

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

No 2006 of 2008
F6180

B E T W E E N:

KEVIN HUNT PTY LTD (ACN 125 910 563)

Plaintiff

and

WALKER CORPORATION PTY LIMITED (ACN 001 176 263)

Defendant

and

KEVIN HUNT

Third Party

AMENDED DEFENCE

Pursuant to the Order made by Justice Hollingworth on 20/6/2008.

Date of Document: 24 June ~~2 May~~ 2008

Filed on behalf of: The Defendant

Prepared by:
Arnold Bloch Leibler
Lawyers

Level 21
333 Collins Street
MELBOURNE VIC 3000

Solicitors Code: 54
Tel: (03) 9229 9999
Fax: (03) 9229 9900
Ref: 01-141459743
Attention: Alex King
Email: alex.king@abl.com.au



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);
 - (iiia) the Plaintiff and Hunt jointly and severally covenanted with the Defendant not to make public or divulge to any person, company or other legal entity any information concerning the business, operations or finances of the Company or any of its dealings, transactions or affairs or otherwise do any act or omit to do any act which directly or indirectly would or might reasonably be expected to injure the goodwill, business or reputation of the Company (clause 9);
 - (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 2008, 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.
- 12A. Between 1991 and 1994 Hunt was National Development Manager for Pioneer Property Group, and between 1994 and October 2002 was CEO - Victoria of Mirvac Victoria Pty Ltd, a subsidiary of Mirvac Limited.
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 express 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;

PARTICULARS

The term is in writing and is stated under the heading "Responsibilities" in the Employment Contract.

- (d) the remuneration payable to Hunt at commencement of the contract of employment was \$400,000 per annum inclusive of superannuation;
 - (e) Hunt would report to and was responsible to the Executive Chairman of the Defendant, Lang Walker.
- 14A. There were implied terms of the Employment Contract as follows:

- (a) Hunt would carry out his employment duties with a reasonable degree of competence and skill;
- (b) Hunt would carry out all lawful and reasonable directions given to him by the Defendant, including in particular directions given by Lang Walker and the Managing Director of the Defendant from time to time;
- (c) Hunt would not engage in conduct that was detrimental to the business interests of the Defendant; and
- (d) Hunt would act honestly in his dealings with the Defendant.

PARTICULARS

The terms were implied by law on the basis of Hunt's experience (as referred to in paragraph 12A herein), the position to which Hunt was employed and Hunt's remuneration.

15. Hunt remained an employee of the Defendant pursuant to the Employment Contract until 30 April 2007.
- 15A. Between December 2005 and 21 September 2007, Hunt held the position of Division Manager for the Victorian and Tasmanian Division of the Walker group of companies ("Walker Group").

PARTICULARS

- (a) The Walker Group includes the Defendant and its subsidiaries and Walker Group Holdings Pty Ltd and its subsidiaries (which includes Kew Development Corporation Pty Ltd).

(b) As Division Manager, Hunt was responsible for identifying new development opportunities in Victoria and Tasmania for the Walker Group and for managing developments undertaken by the Walker Group in Victoria and Tasmania.

15B. In May 2004, the Victorian Department of Human Services ("DHS") issued a Request for Proposals Tender seeking tender proposals for the development of the Kew Residential Services site at Princess Street, Kew, Victoria ("KRS Tender Request").

PARTICULARS

The KRS Tender Request is in writing.

15C. Between May 2004 and 27 October 2006, Hunt managed and co-ordinated the response to the KRS Tender Request on behalf of the Walker Group, including the preparation of indicative designs for dwellings to be constructed and financial feasibilities, and prepared the financial model that was ultimately included as Schedule 9 in the KRSD Agreement (as referred to in paragraph 16 herein).

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 ("State") entered into an agreement entitled "Kew Residential Services Development Agreement" ("the KRSD Agreement").

