IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S CI 2014 00346

JOLEN HOLDINGS PTY LTD (ACN 004 693 654)	Applicant
v	
BELLA BARISTA PTY LTD (DEREGISTERED) (ACN 118 408 398)	First Respondent
BEAN INVESTING SEVEN PTY LTD (ACN 118 344 700)	Second Respondent
VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL	Third Respondent

JUDGE:	Lansdowne AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	13 September 2018
DATE OF RULING:	13 September 2018
DATE OF REVISED REASONS	20 September 2018
CASE MAY BE CITED AS:	Jolen Holdings Pty Ltd v Bella Barista Pty Ltd (deregistered) and ors
MEDIUM NEUTRAL CITATION:	[2018] VSC 548

PRACTICE AND PROCEDURE – Application for leave to appeal VCAT order not prosecuted for four years – Application to set aside the originating motion or dismiss the proceeding – Whether the originating motion should be set aside as stale – Whether continuation of the proceeding is an abuse of process – Whether to dismiss for want of prosecution – Dismissed for want of prosecution – *Protec Pacific Pty Ltd v Steuler Industriewerke GmbH* [2007] VSC 93; *Grovit v Doctor* [1997] 2 All ER 417; *Bishopsgate Insurance Australia (In liq) v Deloitte Haskins & Sells* [1999] 3 VR 863; *Sullivan v Greyfriars Pty Ltd* [2015] VSCA 196 – *Supreme Court (General Civil Procedure) Rules 2015* r 8.09 – *Civil Procedure Act 2010* (Vic) ss 7,8, 9, 25, 28.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr P Finkelstein, solicitor	F.L.A. Partners
For the First Respondent	No appearance	
For the Second Respondent	Mr A C Blair of counsel	Nerlich Lawyers
For the Third Respondent	No appearance	

TABLE OF CONTENTS

HER HONOUR:

Introduction

1 These are the revised and elaborated reasons for my dismissal of this proceeding. I made that order, giving brief oral reasons, at the conclusion of the hearing of the second respondent's application before me on 13 September 2018. I indicated in my oral reasons that I would dismiss the proceeding at least for want of prosecution, and would give further thought to other bases for dismissal advanced by the second respondent. I now set out my conclusions on those other matters as well.

2 I first refer to some procedural matters. The proceeding was commenced by originating motion filed 29 January 2014 seeking leave to appeal an order made by the Victorian Civil and Administrative Tribunal (**VCAT**) on 13 January 2014 (**VCAT Order**). At the time this proceeding commenced, the relevant procedural rules for the commencement of an appeal from an order of VCAT were the 2008 *Supreme Court (Miscellaneous Civil Proceedings) Rules* (Vic) (**2008 Appeal Rules**). Sub-rules 4.06(1) and (2) of the 2008 Appeal Rules required the application for leave to appeal to be made within 28 days after the date of an order of VCAT and by originating motion. The parties to an originating motion are usually identified as plaintiff and defendant, but sub-rule 4.06(4) makes it plain that the moving party is to be referred to as the 'applicant' and the defending party as 'the respondent'. That sub-rule also sets out the requirement for service, and by requiring 'service' on the proposed respondent to the appeal but only 'delivery' of a copy of the originating motion on VCAT should have made it plain that VCAT is not a party to the application. If the proceeding were to continue, I would remove VCAT as a party.

Outline of the facts

3 The proceeding in VCAT arose from a dispute between the applicant (**Jolen**) and first respondent (**Bella**) arising from Jolen's termination of Bella's lease of Jolen's premises at 264 Kings Way, South Melbourne (**Premises**). Bella had utilised the Premises as a drive through coffee shop and car wash. For that purpose, it had erected some

structures on the Premises, which VCAT described as a 'module' and 'shelters', and which the parties call the Pod. Jolen and Bella agreed that VCAT determine as a preliminary question which of them had title to the Pod on the termination of the lease. The applicant asserted that title to the Pod had passed to it by virtue of a handwritten alternation to the lease. By the VCAT Order, VCAT held that Bella held title to 'the building module, portable shelters and signage (but not the fittings and equipment)' located at the Premises.

4 On 17 December 2013, between the time of the hearing before VCAT, 3 December 2013, and the making of the order and delivery of reasons, 13 January 2014, Bella went into voluntary external administration. Shortly prior to the hearing, on 1 December 2013, Bella sold, or according to Jolen purported to sell, the Pod to the second respondent (**Bean**), which shared the same sole director, Mr Kimberley Cousins, as Bella.

