

FACTS

The case of *Key Infrastructure Australia Pty Ltd v Bensons Property Group Pty Ltd*¹ concerned a development project in Port Melbourne. In April 2016, Key Infrastructure Australia Pty Ltd (KIA) and Bensons Property Group (Bensons) executed a development management agreement (DMA), which provided for Bensons to provide payment of \$2 million to KIA in four instalments, if KIA was successful in obtaining a planning permit.

KIA applied to the council for the planning permit as per the agreement, however by May of 2016, it was apparent that the issue might need to be escalated to VCAT to obtain a decision.

On 18 May 2016, KIA applied to VCAT seeking a decision regarding the planning permit. By chance on the same date Bensons wrote a letter (Breach Letter) to KIA stating that any application to VCAT would be a breach of the DMA. Kia withdrew the application, reinstating it on 5 July 2016, and VCAT made orders directing the council to issue the permit, which was done on 6 February 2017, being after the Sunset date.

ISSUE

The Court considered the application of the prevention principle and where or not there was an act of prevention capable of triggering the principle.

FINDING

The court took the view however, that for KIA to succeed, it would have had to show that KIA had withdrawn the first VCAT application and not reapplied for seven weeks as a result of the Breach Letter stating:

“To contend that it was prevented from satisfying the development management conditions, it must establish that an operative reason it withdrew the first VCAT application and did not re-apply for seven weeks, was the 18 May 2016 letter. As will appear, when faced with the 18 May 2016 letter, KIA did not give up at all, let alone because it formed the view that it was futile to attempt to get the permit. It did not proceed on the basis that the VCAT route was unavailable or that the time limit had been enlarged. Rather, it sought advice and formed its own view as to how it would meet the development management conditions.”²

Judgment was given in favour of Bensons and orders made requiring repayment by KIA of the paid instalments of the Development management Fees.

IMPACT

This case serves to underscore the requirement for parties seeking to rely on the prevention principle, to establish that the party was actually prevented from completing their responsibilities under the contract.

¹ [2019] VSC 522

² *ibid* [161].