PARTICULARS

The KRSD Agreement 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 (capitalised words have the meanings given to them in the KRSD Agreement):

- (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). This paragraph has been deleted;~~
- (c) ~~the State of Victoria agrees agreed to pay Kew Development Corporation Pty Ltd specified amounts for the construction of Community Houses on the Site (also referred to in the KRSD Agreement as KRS Dwellings) as calculated under schedule 12 (clause D1.1);~~
- (d) ~~the State of Victoria agrees agreed to pay Kew Development Corporation Pty Ltd the proceeds of settlement of the sale of each developed Lot on the Site (also referred to in the KRSD Agreement as Spec Dwellings) 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~~ DHS 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);-
- (h) Kew Development Corporation Pty Ltd agreed to comply with the Construction Works Program which required, amongst other things, that:
- (i) the Community Houses for Stages 1A, 1B and 1C be completed by 30 November 2007; and
- (ii) the Sale Lots for Stages 1A, 1B and 1C to be completed by 30 November 2007 and the Sale Lots for the balance of Stage 1 to be completed by 30 April 2008,
- (clause B7.1 and Schedule 8);
- (i) Kew Development Corporation Pty Ltd agreed that it would, in a timely and professional manner, and in accordance with the requirements of the KRSD Agreement, bring Stage 1 to Completion by the Stage 1 Date for

Completion (being 30 November 2007 as extended in accordance with the KRSD Agreement) (clause B8.3(c));

- (j) Kew Development Corporation Pty Ltd agreed that, subject to any extensions of time allowed by the State in accordance with the KRSD Agreement, it would ensure that Completion of all Initial Community Houses and Stage 1 occurred on or before the Stage 1 Date for Completion (being 30 November 2007 as extended in accordance with the KRSD Agreement) (clause B14.3(b));
- (k) if Kew Development Corporation Pty Ltd failed to achieve Completion of the Initial Community Houses by the relevant Initial Community Houses Date for Completion, with the result that Completion and commissioning of the Initial Community Houses did not occur by the Stage 1 Date for Completion, Kew Development Corporation Pty Ltd agreed to pay Liquidated Damages (calculated on a daily basis) to the State for every day from the Stage 1 Date for Completion until Completion and commissioning of all of the Initial Community Houses was completed (clause B14.10(a));
- (l) if Kew Development Corporation Pty Ltd failed to achieve Completion of Stage 1 by the Stage 1 Date for Completion, Kew Development Corporation Pty Ltd agreed to pay Liquidated Damages (calculated on a daily basis) to the State for every day after the Stage 1 Date for Completion until Completion of Stage 1 (clause B14.10(d));
- (m) the obligation to pay Liquidated Damages under clauses B14.10(a) and (d) of the KRSD Agreement were subject to the Plan of Subdivision for Stage 1 being certified on or before 10 November 2006. If that did not occur, the Stage 1 Date for Completion and the Stage 1 Cut Off Date would be extended by one day for each day after 10 November 2006 until the Plan of Subdivision was certified (clause B14.10(b));
- (n) the obligation to pay Liquidated Damages under clause B14.10(d) would not apply if completion of Stage 1 occurred by the Stage 1 Cut Off Date (being 31 March 2008 as extended in accordance with the KRSD Agreement) (clause B14.10(e));
- (o) the State was entitled to terminate the KRSD Agreement by written notice to Kew Development Corporation Pty Ltd if Kew Development Corporation Pty Ltd failed to achieve Completion of Stage 1 by 30 June 2008 (as extended in accordance with KRSD Agreement) (clause A22.2);
- (p) if the Construction Works were delayed by reason of an Extension Event, Kew Development Corporation Pty Ltd may seek an extension of, amongst other things, the Initial Community Houses Date for Completion, the Stage 1 Date for Completion, the Stage 1 Cut Off Date and the date referred to in paragraph (a) of the definition of Termination Events (clause A5.3);

M
P

(q) Extension Events are defined in the KRSD Agreement to include a Force Majeure Event, any delay in Kew Development Corporation Pty Ltd obtaining any Approvals required to undertake the Project in a timely manner and the Plan of Subdivision for Stage 1 not being certified by the City on or before the expiry of the prescribed time for certification under the Subdivision Act 1988 (Vic).

19A. In December 2006, Hunt represented to the Defendant that he had the skills and ability to manage and supervise the implementation of the KRSD Project, including the design of the dwellings to be constructed and the construction of the dwellings, so that the KRSD Project would be completed within the timeframes required by the KRSD Agreement (without payment of Liquidated Damages, and allowing for reasonably anticipated Extensions of Time) and within the budget contemplated by the Financial Model in the KRSD Agreement.