5 Bean was not a party to the VCAT Order. The originating motion joins Bean for the purpose identified by the director of Jolen as follows:

> (i)n the event that Jolen is successful in obtaining leave to Appeal and the ownership of the Pod is eventually declared as being in the title of Jolen rather than Bella, for the purpose of enabling Jolen to obtain an Injunctive Order against Bean restraining the sale or disposal of the Pod pending the outcome of this Appeal.[1]

6 The originating motion seeks the following orders:

i) Leave to proceed against Bella as a company in administration pursuant to s 440D of the *Corporations Act 2001* (Cth) (**Corporations Act**);

ii) Subject to the grant of that leave, leave to appeal against the VCAT Order;

iii) Subject to the grant of leave to appeal, a stay on the VCAT Order;

iv) An order against Bean restraining it from taking any step to remove the Pod pending the outcome of the appeal; and

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1 Affidavit of Joe Flinkier sworn 29 January 2014 [7] (**Mr Flinkier's First Affidavit**).

v) Directions and reservation of costs.

7 Jolen claimed to be a creditor of Bella and in that capacity received a Report to Creditors by Bella's administrators dated 21 January 2014, apparently for the purposes of a meeting of creditors to be held on 31 January 2014.[2] The administrators, Con Kokkinos and Matthew Jess of Worrells Solvency and Forensic Accountants, noted the sale by Bella of the Pod to Bean in the Report to Creditors. The administrators noted that '(o)n the information available and our investigations to date, it appears that the sale of these assets were for a commercial value'.[3] The administrators informed creditors that the sale could be further investigated if 'commercially warranted' but that the administration was currently without funds, and the administrators expected there would also be no funds for such an investigation if the creditors voted to place Bella into liquidation. They referred creditors to a request for indemnity to enable further investigation into this sale and certain other matters.[4]

8 The creditors of Bella voted at the meeting held on 31 January 2014 to place it in voluntary liquidation. The administrators were appointed as the liquidators.[5] As a consequence of the liquidation, pursuant to s 500(2) of the Corporations Act, Jolen required leave of the Court to continue this proceeding against Bella. Bella was subsequently deregistered on 16 April 2017, pursuant to s 509 of the Corporations Act, being three months after the presentation of the liquidators' final accounts.

9 Jolen now concedes that any challenge to the sale of the Pod by Bella to Bean pursuant to s 588F of the Corporations Act could only have been instituted by the liquidators and within the time frame specified in that section. There is no evidence that any such challenge was ever instituted, or that Jolen requested the liquidators to do so by agreeing to fund the challenge. I infer that there was no such challenge. The solicitor for Jolen also concedes from the bar table that the Pod remains on the Premises and is

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2 Mr Flinkier's First Affidavit [6]; Exhibit JF-8 to the affidavit of Joe Flinkier sworn 2 July 2018 (**Mr Flinklier's Second Affidavit**).

3 Exhibit JF-8 to Mr Flinkier's Second Affidavit [21].

4 Ibid.

5 Exhibit KC-1 to the affidavit of Kim Cousins sworn 19 June 2018 (**Mr Cousins' First Affidavit**).

being operated as a coffee shop by a third party. I infer that that operation affords some financial benefit to Jolen.

Procedural history post commencement of the proceeding

10 Jolen filed the originating motion and an affidavit in support on 29 January 2014. It was required by r 4.06 (4) of the 2008 Appeal Rules to serve the respondents, Bella and Bean, with the originating motion, and to deliver a sealed copy of the originating motion to VCAT, as soon as practicable after its filing. The Court file contains a letter in the usual form from VCAT dated 5 February 2014, evidencing receipt of the originating motion and informing the Court that VCAT will abide the decision of the Court. No affidavit of service was filed by Jolen at the time to prove service on Bella or Bean, and no proof of service on them is now proffered by Jolen. The solicitor for Jolen, who has acted for it throughout this proceeding, says from the bar table that it is 'a mystery' to him why such proof is not available.

11 Rule 4.08 of the 2008 Appeal Rules required Jolen to bring the originating motion and application for leave to appeal before the Court for determination by filing a summons to that effect within seven days of filing the originating motion. Jolen never took this step. Mr Flinkier, as director of Jolen, gives an explanation for that default, which I will discuss shortly.[6]

12 The solicitors for Bean contacted the solicitors for Jolen by letter dated 18 October 2016 asserting that Jolen had taken no steps to prosecute the appeal since filing the originating motion, giving notice of a potential application to dismiss the proceeding for want of prosecution, and making an offer of settlement (redacted until after I determined the application).[7]

13 Jolen's solicitors replied the next day, confirming that they acted on the appeal and had forwarded the Bean letter to Jolen's 'principal director' Mr Joe Flinkier. The reply stated Mr Flinkier had 'declined to give instructions to us on the contents of your

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6 Mr Flinkier's Second Affidavit [4].

7 Exhibit KC-3 to Mr Cousin's First Affidavit.

letter, one way or the other'.[8] The solicitors for Bean sent a follow up letter to the solicitors for Jolen dated 24 November 2016, which, amongst other things, reminded Jolen of its obligations under the *Civil Procedure Act 2010* (Vic) (**CPA**) to narrow the issues in dispute and to minimise delay.[9] Bean asserts, and in the absence of contest on the point I find, that the solicitors for Jolen never replied.

