



Summary of Judgment

Key Infrastructure Australia Pty Ltd v Bensons Property Group Pty Ltd [2019] VSC 522

14 August 2019

Key Infrastructure Australia Pty Ltd (KIA) is a town planner. In 2015, it acquired the rights to develop a site directly opposite the entrance to Station Pier in Port Melbourne for a restaurant and shops on the ground floor, and two upper floors of apartments. KIA developed plans for the building and applied to the City of Port Phillip for a planning permit.

In 2016, KIA and the owners of the site decided to sell the land and the work that had been done in applying for the planning permit to a property developer, rather than carry out the development themselves. Bensons Property Group Pty Ltd (Bensons), a property developer, approached KIA with a view to acquiring the land, the plans and the work done to obtain a planning permit. KIA and Bensons entered into a development management agreement (DMA) whereby for a fee of \$2 million plus GST, KIA would obtain the planning permit. At the same time, Bensons entered into agreements with the land owners to buy the site, subject to the permit being obtained. Under the DMA, KIA was to obtain the permit by a designated sunset date.

KIA claimed that it had entered into the DMA on the basis that Bensons would appeal to VCAT if the council failed to issue the permit, at Bensons' expense. Bensons said that it could elect to appeal to VCAT under the DMA, but was not bound to, and that it was only obliged to pay if it so elected.

Bensons initially informed KIA that it was not going to appeal to VCAT but that KIA could appeal if it wished. Subsequently, Bensons reversed its position and informed KIA that KIA was not entitled to go to VCAT without Bensons' permission, and if it did so, KIA would be in breach of the DMA. In the meantime, KIA had applied to VCAT, but withdrew the application upon receiving Bensons' threat that it would be in breach of the DMA if it applied to VCAT without Bensons' permission.

After a delay of some weeks, KIA reapplied to VCAT but was unable to obtain the planning permit until after the sunset date. Bensons did not proceed with the purchase of the site or the permit and terminated the DMA.

KIA took proceedings against Bensons for the recovery of the costs it incurred in appealing to VCAT and also for other damage suffered by reason of Bensons' alleged breach of the DMA. Bensons counterclaimed for moneys it had paid to KIA in anticipation of the planning permit being issued by the sunset date.

The Court held that the permit was not issued before the sunset date but that Bensons had breached the DMA by claiming that KIA could not go to VCAT and accordingly preventing KIA from obtaining the planning permit in time. The Court held, however, that Bensons was not obliged under the DMA or otherwise to pay for the costs of KIA appealing to VCAT. The Court held that Bensons was not entitled to the return of moneys paid to KIA for the planning permit. The Court held that KIA was not entitled to any damages as it sold the planning permit to a third party for a sum that exceeded the loss that it suffered by reason of Bensons' breach of the DMA. The Court ordered that Bensons pay KIA \$100 as nominal damages and dismissed Bensons' counterclaim.

NOTE: This summary is necessarily incomplete. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.