PARTICULARS

The representations were oral. They were made to Lang Walker and John Hughes by Hunt in a meeting held in the Walker Group's Sydney offices in December 2006.

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~~In about December 2006, in reliance on the representations made by Hunt as referred to in paragraph 19A herein, Lang Walker directed Hunt to:~~

- (a) manage and supervise the implementation of the KRSD Project by Kew Development Corporation Pty Ltd in accordance with the KRSD Agreement including managing and supervising and advise in respect of the design of the Spec Dwellings to be constructed as part of the KRSD Project, implementation and the marketing and sale of the Spec Dwellings and the construction of the KRS Dwellings and the Spec Dwellings Project;
- (b) manage and supervise the implementation of, and (as required) the updating of, prepare the Financial Model that was included in the KRSD Agreement; and
- (c) report to the Defendant Lang Walker or (if Lang Walker was not available) John Hughes concerning the implementation of the KRSD Project and the achievement of the Financial Model on a regular basis (being at least weekly).

PARTICULARS

The direction was partly in writing, partly oral and partly implied. Insofar as it was in writing, it was constituted by the terms of the Employment Contract. Insofar as it was oral, it was made in a meeting attended by Hunt, Lang Walker and the Managing Director of the Defendant, John Hughes, at Walker Group's Sydney offices in December 2006. Insofar as it was implied, the implication arose

from the position held by Hunt as the Division Manager of the Walker Group for Victoria and Tasmania and the responsibility given to him by Lang Walker to manage and supervise the implementation of the KRSD Project by Kew Development Corporation Pty Ltd.

21. Hunt managed and supervised the implementation of, and (as required) the updating of, 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.
- 22A. On 3 April 2007, Sean Sweeney, the principal representative of the State with responsibility for the KRSD Project, wrote to John Hughes stating that he believed that the KRSD Project would not be completed within the timeframe contemplated by the KRSD Agreement and that the management of Kew Development Corporation Pty Ltd was not focused on bringing the construction program into line with the timeframe required by the KRSD Agreement.

PARTICULARS

The communication was in writing and was made by email on 3 April 2007.

23. On or about 26 April 2007, Hunt represented to the Defendant that:
 - (a) Stage 1 of the KRSD Project would be completed within the timeframes required by the KRSD Agreement and that Kew Development Corporation Pty Ltd would not incur financial or other liability to the State under the KRSD Agreement by reason of delays in the Completion of Stage 1; and
 - (b) 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;
 - (c) the financial report for Stage 1 of the KRSD Project contained in the Project Meeting Report dated 26 April 2007:
 - (i) included all costs that had been incurred to date; and

20070403

\$5.4m

- (ii) was a reasonable estimate of the costs that would be incurred by the Walker Group to complete Stage 1 of the KRSD Project.

PARTICULARS

The representation was partly written, partly oral and partly to be implied in writing. Insofar as it was in writing, it was recorded in the Report of the Project Control Group meeting held on 26 April 2007. 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. Insofar as it was implied, the implication arose by reason of Hunt's failure to inform Lang Walker at the meeting that, based on the then current progress of construction, Stage 1 would not be completed within the timeframe required by the KRSD Agreement and that Kew Development Corporation Pty Ltd would incur financial or other liability to the State under the KRSD Agreement by reason of delays in the Completion of Stage 1, in circumstances where:

- (i) Hunt was the Division Manager for the Walker Group with responsibility for the KRSD Project;
- (ii) Hunt was required to manage and supervise the implementation of the KRSD Project in accordance with the requirements of the KRSD Agreement; and
- (iii) Hunt was required to report to Lang Walker concerning the implementation of the KRSD Project.

24. On or about 31 May 2007, Hunt represented to the Defendant that:

- (a) Stage 1 of the KRSD Project would be completed within the timeframes required by the KRSD Agreement and that Kew Development Corporation Pty Ltd would not incur financial or other liability to the State under the KRSD Agreement by reason of delays in the Completion of Stage 1; and
- (b) 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; and
- (c) the financial report for Stage 1 of the KRSD Project contained in the Project Meeting Report dated 31 May 2007:
- (i) included all costs that had been incurred to date; and
- (ii) was a reasonable estimate of the costs that would be incurred by the Walker Group to complete Stage 1 of the KRSD Project.

