

VID638 / 2008

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIAN DISTRICT REGISTRY

No.

IN THE MATTER OF GLENHURST CORPORATION PTY LTD (ACN 006 277 087)
(ADMINISTRATOR APPOINTED)

BETWEEN

JOSEPH GOODMAN

APPLICANT

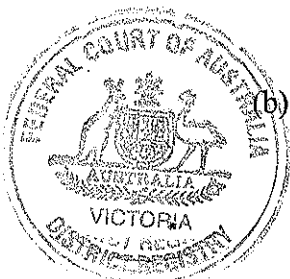
AND

GLENHURST CORPORATION PTY LTD (ACN 006 277 087) (IN
LIQUIDATION)

RESPONDENT

APPLICATION UNDER PART IVA OF THE *FEDERAL COURT OF
AUSTRALIA ACT 1976*
(Order 73, Rule 3)

1. This application is brought by the Applicant as a representative party and seeks leave to begin proceedings pursuant to s. 471B of the *Corporations Act 2001* (Cth).
2. The Group Members to whom this proceeding relates are persons who:
 - (a) were clients of the financial services business of the Respondent between 2002 and 2005;
 - (b) received financial services including investment advice from the Respondent or a representative of the Respondent;



Filed by the Applicant

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(c) invested in one or more of the following investment products issued by Westpoint Corporation Pty Ltd (“**Westpoint**”) or related entities of Westpoint (“**the Westpoint Entities**”):

- (i) the financial product known as York Street Mezzanine Finance Promissory Notes;
- (ii) the financial product known as Market Street Mezzanine Finance Promissory Notes;
- (iii) the financial product known as Bayview Heritage Mezzanine Finance Promissory Notes;
- (iv) the financial product known as Market Street Mezzanine No. 2 Finance Promissory Notes;
- (v) the financial product known as Ann Street Mezzanine Finance Promissory Notes;
- (vi) the financial product known as Mount Street Mezzanine Finance Promissory Notes;
- (vii) the financial product known as Bayshore Development Mezzanine Finance Promissory Notes; and
- (viii) the financial product known as North Sydney Finance Unsecured Notes (“**NSFN**”).

(“**the Westpoint Products**”);

- (d) were advised to invest in one or more of the Westpoint Products by the Respondent or a representative of the Respondent;
- (e) invested in one or more of the Westpoint Products in reliance on the advice provided by the Respondent or a representative of the Respondent;
- (f) suffered financial loss or damage as a result of their investment in one or more of the Westpoint Products;



- (g) are not carrying on any other Court proceedings against the Respondent in relation to financial loss or damage suffered as a result of their investment in the Westpoint Products as a result of (c) to (e) above.

3. The Applicant claims:

- (a) damages for negligence;
- (b) damages for breach of statutory duty;
- (c) damages pursuant to s.1041I of the *Corporations Act 2001* (Cth) further and alternatively s.1005 of the *Corporations Act 2001* (Cth) (as it was prior to the *Financial Services Reform Act 2001* (Cth) (the “*Pre FSR Act*”);
- (d) damages pursuant to s.12GF of the *Australian Securities and Investments Commission Act 2001* (Cth);
- (e) damages pursuant to s.1041I of the *Corporations Act 2001* (Cth);
- (f) damages for negligent misstatement;
- (g) recovery of loss and damage pursuant to s.953B of the *Corporations Act 2001* (Cth); further and alternatively s.852 of the *Pre FSR Act*;
- (h) damages pursuant to s.1022B of the *Corporations Act 2001* (Cth) for a breach of s.1012A of the *Corporations Act 2001* (Cth);
- (i) interest pursuant to s. 51A of the *Federal Court of Australia Act 1976* (Cth);
- (j) such further or other orders as the Court sees fit;
- (k) costs.