14 Bean's letter of 24 November 2016 implied that some action of the kind earlier foreshadowed by Bean would be shortly taken. In fact, Bean did not take any further action in relation to the proceeding until its solicitors sent a further letter to the solicitors for Jolen dated 7 February 2018, giving what it described as 'one further opportunity' before taking action. Again no reply was received from Jolen. Bean filed a summons four months later on 20 June 2018 seeking an order pursuant to r 8.09 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (**Procedure Rules**) setting aside the originating motion.

Issues and submissions

15 Bean contends that the originating motion should be set aside or the proceeding should be dismissed for any of three reasons. I set out those submissions in the order of their oral presentation. The first submission is that the originating motion was not served on Bean within the 12 month period stipulated in r 5.12 of the Procedure Rules. Jolen has not sought to extend this period, either prior to the date of hearing of Bean's summons or by application on that date. Accordingly, so Bean contends, the proceeding is stale as regards Bean and due to the deregistration of Bella cannot now be prosecuted against either respondent.

16 Bean next contends that the continuation of the proceeding is an abuse of process because Jolen does not intend to bring it to a conclusion.

17 Thirdly, Bean submits that the proceeding should be dismissed for want of prosecution by Jolen. Bean relies on the test for dismissal for want of prosecution as

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8 Exhibit KC-4 to Mr Cousin's First Affidavit.
9 Exhibit KC-5 to Mr Cousin's First Affidavit.

articulated by the Court of Appeal in *Sullivan v Greyfriars Pty Ltd* (***Sullivan***),[10] in which the Court held, amongst other things, that the principles for the exercise of the discretion as previously articulated in Victorian and United Kingdom authority cannot be treated as determinative nor exhaustive. The Court in *Sullivan* also held that those principles need now to be applied in Victoria having regard to the statutory obligation imposed on the Court by s 8 of the CPA to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.[11] It noted that '(i)n light of s 8, the merits of the proceeding that is sought to be dismissed may bear on the exercise of the Court's discretion' and that that was especially the case where the proceeding is, as it was in that case and is in this, an application for leave to appeal.[12]

18 Bean submits that Jolen's application for leave to appeal currently has limited or no prospects of success. Bean submits that the first ground identified in the draft notice of appeal is a question of fact, not law, and so cannot ground an appeal under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**). Bean concedes that construction of the lease, which is referenced in the second ground set out in the draft notice of appeal, could give rise to a question of law, but submits that no such question has been articulated in the draft notice of appeal.

19 Jolen opposes the dismissal of the proceeding or setting aside of the originating motion. In relation to dismissal for want of prosecution, Jolen accepts that it did not issue a summons as required, but says that the liquidation of Bella only two days after the filing of the originating motion provides an acceptable reason for that failure and the delay in prosecuting the application for leave to appeal. Further, Jolen submits that Bean has also been derelict in not taking any step in the application for leave to appeal and that the delay by each has been 'more or less equal' and has not prevented a fair trial. Jolen now seeks the opportunity to prosecute the application for leave to appeal.

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10 [2015] VSCA 196 (***Sullivan***).
11 Ibid [22].
12 Ibid [23].

20 In relation to abuse of process, Jolen submits that Bean has failed to show any ulterior purpose in the commencement of the application for leave to appeal and this is what would be required to demonstrate abuse of process.

21 Jolen does not concede that the originating motion was not served within time on Bean, and points to the fact that Mr Cousins, the director of Bean, deposes only to non-service of a *summons*. Mr Cousins does not say that Bean was not served within time with the *originating motion*. Further, Jolen submits that the mere bringing of this application is a concession of service, or submission to the jurisdiction of the Court.

22 In relation to prospects of success, Jolen submits that whether or not the Pod is a fixture, while ultimately a question of fact, turns on a question of law, being the proper construction of the lease.

Consideration

Non-service within time

23 There is no proof of service on Bean (or, for that matter, on Bella) within the requisite time. Proof of service is a matter for the applicant, and a respondent is not required to ease that obligation in any way. It is striking that the same solicitor who has acted throughout this proceeding for Jolen is unable to provide any proof of service, even on information and belief, if indeed the originating motion was served, or give any explanation on oath as to why that proof is not available.

24 Failure to serve originating process within time is an irregularity, which will usually be waived if the defendant (here second respondent) files an unconditional appearance or takes a step in the proceeding inconsistent with the maintenance of the objection to the irregularity.[13] The second respondent has not filed an unconditional appearance, or indeed any appearance. Bean brings its application pursuant to r 8.09 of the Procedure Rules, which does not require the filing of an appearance. The commentary to Civil Procedure Victoria states that this rule:

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13 *Sheldon v Brown Bayley's Steel Works and Dawnays Ltd* [1953] 2 QB 393 at 400-402, cited in *Protec Pacific Pty Ltd v Steuler Industriewerke GmbH* [2007] VSC 93 [45] (Hansen J, as he then was) (***Protec***).