PARTICULARS

The representation was partly written, partly oral and partly to be implied in writing. Insofar as it was in writing, it was recorded in the Report of the Project Control Group meeting held on 31 May 2007. 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. Insofar as it was implied, the implication arose by reason of Hunt's failure to inform Lang Walker at the meeting that, based on the then current progress of construction, Stage 1 would not be completed within the timeframe required by the KRSD Agreement and that Kew Development Corporation Pty Ltd would incur financial or other liability to the State under the KRSD Agreement by reason of delays in the Completion of Stage 1, in circumstances where:

- (i) Hunt was the Division Manager for the Walker Group with responsibility for the KRSD Project;
- (ii) Hunt was required to manage and supervise the implementation of the KRSD Project in accordance with the requirements of the KRSD Agreement; and
- (iii) Hunt was required to report to Lang Walker concerning the implementation of the KRSD Project.

25. In making the representations referred to in paragraphs 23 and 24 herein, Hunt implicitly represented that he had a reasonable basis for the representations referred to in paragraphs 23 and 24 herein.:

(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.

PARTICULARS

The representation was implied by reason of Hunt's duties to the Defendant under the Employment Contract.

26. Hunt made the representations referred to in paragraphs 19A, 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. The representations referred to in paragraph 19A were untrue in that Hunt did not have the skills and ability that he represented.

PARTICULARS

The Defendant will rely on Hunt's failure in the period December 2006 to 21 September 2007 to manage and supervise the implementation of the KRSD Project so that the KRSD Project would be completed within the timeframes required by the KRSD Agreement (without payment of Liquidated Damages) and within the budget contemplated by the Financial Model in the KRSD Agreement, more particularly described in paragraphs 16 and 19 herein. 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;
- (a) Stage 1 of the KRSD Project had fallen behind schedule and would not be completed within the timeframes required by the KRSD Agreement, which would cause Kew Development Corporation Pty Ltd to incur financial or other liability to the State under the KRSD Agreement by reason of delays in the Completion of Stage 1;
- (b) the profit for Kew Development Corporation Pty Ltd from Stage 1 of the KRSD Project would be substantially less than \$4,231,000; and
- (c) the financial report for Stage 1 of the KRSD Project contained in the Project Meeting Report dated 31 May 2007:
- (i) did not include all costs that had been incurred to date; and
- (ii) was not a reasonable estimate of the costs that would be incurred by the Walker Group to complete Stage 1 of the KRSD Project.
29. The representation referred to in paragraph 25 herein was untrue in that, by reason of the matters referred to in paragraph 28 herein, at the time it was made Hunt did not have a reasonable basis for the representations referred to in paragraphs 23 and 24 herein.
- 29A. On 31 May 2007, Lang Walker directed Hunt not to engage the architectural firm dKO Architecture Victoria Pty Ltd ("dKO") to undertake work in respect of Stage 2 of the KRSD Project other than the preparation of a Masterplan.

PARTICULARS

The direction was given orally in the Project Control Group meeting held on 31 May 2007 that was attended by, amongst others, Lang Walker and Hunt.

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

PARTICULARS

The Defendant's offer to enter into the First Consultancy Agreement is in writing and is contained in a letter dated 31 May 2007 from Lang Walker to Hunt.

- 30A. On 4 June 2007, Hunt accepted the Defendant's offer to enter into the First Consultancy Agreement.

PARTICULARS

Hunt accepted the Defendant's offer to enter into the First Consultancy Agreement by countersigning and returning to the Defendant the letter dated 31 May 2007 from Lang Walker to Hunt.

31. The Defendant entered into the First Consultancy Agreement in reliance on the representations referred to in paragraphs 19A, 23, 24 and 25 herein ("**Representations**").
32. There were express and implied 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~~ KRSD 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);
- (da) Hunt was entitled to interpose a corporation as the consultant in place of Hunt provided that the corporation promised to provide the personal endeavours of Hunt (clause 12);

- (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);

PARTICULARS

The terms referred to in paragraphs (a) to (e) were express and were in writing. They were contained in a letter dated 31 May 2007 from Lang Walker to Hunt.

