

SVENSON
BARRISTERS



PROPERTY VENTURES THAT FAILED

3 recent cases: what went wrong and how it was resolved

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14TH MARCH 2018

LIABILITY LIMITED BY A SCHEME APPROVED UNDER PROFESSIONAL STANDARDS LEGISLATION

THE CASES

- ***Huang & Ors v Chen & Anor*** [2017] NSWSC 1699
- ***Bullhead Pty Ltd v Brickmakers Place & Ors*** [2017] VSC 206
- ***Sim Development Pty Ltd v Greenvale Property Group Pty Ltd*** [2017] VSC 335

PURPOSE

- Reflect on options for structuring deals
- Highlight negotiation/drafting/execution errors
- Consider recent judicial decisions
- Identify common issues to avoid / resolve

STRUCTURE

- Background Facts
- Specific Provisions / Events
- Legal Issues
- Relevant Considerations
- Resolution
- Takeaway Points

Huang & Ors v Chen & Anor

[2017] NSWSC 1699



7 Deane Street, Burwood NSW

BACKGROUND FACTS

PLAINTIFFS

Robert Huang

PSR Burwood

Oxford Constructions

TOTAL = \$8.5 / \$13.5m

NAB

\$4.7m

SPD

CLT

**BURWOOD
PROPERTY**

\$10.5m
(Agreed Value)

\$5.25m (shares)

\$3.25m (fees/loan)

DEFENDANTS

Tony Chen

Lilian (wife)

David (bro-in-law)

SPECIFIC EVENTS

- 5 Sep – David email to solicitor
- 16 Sep – NAB email to Lilian
- 20 Sep – JVA executed / \$300k paid
- 23 Sep – Lilian email to NAB
- 29 Sep – \$4.7m paid / NAB discharged
- 6 Oct – \$1.1m paid
- 27 Oct – \$400k paid
- 28 Nov – \$2m paid
- 2 Dec – Robert appointed director of SPD

LEGAL ISSUES

- Intention to create legal relations
- Non est factum
- Specific performance

CONSIDERATIONS

- Effect of signature
- English proficiency
- Subsequent discussions for revised agreement
- Ongoing relationship tension

RESOLUTION

- Tony understood nature of JVA
- JVA binding and enforceable
- Defendants breached JVA:
 - Failed to issue 50% shares to PSR Burwood
 - Failed to open joint bank account
- Specific performance not appropriate
- Restitution

TAKEAWAY POINTS

- Interim arrangements can still be binding
- Be mindful of credibility when using interpreters
- Investors' remedy is often only refund with interest

Bullhead Pty Ltd v Brickmakers Place & Ors

[2017] VSC 206



1018-1028 Mt Alexander Road, Essendon

BACKGROUND FACTS

ORIGINAL PLAN

- Property purchase price = \$3.65m + GST
- 4 initial unitholders (\$600k for 600k units each)
- 2.4m units, total value = \$2.4m

SUBSEQUENT PLAN

- Resale “value” \$6m, with “expected profit” \$2.14m
- 4 initial unitholders (\$65k cash, \$535k “expected profit”)
- New unitholders - \$1 per unit.

SPECIFIC EVENTS / PROVISIONS

- 17 Dec 07
 - Contract of Sale (\$3.65m)
- 27 Feb 08
 - Trust Deed executed
 - Clause 3.2 (\$2.4m / 2.4m units)
 - Clause 5.1 (net asset value)
- 05 Mar 08
 - Formal valuation (\$3.65m)
- 14 Mar 08
 - Unitholders Agreements executed
 - Clause 5 (\$1 per unit)
 - Minute (Discounted Units)
- 16 Dec 13
 - Finalisation Agreement

LEGAL ISSUES

- Breach of trust
- Accessorial liability
- Limitation of actions
- Offer and (electronic) acceptance
- Estoppel

CONSIDERATIONS

- Interpretation of the Trust Deed
- Interpretation of the Unitholders Agreements
- Effect of the Minute dated 14 Mar 08
- Fraud?
- Knowledge attributable to unitholders
- Communication re compromise / resolution

RESOLUTION

- Breach of trust
- Initial unitholders liable as accessories
- Fraud (no LAA defence)
- Finalisation Agreement part-performed / estoppel