> Establishes an alternative procedure to that of conditional appearance under rule 8.08 in the case of challenge to the jurisdiction of the court or to the validity of originating process or its service or of application to the court to stay a proceeding....Application without appearance has the advantage that if the application fails, the defendant can fairly argue that he has done nothing that could be taken to constitute a submission on his part to the jurisdiction of the court.[14]

25 In *Protec Pacific Pty Ltd v Steuler Industriewerke GmbH* (***Protec***)[15] the question arose as to whether bringing an application for dismissal of a proceeding prior to the entry of an appearance, in response to an application for extension of time to serve the originating process, amounted to waiver of non-service within time. Hansen J (as he then was) reviewed a number of previous cases, in some of which waiver had been held to arise, and in others not. In the case before him, he held that there had been no waiver of the failure to serve the originating process within time because '(n)o such intention is manifested by (the defendant's) action in filing and prosecuting the cross summons'.[16] In this case, given that the summons is brought on a basis equivalent to conditional appearance, I do not consider that the summons can be said to waive one of the very irregularities on which it relies - no proof of service within time.

26 However, Mr Cousins does not say that Bean was not served with the originating motion, only that it has not been served with a summons.[17] It would have been very easy to depose that Bean had not been served with the originating motion within time, if that was the case. I am not able to determine if the absence of this evidence is mere oversight, or deliberate. Nor does Bean explain how it is that it was sufficiently aware of the proceeding to instruct its lawyers to write to the solicitors for Jolen in 2016, if neither it nor Bella had been served with the originating motion.

27 For these reasons, although I do not consider that Bean has waived its right to service within time, I decline to dismiss the proceeding on the basis that it was not so served. I do not think that the evidence is sufficient to show that it would be safe and so in the interests of justice to do so.

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14 LexisNexis Butterworths, *Civil Procedure: Victoria*, vol 1 (at service 306) [8.09.1].
15 Protec.
16 Ibid [51].
17 Mr Cousin's First Affidavit [9].

Abuse of process

28 Bean relies on *Grovit v Doctor* (***Grovit***)[18] to support its proposition that the Court has power to dismiss a proceeding for abuse of process where it is shown that the plaintiff (here applicant) does not intend to bring it to a conclusion. Bean submits that on the authority of *Grovit* it is not necessary for the defendant (here second respondent) to satisfy the requirements for dismissal for want of prosecution in such a case. Bean submits that abuse of process is shown here by the following factors, amongst others:

- the explanation given by Jolen for not issuing a summons is specious, given that leave was required to prosecute the proceeding against Bella from commencement, as it was then in administration;
- Jolen was aware that Bean claimed to be the successor in title to Bella, and joined it for that reason;
- it was open to Jolen to continue the proceeding against Bella by seeking leave of the Court and there was no requirement for leave to continue the proceeding against Bean;
- the relief sought against Bean was not dependent on leave to proceed against Bella;
- Jolen failed to prosecute the proceeding against Bean despite the correspondence from Bean's solicitors; and
- the delay knowingly caused by Jolen adversely prejudiced Bean's interests as successor in title to Bella.

29 Bean initially submitted that the Court could conclude that the originating motion was filed to force Bella, then under external administration, into liquidation and the proceeding was commenced for an ulterior purpose, being the stifling of Bean and Bella's rights vis a vis the VCAT proceeding and the Pod.[19] Bean withdrew these

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18 [1997] 2 All ER 417 (***Grovit***).

19 Second Respondent, 'Submissions', Submissions in *Jolen Holdings Pty Ltd v Bella Barista Pty Ltd (deregistered) and ors*, S CI 2014 00346, 31 July 2018 (**Second Respondent's Submissions**), [48],(b) and (c) on p 11.

submissions, in my view properly as I do not consider that there is evidence to support them.

30 In *Grovit* the court at first instance had dismissed a proceeding for abuse of process established by the failure of the plaintiff for over two years to prosecute his action for libel, despite prompts from the defendants. On appeal to the House of Lords, the appellant/plaintiff submitted that this was in effect dismissal for want of prosecution for delay without the necessity for proof of consequential prejudice to the defendant. The House of Lords confirmed that superior courts have power under their inherent jurisdiction to strike out or stay proceedings for abuse of process irrespective of whether the test for dismissal for want of prosecution is satisfied. Lord Woolf, with whom the other members of the bench agreed, held in a passage on which both parties before me rely:

> The courts exist to enable parties to have their disputes resolved. *To commence and to continue* litigation which you have no intention to bring to a conclusion can amount to an abuse of process. ...The evidence which was relied upon to establish abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in *Birkett v James*. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court *in maintaining proceedings* when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.[20] (emphasis added)

31 Jolen relies on the words 'to commence and to continue' in the portion quoted above to contend that abuse of process will only be established where the proceeding was both commenced, and continued, without an intention to prosecute it. Bean relies on the subsequent reference to 'maintaining proceedings' to submit that even if there is no abuse of process in the commencement of a proceeding, abuse of process may be established by continuation of the proceeding without the intention of bringing it to trial.