- (f) Hunt would exercise a reasonable degree of competence and skill to ensure that Stage 1 of the KRSD Project would be completed within the timeframes required by the KRSD Agreement and that Kew Development Corporation Pty Ltd would not incur financial or other liability to the State under the KRSD Agreement by reason of delays in the Completion of Stage 1;
- (g) Hunt would exercise a reasonable degree of competence and skill to ensure that the profit for Kew Development Corporation Pty Ltd from Stage 1 of the KRSD Project would be \$4,231,000; and
- (h) Hunt warranted that the financial report for Stage 1 of the KRSD Project contained in the Project Meeting Report dated 31 May 2007:
- (i) included all costs that had been incurred to date; and
- (ii) was a reasonable estimate of the costs that would be incurred by the Walker Group to complete Stage 1 of the KRSD Project;

PARTICULARS

The terms referred to in paragraphs (f) to (h) were partly written, partly oral and partly implied. The Defendant refers to and repeats the particulars to paragraph 24 herein.

- (i) Hunt would carry out his duties with a reasonable degree of competence and skill;
- (j) Hunt would carry out all lawful and reasonable directions given to him by the Defendant, including in particular directions given by Lang Walker and the Managing Director of the Defendant from time to time;
- (k) Hunt would not engage in conduct that was detrimental to the business interests of the Defendant; and
- (l) Hunt would act honestly in his dealings with the Defendant.

PARTICULARS

The terms referred to in paragraphs (i) to (l) were implied by law on the basis of Hunt's experience, the position to which Hunt was engaged as a

consultant and Hunt's remuneration under the First Consultancy Agreement.

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.

PARTICULARS

The request was made orally by Hunt to John Hughes (on behalf of the Defendant) in or about June 2007.

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.
- 38A. There were express terms of the Second Consultancy Agreement as admitted in paragraph 4(a) herein and as set out in paragraph 4(b) herein.
- 38B. There were further express and implied terms of the Second Consultancy Agreement as follows:
- (a) the Plaintiff would ensure that Hunt exercised a reasonable degree of competence and skill to ensure that Stage 1 of the KRSD Project would be completed within the timeframes required by the KRSD Agreement and that Kew Development Corporation Pty Ltd would not incur financial or other liability to the State under the KRSD Agreement by reason of delays in the Completion of Stage 1;
- (b) the Plaintiff would ensure that Hunt exercised a reasonable degree of competence and skill to ensure that the profit for Kew Development Corporation Pty Ltd from Stage 1 of the KRSD Project would be at least \$4,231,000; and
- (c) the Plaintiff warranted that the financial report for Stage 1 of the KRSD Project contained in the Project Meeting Report dated 31 May 2007:
- (i) included all costs that had been incurred to date; and
- (ii) was a reasonable estimate of the costs that would be incurred by the Walker Group to complete Stage 1 of the KRSD Project;

PARTICULARS

The terms referred to in paragraphs (a) to (c) were partly written, partly oral and partly implied. The Defendant refers to and repeats the particulars to paragraph 24 herein.

- (d) the Plaintiff would ensure that the services to be supplied pursuant to the Second Consultancy Agreement ("**Consultancy Services**") were carried out by Hunt with a reasonable degree of competence and skill;
- (e) the Plaintiff would ensure that Hunt carried out all lawful and reasonable directions given to him by the Defendant, including in particular directions given by Lang Walker and the Managing Director of the Defendant from time to time;
- (f) the Plaintiff would ensure that Hunt would not engage in conduct that was detrimental to the business interests of the Defendant; and
- (g) the Plaintiff would ensure that Hunt acted honestly in his dealings with the Defendant.

PARTICULARS

The terms referred to in paragraphs (d) to (g) are implied by law on the basis of Hunt's experience, the position to which the Plaintiff was engaged as a consultant and the remuneration payable to the Plaintiff under the Second Consultancy Agreement.

