

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST

VCAT REFERENCE NO. BP1198/2017

CATCHWORDS

Australian Consumer Law and Fair Trading Act 2012 s.182 - claim by provider of town planning services for payment for services rendered – whether the services were actually provided for the respondents – whether the respondents were induced by the applicant – evidence required for a claim on a quantum meruit basis

APPLICANT	Spectrum Design Group Pty Ltd ACN 600 431 623
FIRST RESPONDENT	North Nut Brown Pty Ltd ACN 609 980 216
SECOND RESPONDENT	Azrene Abdullah
WHERE HELD	Melbourne
BEFORE	Senior Member S Kirton
HEARING TYPE	Hearing
DATE OF HEARING	13, 14 December 2018
DATE OF ORDER	20 June 2019
CITATION	Spectrum Design Group Pty Ltd v North Nut Brown Pty Ltd (Building and Property) [2019] VCAT 926

ORDER

1. The claim is dismissed.
2. There is liberty to apply on the question of costs. If the parties agree, they may make any application for costs by way of written submissions (limited to 6 pages) and affidavits, to be decided in chambers. Alternatively, a party may request the principal registrar to list the matter for a one hour hearing before Senior Member Kirton.

SENIOR MEMBER S KIRTON

APPEARANCES:

For the Applicant Mr JB Cohen, solicitor

For the First Respondent Ms R Wilson, solicitor

For the Second Respondent Ms R Wilson, solicitor

REASONS

BACKGROUND

1. The applicant (SDG) carries on business as property consultants, providing town planning and other services. Mr Anthony Bruno is a project manager with SDG. The first respondent (NNB) is a company registered on 24 December 2015. The second respondent (Ms Abdullah) was at all material times the sole director of NNB.
2. SDG alleges that it was engaged by the respondents in January 2016 to provide services in order to obtain a planning approval for the construction of an apartment complex in North Road Ormond (the property). It says that it provided these services but has not been paid.
3. The respondents only became the owners of the property in December 2015. Prior to that, the property was owned by a company called 532 NRO Pty Ltd (532 NRO). In July 2015, on behalf of 532 NRO, SDG had lodged a permit application with the Glen Eira Council for the construction of a five-storey building including 10 apartments and retail frontage on the property. The Council refused the application and in September 2015 SDG had made an application to the Tribunal against the Council's decision¹.
4. The parties agreed that in or about August or September 2015, Ms Abdullah met Mr Bruno of SDG for the first time. Ms Abdullah was interested in buying a property to develop and Mr Bruno showed her the property owned by 532 NRO. Ultimately, the respondents² purchased the property by a contract of sale dated 2 December 2015 from 532 NRO.
5. At the time of the sale, the application before the Tribunal was listed for a compulsory conference in December and then a hearing in April 2016. Mr Bruno and Ms Abdullah met and signed the contract between them on 19 January 2016. Settlement of the sale took place on 24 March 2016.

THE ISSUES IN DISPUTE

6. SDG alleges that on 19 January 2016 it entered into a contract with either the first or second respondent, or both (the Stage I contract). The contract is contained in a document sent on SDG's letterhead headed "VCAT Pre-Hearing Negotiations". In simple terms, the Stage I contract provides that SDG will provide "Stage I town planning services", which included "VCAT negotiations, amend plans, town planning advice and meetings and re-issue traffic report".

¹ Under s.77 of the *Planning & Environment Act 1987* (P&E Act).

² The contract of sale was signed by Ms Abdullah "and/or nominee". NNB was nominated as the purchaser prior to settlement of the sale.