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20 *Grovit* 424.

32 In my view, Bean's interpretation of the decision is the correct one. Examination of the facts in *Grovit* shows that it was the continuation of the proceeding, rather than its commencement, that was held to amount to an abuse of process. The plaintiff had taken no steps to prosecute the action for over two years, despite prompts by the defendants to either proceed with it or discontinue it. It is plain from the account of the decision of the court at first instance, that that court did not accept the explanation for the delay proffered by the plaintiff.

33 This interpretation is also supported by the decision of the New South Wales Court of Appeal in *Re Jaden*.[21] That case did not concern an application for dismissal for want of prosecution, but *Grovit* was relied upon in support of a submission that an application made by one of the parties in the first instance proceeding in the Children's Court after the proceeding had been legitimately commenced had been an abuse of process that tainted other orders. In that case, Ipp JA, with whom Beazley and Hodgson JJA agreed, accepted that *Grovit* stood for the proposition that subsequent abuse of process may render a whole proceeding liable to be dismissed, but considered that the facts did not justify that conclusion in the appeal before him. He noted:

> I accept that in particular circumstances, conduct that occurs after proceedings have legitimately been commenced can result in the entire proceedings being regarded as an abuse of process...But this case does not fall into that category.[22]

34 *Grovit* has been applied or distinguished on the facts in other cases in Australia,[23] but so far as I can determine, there has been no criticism of the principle for which it stands, that commencement or continuance of an action with no intention of bringing it to a conclusion can amount to abuse of process. Accordingly, I consider it good law in Victoria.

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21 [2007] NSWCA 35.

22 Ibid [96].

23 See, for example, *Bridge and Marine Engineering Pty Ltd v Taylor and anor* [2004] VSC 534 (Harper J, as he then was); *State of Victoria v Grawin Pty Ltd* [2012] VSC 157 (Croft J); *Gill v Eatts & anor* [1999] NSWSC 1056 (Levine J); *Royalstar v Duke* [2001] WASC 145; *Leighton v Garnham [No 4]* [2016] WASC 134; *Commonwealth Bank of Australia v The Law Debenture Trust Corporation Plc [No 3]* [2017] WASC 382.

35 There is much in support of the submission that the continuation of the proceeding is an abuse of process. Jolen has taken no action at all to prosecute the proceeding against Bean in over four years. It was reminded of the position nearly two years ago, by the first letter from Bean's solicitors, and declined to even substantively respond to the contentions in that letter. It took no action despite the reminder given by that letter, and the subsequent correspondence, and has not brought any application with a view to progressing the proceeding in response to Bean's summons, such as an application to re-register Bella, extend the time for service of the originating motion, or for directions, if the originating motion was served within time.

36 Mr Flinkier gives an explanation for the inaction in his affidavit in opposition. The explanation is as follows:

- Leave of the Court was required to continue the proceeding once Bella went into liquidation;
- Bean had not taken any step to participate in the proceeding;
- It would be a 'needless expenditure of legal costs and unjustifiable (use) of Court time to proceed any further'; and
- Jolen now seeks the opportunity to challenge the transaction by which Bean acquired title to the Pod.[24]

37 Jolen initially sought to resist the application on the basis, identified in this affidavit, that there was a 'threshold' issue as to the standing of Bean to bring the application. The submission was that Bean's standing depended on it being the successor in title to Bella; whether that transaction was voidable was yet to be tested; and that issue could only be tested in a court, not in VCAT.[25] Jolen withdrew these submissions at the hearing. That was proper as the submissions were at best entirely misconceived, and at worst deliberately misleading. Bean has standing to bring the application for

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24 Mr Finklier's Second Affidavit [3]-[6].

25 Appellant, 'Submissions', Submissions in *Jolen Holdings Pty Ltd v Bella Barista Pty Ltd (deregistered) and ors*, S CI 2014 00346, 27 July 2018, sections B and C.

dismissal of the proceeding for the simple reason that it was joined to the proceeding by Jolen. If the sale of the Pod to Bean by Bella was to be questioned, that was for the liquidator, the time has expired by which that could be done, and there is no evidence that Jolen took any action to request such an action.