4. The questions of law or fact common to the claims of the Group Members are:

- (a) the incorporation of the Respondent;

- (b) the business of the Respondent;
- (c) the maintenance by the Respondent of an Approved Product List (“APL”);
- (d) the holding by the Respondent of a securities dealers licence pursuant to the *Pre-FSR Act*;
- (e) the holding by the Respondent of a financial services licence pursuant to the *Corporations Act 2001* (Cth);
- (f) the authorising by the Respondent of persons to be its representatives including persons specifically authorised by the Respondent under the terms of their financial services licence pursuant to s.916A of the *Corporations Act 2001* (Cth) further and alternatively ss.88 and 806 of the *Pre-FSR Act* to act on its behalf in relation to providing financial services further and alternatively securities recommendations including investment advice to the Group Members being clients of the financial services business further and alternatively the securities recommendation business of the Respondent;
- (g) the provision, at various times between 2002 to 2005 by the Respondent or its representatives of financial services further and alternative securities recommendation including investment advice in relation to the Westpoint Products to the Group Members, being clients of the financial services business further and alternatively the securities recommendation business of the Respondent.
- (h) the offers to accept monies made by Westpoint and/or the Westpoint Entities in connection with the Westpoint Products;
- (i) the loan of monies by the Group Members in exchange for the Westpoint Products;
- (j) the terms of the offers of the Westpoint Products;



- (k) the guarantee to be provided by the Westpoint Group defined as Westpoint Corporation Pty Ltd and associates entities (the “Guarantors”) in relation to the Market Street Mezzanine Finance Promissory Notes, the Bayview Heritage Mezzanine Finance Promissory Notes, the Market Street Mezzanine No. 2 Finance Promissory Notes, the Ann Street Mezzanine Finance Promissory Notes, the Mount Street Mezzanine Finance Promissory Notes and the Bayshore Mezzanine Finance Promissory Notes;
- (l) the liquidation of Westpoint, the Westpoint Entities and the Guarantors;
- (m) the expected returns to investors in respect of the Westpoint Products;
- (n) the Respondent’s placement at all relevant times of all of the Westpoint Products on its APL;
- (o) the Respondent’s recommendation that the Group Members invest in the Westpoint Products;
- (p) the Respondent’s knowledge or means of knowledge that the Group Members relied on the Respondent to exercise reasonable care to provide them with financial services and investment advice in a proper and competent manner in relation to the Westpoint Products;
- (q) whether the Respondent carried on the business of providing financial services further and alternatively securities recommendations including investment advice to investors and promoted themselves as providing that service;
- (r) whether the Group Members consulted the Respondent for financial advice further and alternatively securities recommendations;
- (s) whether the Respondent was paid a fee and/or received a commission or other valuable consideration for that advice;



- (t) whether the Respondent knew or ought reasonably to have known that the Group Members:
- (i) were persons who did not have the skills, expertise or experience to make informed investment decisions for themselves unaided by professional financial advice;
 - (ii) relied on the Respondent to provide them with financial advice with due care in a proper and competent manner;
 - (iii) would invest in reliance on the advice of the Respondent;
- (u) whether it was reasonably foreseeable that if the Respondent did not take reasonable care in placing the Westpoint Products on its APL and in providing financial advice to its clients, including the Group Members, in relation to the Westpoint Products, the Group Members, would or would be likely to suffer loss and damage;
- (v) whether the Respondent owed the Group Members a duty to take reasonable care in placing products including each of the Westpoint Products on its APL and in performing the service of providing the Group Members with financial advice in relation to the Westpoint Products;
- (w) whether negligently, and in breach of the duty of care which was owed by the Respondent to the Group Members, the Respondent:
- (i) failed to undertake any, alternatively any adequate, due diligence to investigate the characteristics of and the risks associated with the Westpoint Products prior to placing each of those products on its APL;
 - (ii) placed each of the Westpoint Products on its APL;
 - (iii) failed to adequately describe the characteristics of the Westpoint Products;