- 38C. In June and July 2007, Hunt authorised Kew Development Corporation Pty Ltd to seek fee proposals from dKO in respect of the provision of services for Stage 2 of the KRSD Project including preparation of a Masterplan, Schematic Design of Individual Houses, Planning and Design Developments and Contract Documentation and Construction Phase.
- 38D. On 14 June and 26 July 2007, dKO provided fee proposals to Kew Development Corporation Pty Ltd in respect of the provision of services for Stage 2 of the KRSD Project including preparation of a Masterplan, Schematic Design of Individual Houses, Planning and Design Developments and Contract Documentation and Construction Phase.

PARTICULARS

The fee proposals were in writing and a copy is in the possession of the solicitors for the Defendant.

- 38E. Between June and September 2007, Hunt authorised dKO to undertake, and dKO undertook, work in respect of Stage 2 of the KRSD Project comprising Masterplanning, Schematic Design of Individual Houses and Planning and Design Development and Marketing and rendered invoices in respect of those services in an amount of (at least) \$213,950.

PARTICULARS

The invoices were in writing and copies are in the possession of the solicitors for the Defendant.

38F. The conduct of Hunt referred to in paragraphs 38C and 38E herein was in breach of directions given to him by the Defendant as referred to in paragraph 29A and thereby was in breach of the First Consultancy Agreement and caused the Plaintiff to breach the Second Consultancy Agreement.

38G. Between 12 and 19 September 2007, Sean Sweeney, as the principal representative of the State in respect of the KRSD Project, informed the Defendant that:

- (a) he did not believe that Kew Development Corporation Pty Ltd would be able to complete Stage 1 by the Stage 1 Date for Completion;
- (b) he did not believe that Hunt and the staff working with Hunt had the necessary skills to manage the completion of the KRSD Project within the timeframes required by the KRSD Agreement;
- (c) despite requests made on behalf of the State, Hunt had not taken adequate steps to accelerate the Completion of Stage 1;
- (d) Kew Development Corporation Pty Ltd had made frivolous claims for extensions of time under the KRSD Agreement;
- (e) the State intended to pursue claims for Liquidated Damages under the KRSD Agreement in respect of the failure by Kew Development Corporation Pty Ltd to complete Stage 1 by the Stage 1 Date for Completion;

PARTICULARS

The communications were made in writing and orally. Insofar as they were written, they were contained in an email dated 13 September 2007 from Sean Sweeney to John Hughes. Insofar as they were oral, they were made in a meeting between Sean Sweeney and John Hughes held at Walker Group's Sydney offices on 12 September 2007 and a meeting between Sean Sweeney and Stephen Case (both representing the State) and Lang Walker on 19 September 2007.

38H. As at September 2007, Hunt had failed to exercise a reasonable degree of competence and skill to:

- (a) manage the design of the Stage 1 Spec Dwellings so that:
 - (i) the dwellings could be constructed for the costs contemplated by the Financial Model; and

Too Much
Beach/Leaves

- (ii) the dwellings could be constructed within the timeframes required by the KRSD Agreement; and

PARTICULARS

The Stage 1 Spec Dwellings were designed to incorporate substantial quantities of architectural steel, which was both unnecessary and costly. The dwellings also had individual designs which prevented builders from obtaining cost and time efficiencies in replicating the required construction over many dwellings. As at September 2007, the financial report for Stage 1 of the KRSD Project contained in the Project Meeting Report dated 31 May 2007 had been shown to be inaccurate and not reasonably based and the forecast profit for Stage 1 had been reduced to \$1,706,881.

- (b) implement a construction strategy and sequence that would enable the Stage 1 dwellings to be completed in accordance with the timeframes required by the KRSD Agreement.

PARTICULARS

Hunt had failed to engage head sub-contractors to undertake specific trades and building tasks in a sequence across all of the Stage 1 dwellings and instead had engaged day labour to undertake sub-contract works on individual dwellings.

- 38I. The failure of Hunt to exercise a reasonable degree of competence and skill as referred to in paragraph 38H herein was in breach of the First Consultancy Agreement and caused the Plaintiff to breach the Second Consultancy Agreement.
- 38J. On 21 September 2007, Lang Walker told Hunt and other staff of Kew Development Corporation Pty Ltd of the matters referred to in paragraph 38G and 38H. Hunt said to Lang Walker that the statements of Sean Sweeney as referred to in paragraph 38G were inaccurate.