38 Once these submissions were withdrawn, the explanation given in the affidavit is exposed as insufficient. In fact, I consider it was always inadequate and arguably disingenuous. It is not up to a respondent to prosecute an appeal or application for leave to appeal – it is always entirely a matter for the applicant or appellant, particularly where that applicant has not even established service of the application. I adopt the submissions by Bean to this effect.[26] Absence of action by a respondent cannot be a sufficient explanation for failure to prosecute the application by the applicant. In any event, Mr Cousins has given an explanation for any perceived inaction by Bean between May 2015 and the filing of the summons which is not challenged, and which I consider adequate.[27]

39 Leave of the Court pursuant to s 440D of the Corporations Act was required to prosecute the application against Bella from the outset if the administrators did not consent. The originating motion in fact sought that leave. Bella later went into liquidation, but if Jolen genuinely wished to continue the proceeding against both substantive respondents, or considered that it needed to proceed against Bella to proceed against Bean, it could have made an application for leave to proceed against Bella at any time until Bella was deregistered. Had its failure to prosecute the proceeding somehow slipped its mind, then it was reminded of the position by the 2016 letters from the solicitors for Bean. Bella was not deregistered until six months later, and the time for challenge to the sale of the Pod to Bean by the liquidator had also not expired at that time. Yet Jolen took no action to seek leave of the Court and there is no evidence that it requested the liquidator to challenge the sale, or funded it to do so. It is disingenuous for Jolen to assert that it now seeks the opportunity to

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26 Second Respondent's Submissions [43], citing *Reid v Australian Guarantee Corp Ltd* (Unreported, Victorian Court of Appeal, 19 March 1996).

27 Affidavit of Kim Cousins sworn 20 July 2018 (**Mr Cousin's Second Affidavit**) [7(c)-(e)].

challenge the transaction after Bella has been deregistered and so that challenge is no longer possible.

40 If, in the alternative, Jolen genuinely wished to continue the proceeding against the remaining substantive respondent, Bean, then it was open to it to take some action to do so prior to the hearing of Bean's application, for example by filing a summons for directions to that effect returnable at the hearing of Bean's summons. It did not do so and there is no explanation in evidence or in submission for that failure.

41 The assertion that it would be a 'needless expenditure of legal costs' to prosecute the proceeding seems particularly disingenuous, given that Jolen concedes that the Pod remains on the Premises, is being operated as a coffee shop by a third party (I infer at some benefit to Jolen), and no further step has been taken in the VCAT proceeding. Jolen has thus been in a position to utilise the Pod to the exclusion of Bean for over four years.

42 Bean asserted in the 2016 correspondence that Jolen had already by that time been receiving rent for the use of the Pod, despite having no title to it. If this were the case, it would support suspicion that Jolen had not prosecuted the proceeding because it had already obtained the commercial benefit of overturning the VCAT Order, without the risk and cost of prosecuting its application to appeal it.

43 Jolen did not respond to the substance of this allegation. It follows that it did not deny it. I have carefully considered whether that form of response, coupled with the concessions by the solicitor for Jolen at the hearing and the other matters I have addressed, are enough to show the intention not to bring the proceeding to a conclusion that *Grovit* requires. On balance, I do not think that they are. The burden of proving the absence of intent to bring the proceeding to a conclusion is on Bean. There are indications that Jolen has profited from its inaction, but no direct evidence to this effect, let alone that this is an explanation for the inaction. Further, to continue the proceeding without the intention to bring it to trial is a serious allegation, and

fairness would ordinarily require that the allegation be put to Mr Flinkier for his response or explanation on oath. Bean has not sought to cross examine Mr Flinkier.

44 For these reasons, this ground fails.

Dismissal for want of prosecution

45 As indicated at the conclusion of the hearing, I will, however, dismiss the proceeding for want of prosecution.

Test for dismissal for want of prosecution

46 In *Bishopsgate Insurance Australia Ltd (In liq) v Deloitte Haskins & Sells* (***Bishopsgate***)[28] the Full Court of this Court adopted the statement of principles by Lord Griffiths in *Department of Transport v Chris Smaller (Transport) Ltd* (***Chris Smaller***)[29] for dismissal for want of prosecution as follows:

> The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of process of the court; or (2)(a) that there has been an inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants, either as between themselves and the plaintiffs, or between each other, or between them and a third party.[30]

47 Tadgell and Ormiston JJ, with whom Brooking J agreed, noted that '(w)e would not wish to travel outside those principles but it should not be understood from this decision that they are immutable or incapable of adaptation according to the circumstances of the case'.[31]

48 The test thus articulated has a long history. Lord Griffiths in *Chris Smaller* drew it from the judgment of Lord Diplock in an earlier House of Lords decision, *Birkett v*

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28 [1999] 3 VR 863 (***Bishopsgate***).
29 [1989] AC 1197.
30 Ibid 1203.
31 *Bishopsgate* 873 [28].