- (iv) failed to place any or any adequate restrictions on the recommendations which its representatives could make to the Group Members in respect of the Westpoint Products;
 - (v) failed to warn the Group Members that the Westpoint Products were highly risky investments;
 - (vi) advised the Group Members to invest in one or more of the Westpoint Products;
- (x) whether the Respondent failed to do all things necessary to ensure that the financial services covered by its financial services licence was provided efficiency, honestly and fairly in breach of s.912A(1)(a) of the *Corporations Act 2001* (Cth);
- (y) whether there was a reasonable basis for having the Westpoint Products on the Respondent's APL or for the Respondent recommending that the Group Members invest in the Westpoint Products;
- (z) whether the structure and characteristics of the Westpoint Products provided little security for investors and provided for a return that was not sustainable;
- (aa) whether the Westpoint Products represented a very significant risk, which was rewarded by an inadequate and uncertain return;
- (bb) whether the Respondent represented to the Group Members as follows:
- (i) that one or more of the Westpoint Products was an appropriate investment for the Group Members;
 - (ii) that the Group Members should invest in one or more of the Westpoint Products;
 - (iii) that the Group Members would likely obtain a return of 12% interest per annum paid monthly in arrears plus an



additional 2% paid on the repayment of capital (“the **Represented Return**”) from one or more of the Westpoint Products;

- (iv) that one or more of the Westpoint Products was sufficiently secure to make it reasonable for the Group Members to invest in them;
- (v) the Respondent had undertaken a reasonably careful and prudent review of one or more of the Westpoint Products prior to placing them on the Respondent’s APL;
- (vi) the Respondent had a reasonable basis for placing one or more of the Westpoint Products on the APL; and
- (vii) the Respondent and/or the Respondent’s representatives would be acting reasonably and prudently in recommending one or more of the Westpoint Products to the Respondent’s clients;

(“the Representations”);

- (cc) whether the Respondent made the Representations in relation to financial services within the meaning of s.12DA of the *Australian Securities and Investments Commission Act 2001 (Cth)*;
- (dd) whether the Respondent made the Representations in relation to a financial product or a financial service within the meaning of s.1041H of the *Corporations Act 2001 (Cth)* further and alternatively s.999 of the *Pre-FSR Act*;
- (ee) whether the Representations were inaccurate and were misleading or deceptive or likely to mislead or deceive in that:
 - (i) each of the Westpoint Products was not an appropriate investment for the Group Members;



- (ii) the Group Members should not have invested in any of the Westpoint Products;
 - (iii) it was not likely that the Group Members would obtain the Represented Return from any one of the Westpoint Products;
 - (iv) the Westpoint Products were not sufficiently secure to make it reasonable for the Group Members to invest in any of them;
 - (v) the Respondent had not undertaken a reasonably careful and prudent review of each of the Westpoint Products prior to placing them on the Respondent's APL;
 - (vi) the Respondent had no reasonable basis for placing one or more of the Westpoint Products on the APL; and
 - (vii) the Respondent and or the Respondent's representatives would be acting reasonably and prudently in recommending each of the Westpoint Products to the Respondent's clients;
- (ff) whether the Representations that it was not likely that the Group Members would obtain the Represented Return from any of the Westpoint Products was a representation as to a future matter without a reasonable basis for it;
- (gg) whether the Respondent engaged in conduct that was misleading or deceptive or was likely to mislead or deceive in contravention of either or both of s.12DA of the *Australian Securities and Investments Commission Act 2001 (Cth)* and s.1041H of the *Corporations Act 2001 (Cth)*; further and alternatively s.999 of the *Pre-FSR Act*;
- (hh) whether at the time of making the Representations, the Respondent intended and knew or ought to have known that the Group Members would likely rely on the Representations and would be induced thereby to invest in the Westpoint Products;