PARTICULARS

The communications were oral and were made in the Project Control Group meeting held on 21 September 2007 attended by, amongst others, Lang Walker and Hunt.

- 38K. On 21 September 2007, Lang Walker asked Hunt whether dKO had been engaged to undertake work for Stage 2 of the KRSD Project. Hunt told Lang Walker that dKO had only been engaged to provide Masterplanning services for Stage 2 at a total cost of \$35,000, and that they had not provided any other services.

PARTICULARS

The statements were oral and were made in the Project Control Group meeting held on 21 September 2007 attended by, amongst others, Lang Walker and Hunt.

- 38L. The statements made by Hunt to Lang Walker on 21 September 2007 as referred to in paragraph 38J were untrue.
- 38M. The conduct of Hunt referred to in paragraphs 38K herein caused the Plaintiff to breach the Second Consultancy Agreement.
- 38N. On or about 21 September 2007, Lang Walker appointed David Gallant to manage the implementation and completion of the KRSD Project in place of Hunt and directed Hunt:
- (a) to manage the marketing and sale of Spec Dwellings and to have no other role in the KRSD Project; and
 - (b) to report to Lang Walker concerning the marketing and sale of Spec Dwellings on a regular basis (being at least weekly).

PARTICULARS

The directions were given orally in the Project Control Group meeting held on 21 September 2007 attended by, amongst others, Lang Walker and Hunt.

- 38O. After 21 September 2007, Kew Development Corporation Pty Ltd undertook a review of the design and construction of the Stage 1 dwellings with the object of determining whether Stages 1A, 1B and 1C could be completed in accordance with the timetable required by the KRSD Agreement and at the costs contemplated by the Financial Model.
- 38P. In or about September and October 2007, Hunt instructed the sales and marketing staff working on the KRSD Project, including Lia Thomas and Matthew Bracken, to inform purchasers of Spec Dwellings being constructed as part of Stages 1A, 1B and 1C that the dwellings would be completed and settlement of the sale of the dwellings would occur between July and October 2008.

PARTICULARS

The instructions were partly in writing and partly oral. Insofar as the instructions were written, they were contained in a diagrammatic settlement program for Stage 1 of the KRSD Project prepared in or about September 2007. Insofar as the instructions were oral, they were communicated orally by Hunt to Lia Thomas and by Lia Thomas to Matthew Bracken and other sales staff in or about September 2007.

Handwritten marks at top right: a circled 'X' and a signature.

38Q. The conduct of Hunt referred to in paragraphs 38P herein was detrimental to the business interests of the Defendant and thereby caused the Plaintiff to breach the Second Consultancy Agreement.

38R. In early October 2007, Kew Development Corporation Pty Ltd made refinements to the design of the Stage 1 Spec Dwellings with the object of reducing the cost of construction and enabling the dwellings to be constructed within the timeframes required by the KRSD agreement.

Handwritten note: "After Sale?"

38S. In or about October 2007, Hunt said to John Hughes that:

- (a) Hunt was responsible for the design of the Stage 1 Spec Dwellings;
- (b) Kew Development Corporation Pty Ltd must not change the designs of the Stage 1 Spec Dwellings;
- (c) the designs represented Hunt's vision for the KRSD Project;
- (d) the contracts of sale in relation to the Stage 1 Spec Dwellings did not permit changes to the design; and
- (e) any potential disputes about design with purchasers of Stage 1 Spec Dwellings would embarrass the State, as the vendor of the land on which the Stage 1 Spec Dwellings are built.

Handwritten note: "which represents"

Handwritten squiggly mark on the left margin.

Handwritten note: "EMBARASSING GOVT."

PARTICULARS

The statements were partly in writing and partly oral. Insofar as they were in writing, they were contained in a memorandum from Hunt to John Hughes dated 10 October 2007. Insofar as they were oral, they were made at a meeting in Melbourne involving Hunt and John Hughes in or around mid October 2007.

38T. In or about the latter half of October 2007, Hunt said to the State that Kew Development Corporation Pty Ltd was altering the design of the Stage 1 Spec Dwellings in a manner that may harm the interests of or embarrass the State.