7. The applicant says it provided the agreed services but has not been paid, in breach of the Stage I contract. The amount claimed is \$12,100 pursuant to the contract, alternatively on a quantum meruit basis.
8. The applicant also claims for further services allegedly provided by it in addition to the Stage I contract. It says these works were carried out pursuant to a second contract for stage II services (the Stage II contract), alternatively on a quantum meruit basis. The amount claimed is \$5407.88.
9. The respondents say they should not be required to pay for any of the services provided on a number of grounds, as follows:
 - a. Mr Bruno, on behalf of the applicant, induced the second respondent into entering into a contract to purchase the property, with nondisclosure of the planning history and planning status of the property and with assurances that a planning permit would issue prior to settlement.
 - b. The respondents deny that the fee proposal letter dated 19 January 2016 was a contract with either respondent.
 - c. The respondents deny that the applicant was acting on the instructions of, or authority of, or on behalf of, either respondent during the time the alleged debt totalling \$17,507.88 was incurred.
 - d. The respondents did not benefit from any works performed or actions taken by the applicant.
 - e. The applicant has no legal standing for a claim of interest pursuant to the *Penalty Interest Rates Act* 1983.
10. All parties were legally represented at the hearing. Evidence for the applicant was given by Mr Bruno. Ms Azrene Abdullah and Ms Hui Jin Foo gave evidence for the respondents.
11. For the reasons given below, I dismiss the applicant's claim. In summary, I find that while the parties entered into the Stage I contract for the provision of the stage I services, and that those services were provided by SDG, they were provided to the then owner of the property, 532 NRO, and not to the respondents. Further, I find that while the applicant provided some services to the respondents after 24 March 2016, these were not provided under any contract. The applicant's claim for these services on a quantum meruit basis fails, as SDG has failed to provide any evidence of the value of the services provided or of any benefit to the respondents.

WAS THERE A CONTRACT BETWEEN THE PARTIES FOR THE STAGE 1 SERVICES?

12. I am satisfied that SDG entered into the Stage I contract with both respondents for the stage I services on 19 January 2016 and that the terms of that contract are set out in the document headed “VCAT Pre-Hearing Negotiations”. Mr Bruno for SDG and Ms Abdullah both gave evidence that they had discussed and then signed the document during a meeting between them on that date. It was not submitted by the respondents that they were induced or coerced to enter into the Stage I contract.
13. The terms of the contract are set out in the document, and the relevant parts state as follows:

We... thank you for your invitation to provide an outline of our services and fees for the above project.

Firstly congratulations on the purchase of your new property and we hope we can provide you with our business to make your new development a reality. We have the great pleasure in providing you our fee proposal for our services to complete and finalize the town planning application. As you may know Spectrum Design Group has already commenced the required documentation and all related works in order to obtain the planning permit and all the required fees up to this point have been paid by the previous owner. As you are now the new owners of the property, Spectrum Design Group will be requesting the reappointment to continue with the application and from this point on you as the new owner will be responsible for all costs leading up to the VCAT hearing.

Following the compulsory conference hearing with Glen Eira Council at VCAT we are confident in obtaining approval of the planning permit prior to the upcoming VCAT hearing on the 1st April 2016. Although we are confident to gain a permit prior to the VCAT hearing, there is still the possibility that we may need to go through the VCAT process.

14. The services to be provided and the amounts to be charged for each service are set out in the document. Ms Abdullah said in her evidence that she had asked for a reduction in the offered price and this was agreed to by Mr Bruno. The evidence of all parties was that they had agreed on a price of \$11,250. The services and the agreed amounts are described as follows:

Stage 1 VCAT negotiations

○ Amend plans (anticipate one further change)	\$4,500
○ Town planning advice and meetings	\$5,500
○ Re-issue traffic report	\$1,250
Total	\$11,250

In order to commence works on stage I kindly provide a deposit of \$6000 as stated on page 3 with the balance to be paid upon completion.

Please note: All additional meetings will be charged at \$225.00 per hour plus GST.

Note: the fee mentioned above is a fixed cost up to the VCAT hearing...

15. As I am satisfied that there was a contract for the stage I services, the issue before me is whether any of the matters raised in their defence entitled the respondents to avoid their contractual obligations under the Stage I contract.

WHO WAS THE APPLICANT ACTING FOR WHEN CARRYING OUT THE WORK?