James.[32] The Full Court of this Court had adopted the *Birkett v James* test and applied it to an appeal in 1979 in *Muto v Faul*.[33]

49 Fifteen years later, in *Bishopsgate*, in 1994, the Full Court held that considerations of the public interest in avoiding the unnecessary wasting of the Court's time and resources are 'not ordinarily relevant' to a decision as to whether a proceeding should be dismissed for want of prosecution. Tadgell and Ormiston JJ noted that '(w)e would not wish to say that this factor of public interest could never be relevant' but stressed that 'it is the harmful effect of the alleged delay on the defendant upon which concentration should be fixed'.[34] Since that decision, however, the litigation landscape has been fundamentally changed by the CPA. Section 7 of that Act provides that the 'overarching purpose' of the Act and the rules of court in relation to civil proceedings is to 'facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'. By s 8(1) of the CPA this Court is required to give effect to the overarching purpose in the exercise of any of its powers, whether those powers are in the Court's inherent, implied or statutory jurisdiction.

50 The change this has brought was noted by the Court of Appeal in *Sullivan*. The Court, there constituted by Whelan and McLeish JJA, held that the principles as articulated in *Birkett v James*, and adopted in *Muto v Faul*, cannot be exhaustive or determinative, given that the issue concerns the exercise of a judicial discretion. The Court in *Sullivan* did not refer to *Bishopsgate*, but their observation is not inconsistent with the observations by Tadgell and Ormiston JJ I quoted earlier. The Court in *Sullivan* noted that the *Birkett v James* principles are particularly unlikely to exhaust the factors that may be relevant to dismissal of an application for leave to appeal, because of the discretionary factors that may be relevant to such an application. The Court then held that 'most significantly, the Court is now subject...to the statutory obligation in s 8 of

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32 [1978] AC 297.
33 [1980] VR 26.
34 *Bishopsgate* 874 [30].

the Civil Procedure Act 2010 to seek to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'.[35]

51 I approach the application for dismissal for want of prosecution on the basis that the principles are those as set out in *Bishopsgate* but to be read in the light of the subsequent introduction of the CPA and the decision in *Sullivan*. As noted, even in *Bishopsgate* itself which might otherwise be thought to lay down an exhaustive set of principles, the Full Court said these principles are not immutable or incapable of adaptation to the circumstances of the case.

Intentional or contumelious delay

52 Jolen has failed to comply with the 2008 Appeal Rules since 2014. I consider that that default is properly considered intentional from 19 October 2016, being the date on which Jolen, through its solicitors, both acknowledged receipt of the letter reminding it of its default, and declined to respond to it in substance. The rather extraordinary approach of retaining a solicitor to act on the appeal, but declining to give that solicitor instructions on claimed default in the prosecution of the appeal, could perhaps also be considered contumelious. In any event, I consider the default became contumelious no later than the beginning of December 2016, allowing seven days for Jolen to take action after the letter of 24 November 2016 to Jolen from the solicitors for Bean. By that letter, Bean not only reminded Jolen again of its default, it also alerted it to the failure to comply with the CPA. The continuation of that default in those circumstances is properly regarded as contumelious, in the sense of intentional failure to comply with statutory and Court requirements.

53 The first limb of the *Bishopsgate* test is thus satisfied. I consider that the second limb is also satisfied, taking into account the current merits of the application for leave to appeal, and the obligations imposed on the Court and parties by the CPA.

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35 *Sullivan* [22].

Inordinate and inexcusable delay

54 The delay in question is over four years. Jolen has taken no steps, even in response to this application, to progress the proceeding. The delay is plainly inordinate.

55 I do not accept the submissions put that Jolen has an appropriate excuse for its inaction over this lengthy period. In that regard, I repeat my comments on the explanation for delay set out earlier in relation to abuse of process.

Risk to a fair trial

56 I consider that the delay will give rise to a substantial risk that there will be no fair hearing of the application for leave to appeal, and appeal if leave were granted. In cases that will turn at trial on factual questions, this risk is often said to arise from the effect of delay on memory and retention of documents. That is not a relevant risk in this proceeding, because the application for leave to appeal, and appeal if leave were granted, turn on legal issues and the evidence will turn on the evidence already given at the VCAT.

57 However, there is a major procedural issue that has arisen as a result of the delay. This issue arises because the proceeding in VCAT was as between Jolen and Bella, and Bella no longer exists. It was deregistered in the period of Jolen's delay. Bean was not a party to the proceeding in VCAT but was joined to the application for leave to appeal by Jolen. There are complicated procedural questions as to whether the application for leave to appeal can even be prosecuted, let alone the VCAT proceeding if ultimately an appeal were to be successful, without Bella being in existence. The solicitor for Jolen claims that Jolen was not aware that Bella was to be deregistered, despite being a creditor. Even if this is correct, Jolen was prompted to take action before the deregistration, and did not do so, and has taken no action since to seek that Bella be reregistered.

58 If the application were to proceed and eventually an appeal be successful, the deregistration of Bella, even if reregistered for the appeal, may also cause difficulties for any rehearing by VCAT if further evidence is required. This is because the

continued existence and location of records formerly in the possession of the liquidator may now not be known.