- (ii) whether the Respondent was under a duty of care to the Group Members to take reasonable care in making the Representations;
- (jj) whether in breach of the duty of care, the Respondent was negligent in making the Representations;
- (kk) whether the Representations were incorrect;
- (ll) whether in:
 - (i) placing the Westpoint Products on its APL; and
 - (ii) advising, or thereby permitting or encouraging its representatives to advise the Group Members to invest in one or more of the Westpoint Products;

the Respondent failed to give such consideration to, and conduct such investigation of, the Westpoint Products as was reasonable in all the circumstances, in order to have a reasonable basis for the advice given to the Group Members to invest in one or more of the Westpoint Products, in breach of s.945A of the *Corporations Act* 2001 (Cth);

- (mm) whether the Group Members are entitled to recover pursuant to s.953B of the *Corporations Act* 2001 (Cth) further and alternatively s.852 of the *Pre-FSR Act* the loss and damage they have suffered as a result of the Respondent's failure to comply with s.945A of the *Corporations Act* 2001 (Cth) further and alternatively s.851 of the *Pre-FSR Act*;
- (nn) whether each of the Westpoint Products issued by Westpoint and the Westpoint entities constituted a managed investment scheme within the meaning of s.9 of the *Corporations Act* 2001 (Cth);
- (oo) whether each of the Westpoint Products issued by Westpoint and the Westpoint entities were financial products within the meaning of



s.764A of the *Corporations Act* 2001 (Cth) further and alternatively securities within the meaning of ss.9 and 92 of the *Pre-FSR Act*;

- (pp) whether the advice given by the Respondent to invest in each of the Westpoint Products issued by Westpoint and/or the Westpoint entities comprised financial product advice within the meaning of s.766B of the *Corporations Act* 2001 (Cth);
- (qq) whether the Respondent was obliged to give a product disclosure statement to the Group Members when it provided a financial product advice to the Group Members that included a recommendation that the person acquire one or more of the Westpoint Products;
- (rr) whether the Respondent recommended that the Group Members acquire one or more of the Westpoint Products issued by Westpoint and the Westpoint entities, but (except in the case of NSFN) in breach of s.1012A of the *Corporations Act* 2001 (Cth) did not give the Group Members a product disclosure statement;
- (ss) whether if the Group Members had been provided with a product disclosure statement in respect of one or more of the Westpoint Products (except in the case of NSFN), that statement would have fully disclosed the risks of investing in the investment products issued by Westpoint and the Westpoint entities and disclose that each of the Westpoint Products were part of a managed investment schemes that were not registered and therefore liable to be wound up pursuant to s.601EE of the *Corporations Act* 2001 (Cth);
- (tt) whether the conduct of the representatives in relation to the Group Members concerning the Westpoint Products was conduct that related to the provision of a financial service as that term is defined in the *Corporations Act* 2001 (Cth);
- (uu) whether the Respondent is responsible as between the Respondent and the Group Members for the conduct of the representatives.



5. The Applicant claims by way of interlocutory relief: none.

DATED: 13 August 2008



Signature of Applicant's solicitors



TO THE RESPONDENT:

Glenhurst Corporation Pty Ltd (In Liquidation)
C/- CJL Partners Pty Ltd

Level 3, 180 Flinders Lane

Melbourne VIC 3000

A directions hearing in this application will be heard by the Court at the time and place specified below.

If there is no attendance before the Court by you or a legal practitioner representing you, the application may be dealt with and judgment may be given or an order made in your absence. Before any attendance at that time, you must file an appearance in the Registry.

Time: 9.30 am on 16 SEPTEMBER 2008

Place: Federal Court of Australia
Owen Dixon Commonwealth Law Courts Building
305 William Street
Melbourne VIC 3000

Date: August 2008

13 AUG 2008

(For)



The Applicant's address for service is care of Australian Securities and Investments Commission, 120 Collins Street, Melbourne, Victoria, 3000 (Reference: Mark Pangbourne).

The Applicant's address is known to ASIC.