16. The respondents' position, if the Tribunal is satisfied that the applicant was providing services under a contract, is that they deny the applicant was acting on the instructions of, or authority of, or on behalf of, either respondent during the time the alleged debt was incurred.
17. In light of Mr Bruno's evidence given during the hearing, the answer to this question conclusively resolves much of the dispute in favour of the respondents.
18. As set out above, the Stage I contract commenced on 19 January 2016. SDG rendered an invoice dated 1 February 2016 to the respondents in relation to the stage I services. This is the invoice claimed in this proceeding³. The works carried out are described in the invoice as follows:

VCAT negotiations

- Amend plans
- Town planning advice and meetings
- Re-issue traffic report

19. In contrast to the pleaded claim, during cross-examination Mr Bruno conceded that up until the settlement of the sale of the property on 24 March 2016, SDG had been acting for 532 NRO. That is, when SDG had obtained instructions to amend the plans prior to the compulsory conference, when it had appeared at the compulsory conference, and when it lodged amended plans on 5 February 2016, SDG had been acting on the instructions of 532 NRO. Further, Mr Bruno conceded that Metropol had been engaged by and acted for 532 NRO at the compulsory conference and in subsequently advising on and preparing the revised plans. His evidence was that Ms Abdullah "was a new client. We knew the date of settlement. She would be the new client from settlement".
20. When it was suggested to him that this evidence indicated that SDG's claim against the respondents was misconceived, Mr Bruno said that even though SDG was acting for 532 NRO at the compulsory conference and in

³ Several different versions of this invoice were tendered, with differing amounts and dates, but I rely on the version attached to the Points of Claim. I make no findings about the variances, as nothing turns on this.

preparing the revised plans, he was careful to notify Ms Abdullah of any changes made and seek her instructions. He described the overlapping period as a “buffer zone” and Ms Abdullah as having had a “vested interest”. He said that he provided her with a copy of the proposed revised plans on 16 December 2015 (after the compulsory conference) and these indicated there would be nine apartments. He admitted that he did not expressly discuss with her the fact that these plans deleted one apartment, but said he had told her initially that SDG always includes too many units initially, thinking it will be cut back by Council. Mr Bruno said that when Ms Abdullah did not object to the proposed plans, he took that to mean she agreed.

21. The respondents asked Mr Bruno whether the negotiations he undertook at and surrounding the compulsory conference at VCAT were included as part of the “VCAT negotiations” provided under the Stage I contract. Mr Bruno agreed they were. When he was asked to explain why these services fell within the scope of the contract entered into in January 2016, when the services had occurred in December 2015, Mr Bruno said the “VCAT negotiations” also included negotiating with the Council following the compulsory conference and leading up to the hearing on 1 April. Mr Bruno relied on a series of emails sent on 23, 24 and 25 February 2016 as evidence that SDG and its consultant Metropol had carried out further negotiations with the Council.
22. It was then put to him by the respondents that the only step left to do following the compulsory conference and the drafting of the amended plans was to provide them to the Council and VCAT 33 business days before the hearing, being by 12 February 2016. SDG failed to do this, and as a result, the hearing had to be adjourned from 1 April 2016. Mr Bruno initially responded that he had refused to lodge the revised plans in February because SDG had not been paid by the respondents. He then conceded that as at that date he was still engaged by 532 NRO, and that it was that company which had instructed him not to lodge the revised plans.

Conclusion on the question of who the applicant was acting for

23. Based on these concessions from Mr Bruno, I accept the respondents’ contention that in spite of the Stage 1 contract signed on 19 January 2016, the services actually provided by SDG up until 24 March 2016 were carried out on the instructions of and for the benefit of 532 NRO. As a result, I find that the only services covered by the Stage I contract for which the respondents are liable are any “VCAT negotiations, amendment of plans, provision of town planning advice and meetings and re-issuing of traffic reports” which were provided after settlement on 24 March 2016.

WHEN DID THE STAGE I CONTRACT CONCLUDE?

24. On the basis of Mr Bruno's evidence, set out in the following paragraph, I find that the Stage I contract concluded on 5 April 2016, and the stage II services would have commenced on 6 April 2016, if they had been agreed.
25. It was put to Mr Bruno in cross examination that Ms Foo had asked him if SDG would be representing the respondents at the hearing on 1 April. Mr Bruno responded "I provided a contract for me to represent them at VCAT. Before that there was no agreement for me to go to VCAT". On 6 April 2016 SDG sent the respondents a document headed "Engagement Agreement - VCAT Attendance", which was SDG's fee proposal for it to coordinate and attend the hearing at VCAT.
26. On the basis of that evidence, I am satisfied that SDG's position was that the Stage I contract was for the provision of services up until it was necessary to prepare for and attend a hearing at the Tribunal. Those services concluded when SDG sent the proposal on 6 April 2016. As a result, I find that any services provided after 5 April 2016 were not provided pursuant to the Stage I contract.

