporation Pty Ltd will derive a loss in excess of $7,000,000 from Stage 1 of the KRSD Project.

28. The representations referred to in paragraphs 23 and 24 herein were untrue in that at the time they were made Stage 1 of the KRSD Project was not proceeding satisfactorily or in accordance with the Financial Model or the KRSD Agreement.

29. The representation referred to in paragraph 25 herein was untrue in that at the time it was made Hunt did not have a reasonable basis for the representation referred to in paragraphs 23 and 24 herein.

30. On 31 May 2007, the Defendant entered into an agreement with Hunt entitled "Consultancy Arrangements" ("**the First Consultancy Agreement**").

PARTICULARS

The First Consultancy Agreement is in writing.

31. The Defendant entered into the First Consultancy Agreement in reliance on the representations referred to in paragraphs 23, 24 and 25 herein ("**Representations**").

32. There were terms of the First Consultancy Agreement as follows:

(a) the term of the agreement was stated to be 1 May 2007 until 30 April 2014 (clause 1);

(b) Hunt's duties were to assist, as directed, with the marketing, implementation and all other matters relating to the development of the Kew project as well as assisting, as directed, the Defendant to enter into a development agreement with the Tasmanian Government for the Lauderdale project (clause 3);

(c) Hunt was engaged as an independent contractor and not as an employee;

(d) the Defendant agreed to lend Hunt the amount of $1,000,000 on terms that:

(i) the loan would be interest free for 4 years;

(ii) the loan would be secured by Hunt charging his entitlements to fees payable pursuant to clauses 5, 6 and 8 of the agreement;

(iii) if the loan is not repaid within 4 years, it would earn interest and if not repaid out of the fees payable to Hunt under clauses 5, 6 and 8 of the Agreement would be repayable no later than 1 July 2012 (clause 7);

(e) the Defendant was entitled to terminate the agreement if Hunt persistently failed to abide by any reasonable direction given to him by the Chairman or Managing Director of the Defendant (clause 13).

33. Pursuant to the First Consultancy Agreement, the Defendant lent Hunt the amount of $1,000,000 (the "**Loan**").

34. Shortly after entering into the First Consultancy Agreement, Hunt requested the Defendant to replace that agreement with a consultancy agreement with a company to be established by Hunt.

35. On or about 12 June 2007, Hunt incorporated the Plaintiff.

36. At all times since 12 June 2007 Hunt has been the sole shareholder and director of the Plaintiff.

37. On 27 June 2007, the Defendant entered into the Second Consultancy Agreement with the Plaintiff and Hunt.

38. The Defendant entered into the Second Consultancy Agreement in reliance on the Representations.

39. By reason of the matters referred to in paragraphs 23 to 38 herein, the Defendant was entitled to rescind the Second Consultancy Agreement once it became aware that the Representations were untrue.

40. By the letter sent to the Plaintiff on or about 19 December 2008, the Defendant has rescinded the Second Consultancy Agreement.

41. Further or alternatively, the representations referred to in paragraphs 23, 24 and 25 herein were made by Hunt in trade or commerce.

PARTICULARS

The representations were made by Hunt during the period in which he was undertaking negotiations with the Defendant to enter into a consultancy agreement and for the purpose of inducing the Defendant to enter into a consultancy agreement with him.

42. By making the representations referred to in paragraphs 23, 24 and 25 herein, Hunt engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of section 9 of the *Fair Trading Act* 1999.

PARTICULARS

The Defendant relies on the matters referred to in paragraphs 23 to 29 herein and section 4 of the *Fair Trading Act* 1999.

43. The Defendant is a person who may suffer loss and damage by reason of Hunt's contravention of section 9 of the *Fair Trading Act* 1999.

44. On the basis of the matters referred to in paragraphs 42 and 43 herein, the Defendant seeks an order under section 158(2) of the *Fair Trading Act* 1999 that:

(a) the Second Consultancy Agreement is void; or

(b) the Second Consultancy Agreement is not to be enforced.

45. Further or alternatively, in the period 31 July 2007 to 19 December 2008, the Defendant directed the Plaintiff, through Hunt, to provide regular updates concerning the KRSD Project and the Lauderdale project.

PARTICULARS

The directions were both oral and in writing. In so far as they were oral, they were given by the Chairman and Managing Director of the Defendant to Hunt. In so far as they were in writing, they were given by letter dated 6 December 2008.

46. The Plaintiff did not provide regular updates concerning the KRSD Project and the Lauderdale project as directed.

47. By reason of the matters referred to in paragraphs 45 and 46 herein, the Defendant was entitled to terminate the Second Consultancy Agreement.

M H O'BRYAN

Arnold Bloch Leibler

ARNOLD BLOCH LEIBLER
Solicitors for the Defendant