PARTICULARS

The statements were made orally by Hunt to an officer of the DHS and communicated back to the Defendant via Major Projects Victoria.

38U. The conduct of Hunt referred to in paragraph 38T herein was detrimental to the business interests of the Defendant and thereby caused the Plaintiff to breach the Second Consultancy Agreement.

38V. On or about 1 November 2007 Lang Walker directed Hunt that:

- (a) the only service that the Defendant required Hunt to provide in respect of the KRSD Project was to assist in the marketing of that Project, and that

Handwritten signature: "Caleb Walker" and another signature below it.

\$7 Mil

Hunt was to immediately cease being involved in any other aspect of the KRSD Project, until further directed;

(b) Hunt was to cease any contact with the DHS and any officer of the DHS; and

(c) Hunt was to use his best endeavours to make the KRSD Project a success.

PARTICULARS

The directions were given by letter dated 1 November 2007 from Lang Walker to Hunt. A copy of the letter is in the possession of the solicitors for the Defendant.

38W. On 6 December 2007, the Defendant wrote to Hunt and directed him to telephone Lang Walker or John Hughes to provide an update on the Lauderdale Project and the KRSD Project.

PARTICULARS

A copy of the letter is in the possession of the solicitors for the Defendant.

38X. On 11 December 2007, John Hughes directed Hunt to communicate with and report to Lang Walker on a regular basis, at least weekly. In response, Mr Hunt stated that a written report that he had prepared in October 2007 and provided to Lang Walker was sufficient communication with Lang Walker and that he could otherwise do no more to comply with the direction.

PARTICULARS

The statements were oral and made in a conversation by telephone on 11 December 2007.

38Y. Between June 2007 and 19 December 2007, Hunt did not communicate with or report to Lang Walker on a weekly or otherwise regular basis in relation to any aspect of the work being performed by Hunt or the Plaintiff for the Defendant.

38Z. The conduct of Hunt referred to in paragraph 38Y herein was in breach of directions given to him by the Defendant as referred to in paragraphs 20, 38N, 38W and 38X and thereby was in breach of the First Consultancy Agreement and caused the Plaintiff to breach the Second Consultancy Agreement.

38ZA. By reason of the breaches of the First and Second Consultancy Agreements referred to in paragraphs 38I, 38Q and 38Z, Kew Development Corporation Pty Ltd will derive a loss in excess of \$7,000,000 from Stage 1 of the KRSD Project.

PARTICULARS

The alleged loss is calculated on the basis of a financial model prepared by the Defendant in April 2008 in respect of the KRSD Project. The financial model is confidential. Subject to the Defendant receiving an appropriate undertaking with respect to confidentiality, a copy of the financial model will be provided in the course of discovery.

- 38ZB. By reason of the breaches of the First and Second Consultancy Agreements referred to in paragraphs 38F, 38I, 38M, 38Q, 38U and 38Z herein (either separately or collectively), the Defendant was entitled to terminate the Second Consultancy Agreement.
- 38ZC. On 19 December 2007, the Defendant terminated the Second Consultancy Agreement by giving written notice to the Plaintiff.
39. Further or alternatively, Bby reason of the matters referred to in paragraphs 19A and 23 to 38 herein, the Defendant was entitled to rescind the Second Consultancy Agreement once it became aware that the Representations were untrue.

PARTICULARS

The Defendant became aware that the Representations were untrue progressively in the period July 2007 to and including 19 December 2007. It became aware that the Representations were untrue through information provided by Kew Development Corporation Pty Ltd to the Defendant. The information is recorded in monthly reports in respect of the KRSD Project prepared between July 2007 and December 2007.

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 19A, 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 19A, 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*.

PARTICULARS

The Defendant refers to and repeats paragraphs 31 and 38 of the Defence and says further that the loss and damage are the amounts payable by the Defendant pursuant to the First and Second Consultancy Agreements.

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. ~~*This paragraph has been deleted.* 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. ~~*This paragraph has been deleted.* The Plaintiff did not provide regular updates concerning the KRSD Project and the Lauderdale project as directed.~~
47. ~~*This paragraph has been deleted.* 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
 Solicitors for the Defendant