WHAT SERVICES WERE PROVIDED BETWEEN 24 MARCH AND 5 APRIL 2016?

27. The applicant failed to provide any evidence of any stage I services (being "VCAT negotiations, amendment of plans, provision of town planning advice and meetings and re-issuing of traffic reports") which took place between 24 March and 5 April 2016. Mr Bruno referred to a number of emails passing between him and Ms Foo on 24 and 29 March, and a meeting they had on 29 March, and a phone discussion on 4 April, but based on his evidence, I am not satisfied that these meetings were anything more than SDG providing information to the respondents. Mr Bruno said words to the effect that "I met with Gin Foo, I gave them the information they asked for".
28. As there is no evidence of any services provided pursuant to the Stage I contract between 24 March and 5 April 2016, I am not satisfied that the work detailed in the invoice dated 1 February 2016 for \$12,100 was undertaken for the respondents pursuant to the Stage I contract. I dismiss this part of the claim.

WHAT IS THE EFFECT OF THE AUTHORITY GIVEN BY THE RESPONDENTS TO SDG?

29. Following Mr Bruno's concession that SDG had not been acting on behalf of the respondents prior to 24 March 2016, Mr Bruno then attempted to rely on an Authority to Act as Agent which forms part of the Stage I contract. Mr Bruno contended that by signing that authority, Ms Abdullah had given him unlimited authority to make any decisions on the planning application,

even where those decisions were in fact based on instructions given by 532 NRO.

30. Leaving aside the fact that the authority was not signed by Ms Abdullah, and therefore may not be enforceable, I do not accept SDG's contention in any event. It is illogical and inconsistent for Mr Bruno to be acting on an authority from the respondents to continue with the VCAT action and negotiations but at the same time, while acting on the instructions of 532 NRO, to not lodge the amended plans at VCAT by 12 February 2016 when they were due. Either of those actions cannot be said to be consistent with the terms of the authority, even if it had been given. I reject this argument.

WAS THERE A FURTHER CONTRACT BETWEEN THE PARTIES IN RESPECT OF THE STAGE II SERVICES?

31. In this proceeding SDG claims for two further invoices, numbered 2501 and 2493, for services provided as part of stage II of the project. These invoices are for \$2894.38 and \$2348.50 respectively. SDG claims these amounts either on the basis that there was a contract for the stage II services, or on a quantum meruit basis.
32. On 6 April 2016 SDG sent the respondents a document headed "Engagement Agreement - VCAT Attendance", which was SDG's fee proposal for it to coordinate and attend the hearing of the VCAT planning application. The services quoted were approximately \$30,300, including some consultants' fees. The proposal stipulated:

"To instruct [SDG] to proceed, kindly sign the duplicate copy of this letter signifying your acceptance of the terms and conditions of our appointment. Kindly provide a \$10,000 deposit payment to instruct [SDG] to proceed. We shall require a deposit payment as soon as possible to start organising consultants and evidence and prepare all required documents 2 weeks prior to the hearing date".
33. The respondents did not sign the agreement, nor did they pay the deposit.
34. SDG then amended the plans and provided these to VCAT. When he was asked whether this was done with the knowledge and consent of the respondents, Mr Bruno's answer was that he had disclosed the work to them, "so yes".
35. The parties engaged in a series of communications and meetings throughout April 2016, during which SDG regularly asked for payment and for the stage II agreement to be signed. Ms Foo on behalf of the respondents originally asked for the stage II services to be rendered at a fixed price, and when this was refused, she asked to be charged on an hourly rate, with the respondents paying the consultants directly. SDG also rejected this proposal. Ms Abdullah and Ms Foo then queried the work that had been carried out by SDG to date, including why the hearing had been adjourned

from 1 April, and the strategies they were proposing to adopt in preparation for the hearing.