TAKEAWAY POINTS

- Special care required for trust structures
- Caution when preferencing investors
- Legal input in communications to compromise

Sim Development Pty Ltd v Greenvale Property Group Pty Ltd

[2017] VSC 335

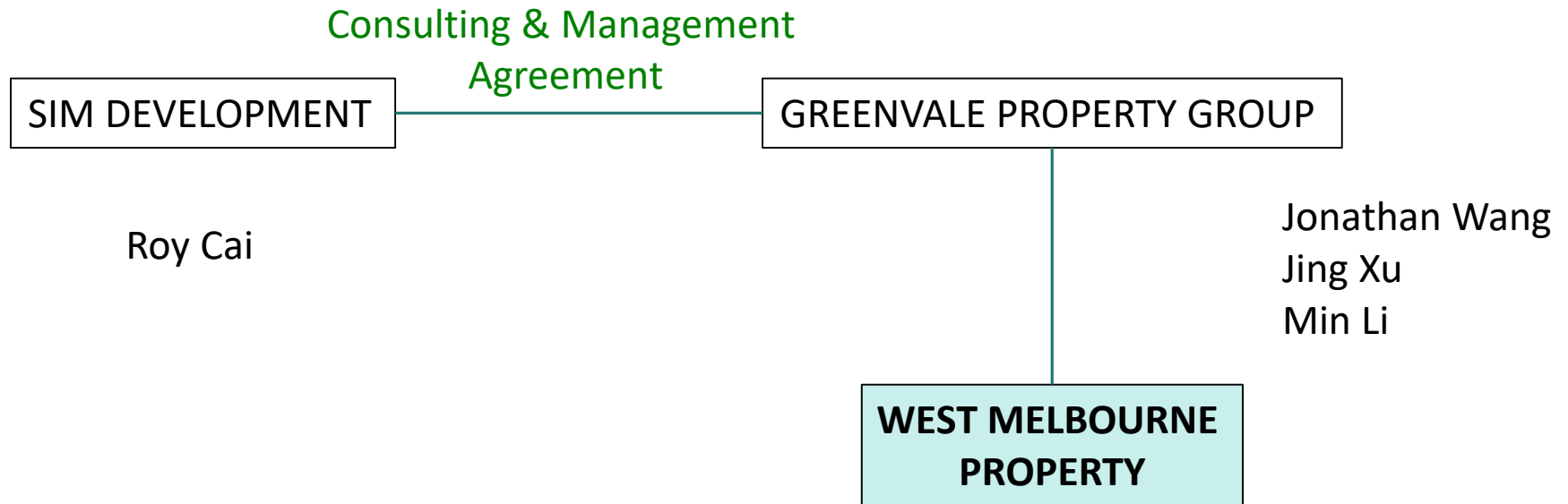


617-643 Spencer Street, West Melbourne

BACKGROUND FACTS

PLAINTIFF

DEFENDANT



SPECIFIC PROVISIONS

- Clause 7
 - Payment of Agreed Fee
(20% of net profit)
- Clause 15
 - Termination
- Clause 16
 - Consequence of early termination
(hourly rate)
 - Right to security

LEGAL ISSUES

- Contract construction
- Negligence (existence of duty)
- Caveats

CONSIDERATIONS

- Agreed Fee payable despite early termination?
- Causation test for negligence (s.51 Wrongs Act)
- Necessary requirements to lodge caveat

RESOLUTION

- No entitlement to Agreed Fee
- Claim on hourly basis reduced due to lack of evidence
- Breach of duty but no causation linking loss
- Caveat lodged on proper basis

TAKEAWAY POINTS

- Consider all possible / likely contingencies
- Include the mechanics – not just the outcome
- Collate evidence to support time-based claims

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SUMMARY OF KEY TAKEAWAYS

WHEN DEAL IS BEING DONE:

- Consider all contingencies
- Include mechanics
- Interim arrangements binding
- Special care for trusts
- Caution for preferences

WHEN DEAL IS ON THE ROCKS:

- Legal input in any compromise
- Remedy = refund with interest
- Evidence to support claims

QUESTIONS?