36. On 22 April 2016, SDG wrote to Ms Abdullah and said:

“On behalf of Anthony, he is happy to meet with you on Monday even though it is a public holiday, he will however be charging for his time.... Anthony has explained to you on a number of occasions the process to gain a permit and we are taking this process...

Anthony never once guaranteed to a permit straight away, and you need to go through this process, be it with Council or via the VCAT option.

We have been trying to help you everywhere we can from day one and the information and advice you are receiving from others is incorrect.

We have not been paid for any of our services up to date, in which I hope you can resolve when we meet, and no documentation will be released until payment is made...

If you are not happy with this outcome or payment for our services is not made by COB Thursday we will have no other option but to withdraw the application from VCAT and Council, leaving you to start again...”

37. Mr Bruno then met with Ms Abdullah on the Anzac Day public holiday. Following that meeting, Ms Foo for the respondents made a series of requests to extend the time for payment to the applicant. On 27 April, Ms Foo asked “We would like to ask for an extension for the payment to next Tuesday as Azrene is currently away for another business conference”. SDG agreed to this request, being 3 May 2016.
38. Mr Bruno and Mr de Lorenzo of SDG then met with Ms Abdullah and Ms Foo and with Metropol on 3 and 4 May 2016 to discuss the preparation for the hearing. The respondents were advised that new drawings had been submitted to Council in March 2016 and SDG and Metropol were confident that the Council would issue the permit without needing the hearing on 31 August. The proposal included nine units plus a shop, and improvements had been made to the layout.
39. Ms Foo prepared minutes of that meeting in which she stated the parties had agreed that all designing consultants’ fees were based on a “succession basis (upon being granted a planning permit based on amended plans)”. Mr Bruno denied that an agreement had been reached. SDG advised Ms Abdullah in an email sent 18 May 2016 that Mr Bruno was happy to discuss the outstanding payments with them but that:

In regards to payment, it was never agreed that no payment would be made till the permit is issued as Gin has claimed. There are costs involved to get to the stage we are at in which you signed the authority agreement and as discussed at meeting. So Anthony is asking if you could please organise payment so we can continue. If payment to Spectrum is not received by COB next Wednesday 25th May we will have no choice but to cancel the application with Council.”

40. On 19 May 2016, SDG sent Ms Abdullah an email, attaching a draft letter that SDG said it would send to the Glen Eira Council, withdrawing the planning application, unless payment of its fees was made by 25 May. Mr Bruno made a further offer to discuss the outstanding payment with the respondents.
41. SDG sent a follow-up email on 23 May in which it said “just touching base with you... regarding payment... Anthony is still happy to meet with you to discuss any questions you may have. As mentioned previously, Anthony doesn’t want to head down this track of withdrawing the application”.
42. SDG sent a further follow-up email on 25 May to Ms Abdullah stating “Just touching base with you as we have not heard back from you. As per our previous emails and letter payment is due today, otherwise as stated we may have no other option but to withdraw and cancel the application...”.
43. Ms Foo replied to that email and said “[Ms Abdullah] had to go overseas, and I am also unable to contact her. I will try again over the course of today if not I would recommend waiting for her to get back to me.”
44. On 26 May, SDG advised Ms Foo “I spoke to Anthony, he is willing to wait till you have spoken with [Ms Abdullah]”. However no response was received from the respondents.
45. Unbeknownst to the applicant, and without its consent, on 23 May 2016 Ms Foo had written to VCAT on behalf of the respondents and had requested to change the applicant in the VCAT proceeding from SDG to NNB. Ms Foo also asked that all correspondence from VCAT be sent to NNB, and “we are still in the process of trying to ascertain who is acting on our behalf”. VCAT made an order on 25 May 2016 changing the name of the permit applicant and the applicant for review to North Brown Pty Ltd (sic).
46. SDG became aware of this action by Ms Foo and objected to VCAT, who listed the matter for a directions hearing. Prior to that hearing, the respondents obtained advice from their current solicitor and requested the Tribunal to reinstate SDG as the permit applicant and the applicant. SDG consented to these orders.
47. SDG then applied to the Tribunal to withdraw the application, on the grounds it had not been paid and no agreement had been reached for it to continue to represent the respondents. Orders were made on 14 July 2016 giving the applicant leave to withdraw the application and vacating the hearing listed for 31 August 2016.
48. The invoices rendered by SDG numbered 2501 and 2493 set out the work done outside the Stage I contract. These are for \$2894.38 and \$2348.50 respectively. SDG claims these amounts either on the basis of a contract or on a quantum meruit basis.

Conclusion on the stage II services

49. I do not accept that the parties entered into a contract for the stage II services. While the written contract was provided to the respondents on several occasions, it was never signed. All communications from the respondents confirm that they had not agreed to the proposed terms. I also do not accept that the parties entered into an oral agreement for the stage II services. Again, the evidence of each witness, combined with the contemporaneous correspondence, indicates that there was no meeting of the minds and no agreement was reached.

ARE THESE AMOUNTS CLAIMABLE ON A QUANTUM MERUIT BASIS?

50. The applicant contends in the alternative that if there was no contract, it is entitled to payment on a quantum meruit basis. As I have concluded that there was a contract for the stage I services, the only work that falls to be claimed on a quantum meruit basis are the services provided following the completion of the Stage I contract on 5 April 2016 (being the date discussed above). The respondents' defence that they did not benefit from any works performed or actions taken by the applicant is relevant to this question.

51. It is well established that for a claim to succeed on a quantum meruit basis, there must be no enforceable contract and the respondents must have been unjustly enriched at the expense of the applicant. Three things must be established. First, the respondents must have been enriched by the receipt of a benefit. Second, that benefit must have been gained at the applicant's expense. And, third, it would be unjust in the circumstances to allow the respondents to retain the benefit⁴.

52. The services described in each of the invoices from 6 April 2016 onwards are as follows:

6/4/16 Discussion with Gin/Azrene 15 mins	\$61.88
20/4/16 Liaise with Azrene/Gin 2 hours @ \$225 ph	\$495
20/4/16 Liaise with Town Planner/Council 3 hrs at \$225 ph	\$742.50
19/4/16 Meeting 1 hour re Vcat at \$225 ph	\$247.50
Meeting 3/5/16 1 hr with Joe \$200 ph and Anthony \$250 ph	\$495
Meeting 4/5/16 4 hrs with Town Planner/Metropol – 2 hrs Joe \$400 / 2 hrs Anthony \$500	\$990
3/6/16 Liaise with Gin Foo and VCAT 3 hrs at \$200 ph	\$660

⁴ *Sopov v Kane Constructions Pty Ltd (No 2)* [2009] VSCA 141; *Pavey & Matthews* (1987) 162 CLR 221.

53. No evidence was led as to the calculation of each item. It is insufficient to simply tell the Tribunal that Mr Bruno's charge out rate is \$250 per hour and Mr de Lorenzo's rate is \$200 per hour. In order to succeed on a quantum meruit basis, the applicant must demonstrate what it has cost it to provide the service. I am not satisfied on the evidence before me that SDG has done so.
54. Second, SDG must establish that the respondents have been enriched by the services provided. No evidence was led about each of the items claimed. In circumstances where the planning application was withdrawn, it is hard to see how the applicant has benefited from the meetings between SDG and Metropol and the Council. The other meetings referred to are meetings between SDG and the respondents (including their representatives) which appear to have been largely for the purposes of providing information. I am not satisfied that SDG has established that the respondents have received any benefit from the time recorded in these invoices.
55. For the sake of completeness, I note that the Points of Claim also included a claim for invoice number 1015 dated 27 October 2016 in the sum of \$165. This invoice was not attached to the Points of Claim and no evidence was led about it. Accordingly, I dismiss this aspect of the claim.

WERE THE RESPONDENTS INDUCED TO PURCHASE THE PROPERTY?

56. The respondents' primary argument, in substance, is that they paid \$400,000 too much for the property, and were induced or misled by Mr Bruno to do so. Because of this conduct, they should not be required to pay the invoices rendered by SDG. In light of my findings above, the answer to this question will not alter the outcome of the claim. However, I will address it briefly, as requested by the parties.
57. The argument is that 532 NRO had purchased the property for \$700,000 in May 2015. NNB paid \$1.1 million for it on 2 December 2015 on the understanding that a planning permit would be provided with the property so that NNB could undertake the development. SDG failed to provide the planning permit and accordingly the value of the property was not worth the extra \$400,000 paid.
58. It was not disputed that in or about August or September 2015, Ms Abdullah met Mr Bruno for the first time. Mr Bruno's evidence was that Ms Abdullah told him she was interested in buying a property and he told her "I had a client looking to sell". He showed her the property and the proposed plans and said the development "was in negotiation with the Council to get a town planning permit". He denied having promised that he would obtain the planning permit for her.
59. Ms Abdullah's evidence was that Mr Bruno never disclosed to her that he was the sole shareholder of 532 NRO. She said that Mr Bruno had shown

her the site and a feasibility study. She could not remember if he had shown her the plans at that time. She remembers seeing a picture of the building and understanding that she could develop 10 units on the site. She said that Mr Bruno promised her he would get the planning permit and she had no reason to doubt him.

60. On 15 September 2015 SDG lodged the application to the Tribunal under s.77 of the P&E Act against the Council's decision to issue a Notice of Refusal. The Planning and Environment List made directions on 21 September 2015, including listing the application for a compulsory conference on 10 December 2015 and a one-day hearing on 1 April 2016.
61. By email dated 23 November 2015, Mr Bruno advised Ms Abdullah that no objections had been received by VCAT to the proposed development. Ms Abdullah said that she was not advised that the matter had been listed for a compulsory conference or for a hearing.
62. On 25 November 2015 Metropol Planning Solutions (who had been engaged by SDG to provide professional planning consultancy services on behalf of 532 NRO) advised SDG that there were problems with the plans for the proposed development, including the number and size of apartments, and that they would be unlikely to succeed at the compulsory conference unless the proposal was amended.
63. On 2 December 2015 Ms Abdullah "and/or nominee" signed the contract of sale to purchase the property from 532 NRO. The contract was signed by Mr Angelo Pluchinotta, the director of 532 NRO. Mr Bruno acknowledged (during the hearing) that Mr Pluchinotta had some connection to SDG, and the contract was signed in the offices of SDG. Mr Bruno was present.
64. Ms Abdullah's evidence was that Mr Bruno again promised to deliver the planning permit by settlement date. He made no mention that the permit application had been refused by Council or of the VCAT compulsory conference listed for the following week, or that amended plans were being considered which reduced the number of apartments. Mr Bruno denied having made any such promise. He also said that he had told Ms Abdullah that there was a compulsory conference the following week and that Metropol had proposed reconfiguring the development to reduce the number of units from 10 to 9.
65. At the compulsory conference on 10 December 2015, Metropol represented SDG and proposed the deletion and reconfiguration of a number of apartments.
66. On 16 December 2015 SDG sent the proposed revised plans to Ms Abdullah. These were lodged with the Council on 17 December 2015. The revised development is for 9 apartments. While Ms Abdullah denied

receiving these plans, I accept the documentary evidence that they were sent to her.

67. On 1 February 2016 Glen Eira Council advised Metropol that there were still issues with the plans. The following day, Metropol advised SDG of the further changes required.
68. On 22 February 2016 SDG provided an update to the respondents, which indicated the original plans had been lodged with Council on 9 July 2015, that amendments had been lodged on 5 February 2016 and that as at 22 February, SDG was waiting for Council's response.
69. On 4 March 2016 Ms Abdullah wrote to SDG and said that she would be asking for an extension for settlement of the sale of the property to give the bankers enough time to process the loan as she was a foreigner. She also asked SDG to release the copyright in all the drawings and marketing materials they had prepared so far. SDG replied that it was not prepared to do this at that stage, but may do so once the works were complete with a fee to be paid.
70. On 9 March 2016 SDG advised Ms Abdullah by email that the permit application had not been resolved by the Council and that the application would now "be heard and decided at VCAT on 1st April. [Mr Bruno] will contact you shortly with the VCAT process and related fees".
71. On 11 March 2016 the solicitors acting for the respondents in the purchase of the property wrote to the solicitors for 532 NRO and raised concerns about the sale, including:

Our client was informed on behalf of the vendors that the property was being sold as a "development site" and that the vendors had spent a considerable amount on a town planning application (circa \$150,000). We note that there is no mention of any such application in the contract and further it seems that the purchaser is not receiving the benefit of any plans, applications or the like even though this was incorporated into the purchase price – your client only paid about \$700,000 to purchase six months earlier.

Our client has also just recently learned that the vendor has made an unsuccessful planning application. Please refer to the city of Glen Eira extract which indicates that the vendors made an application to the Glen Eira City Council in July 2015 and that a Notice of Refusal was issued by the Council in August 2015.

As the vendor was the owner of the property at the time the application was made and the notice of refusal was issued, it is reasonably expected that these matters were things that the vendors might reasonably be expected to have knowledge of. Notwithstanding this, paragraph 4.1 of the vendors statement states "not applicable"... At the very least the vendors had a duty to disclose particulars of the application pursuant to section 32 of the *Sale of Land Act*...

... The purchaser is entitled to rescind the contract and be immediately entitled to a refund of the deposit in full...

Our client would like to discuss a commercial resolution of the issues referred to rather than resort to litigation against the vendor...

72. On 14 March 2016 Ms Abdullah's tax agent contacted Mr Bruno to ask for the date he submitted the initial application for the planning permit. She said she had been advised by the respondents' solicitors that this was done after the contract of sale was signed and "this information is extremely important as it would result in potential duties for our client". Mr Bruno replied the same day, and said "I will find out tomorrow but it was way before signing of contract. I think your solicitor is trying to find any way out of the contract. It is not very honest sorry to say". The following day, SDG sent an email advising that the application to VCAT was lodged on 15 September 2015.
73. Settlement of the sale occurred on 24 March 2016. Also, on that day, SDG was contacted by Ms Gin Foo, of Loft Real Estate, who had been engaged by Ms Abdullah to represent her. She later met with Mr Bruno and they discussed the progress of the planning application and the strategy to be adopted at the hearing before VCAT.

Conclusion on the question of inducement

74. I do not accept Ms Abdullah's evidence that Mr Bruno promised to obtain a planning permit for the property. I accept Mr Bruno's evidence on this issue. During cross-examination he pointed out that the written contract makes no such promise. Further, he said that the town planning consultants and traffic engineers engaged by SDG on this project did not provide any promises that a permit would be obtained. It is improbable that SDG would make such a promise when its consultants do not.
75. I am also persuaded by the fact that the VCAT hearing of the planning appeal was listed to occur after the settlement date. I consider it highly unlikely that Mr Bruno would have made a promise to provide a planning permit at settlement when the application was still awaiting a hearing by the Tribunal. The only way that a permit could have been provided prior to settlement was if the Council reconsidered its decision. The timing of any such review was out of the hands of Mr Bruno.
76. The correspondence passing between the parties supports Mr Bruno's version of the conversations, especially the emails sent 16 December 2015, 22 February 2016 and 9 March 2016.
77. In any event, if I am wrong on this point, I am satisfied that the correspondence from the respondents' solicitors sent on 11 March 2016, prior to the settlement of the sale, has the effect that any promises or representations that may have been made were not relied on by the

respondents in their decision to purchase. The respondents' solicitors confirmed that they were aware there was no planning permit in place and they indicated their clients were entitled to rescind the contract of sale with a full refund of the deposit. However, the respondents chose to complete the sale instead.

78. Accordingly, I do not accept that the respondents were induced to enter the contract of sale. In any event, if there was such an inducement, the respondents' remedy would be against 532 NRO. It is not a defence to a claim by SDG for a breach of the Stage I contract.

ORDERS

1. The claim is dismissed.
2. Liberty to apply on the question of costs. If the parties agree, they may make any application for costs by way of written submissions (limited to 6 pages) and affidavits, to be decided in chambers. Alternatively, a party may request the principal registrar to list the matter for a one-hour hearing before Senior Member Kirton.

SENIOR MEMBER S. KIRTON