Prospects of success

59 In *Sullivan*, the Court of Appeal held that the merits of an application for leave to appeal could bear on the exercise of the discretion to dismiss it for want of prosecution. Pursuant to s 148 of the VCAT Act, an application for leave to appeal from an order of the VCAT can only be brought on a question of law. The 'question of law' to which s 148 refers founds the jurisdiction of the Court and constitutes the subject matter of the appeal.[36] For that reason, questions of law must be clearly stated and not simply ascertained by reference to the grounds of appeal.[37] The purpose of the grounds is to put the questions of law in the context of the particular dispute, but they are not a substitute for properly articulated questions of law.

60 The draft notice of appeal contains no questions of law, identified as such. It contains only two grounds as follows:

> 1. That the Tribunal erred in law when concluding that title to the 'modules, shelters and signage' ('the **structure**') erected at the subject premises at 264 Kingsway, South Melbourne, Victoria ('the **premises**') had not becomes fixtures to the land for the benefit of the Appellant as Lessor.
>
> 2. That the Tribunal also erred in law when concluding that the proper construction of the stated intentions of the parties to the Commercial Lease for the said premises, as set forth in Clauses 31 and 32 thereof, did not contractually bind them to the position propounded by the Appellant at the hearing before the Tribunal, namely that the Appellant as Lessor:
>
> 2.1 Held an unqualified entitlement thereby to give notice in writing to the First Respondent as Lessee to the effect that the said structure was required to remain intact at the said premises.
>
> 2.2 Had effectively given such notice in writing to the First Respondent as Lessee, thereby implementing the terms of such notice.

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36 This has been stated in many cases, including *Commissioner for State Revenue v STIC (Australia) Pty Ltd and anor* [2010] VSC 608 [9] (Davies J), to which counsel for Bean referred me. It was recently restated by the Court of Appeal in *Coliban Heights Pty Ltd v Citisolar Vic Pty Ltd* [2018] VSCA 191 [38] (***Coliban***).

37 *Coliban* [38].

2.3 Had accordingly become entitled to regard the said structure as having become fixtures to the land at the said premises.

61 Bean concedes that there may be a question of law that arises from construction of the lease, as referenced in the second of these grounds. It contends, however, that the first ground is purely one of fact. Jolen concedes that ultimately the determination of whether a chattel has become a fixture is one of fact, but says that this involves the proper construction of the lease, which is a question of law. This may be correct, and it is not impossible that a question of law arises from the interpretation of the lease by VCAT. I cannot currently determine this, however, because no question of law is articulated in the draft notice of appeal; no proposed amended notice of appeal is before the Court; and the solicitor for Jolen was unable to articulate appropriate questions of law with sufficient precision in the running of the hearing.

62 Unless a proper question of law is articulated in an amended draft notice of appeal, the jurisdiction of the Court to consider the application for leave to appeal is not invoked, and the application will fail for that reason alone, even without consideration of the merits of Jolen's arguments. It is not inconceivable that this jurisdictional difficulty could be overcome, but Jolen has not currently shown any comprehension that amendment is required. If that were to change, then the necessity of drafting and considering an amended draft notice of appeal is likely to add further delay before the application for leave to appeal is ready to be heard, even if all other procedural difficulties were overcome.

63 The test for whether leave to appeal should be granted has now changed, by the inclusion of s 148(2A) into the VCAT Act. The amendment applies only to applications made on or after the commencement of the amendment, which was 1 May 2018,[38] and so this application for leave would still be considered under the test articulated in *Secretary to the Department of Premier and Cabinet v Hulls*.[39] However, in the absence of

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38 Pursuant to s 32 of the amending Act, the *Justice Legislation Amendment (Court Security, Juries and Other Matters) Act 2017* (Vic) which inserted a new s 170 to this effect into the VCAT Act.

39 (1999) 3 VR 331 [8]-[13].

a properly articulated question of law, it is not possible to consider the merits of the application for leave to appeal.

Serious prejudice to Bean

64 The alternative sufficient consequence to inordinate and inexcusable delay in the *Bishopsgate* test is serious prejudice to the defendant.

65 The evidence of financial loss to Bean arising from the delay is not strong. Mr Cousins deposes in his affidavit in reply sworn 20 July 2018 that 'as a consequence, in part, of the Applicant's conduct in respect of the substance of the VCAT Proceeding, I and the Second Respondent experienced financial difficulty'.[40] This evidence is too general and guarded to have much weight.

66 Bean asserted in the letter from its solicitor to the solicitors for Jolen of 18 October 2016 that it had been denied access to the Pod and as a consequence had suffered loss from being unable to use, franchise or sell the Pod. Jolen did not deny this, but as noted earlier in relation to the assertion in the same letter that Jolen had been paid rent for use of the Pod, absence of denial is not the same as proof by direct evidence. There is no direct evidence in Bean's case that it has attempted to regain possession of the Pod, and been denied by Jolen, and of any consequent loss suffered by Bean. On the other hand, nor is there any evidence from Jolen of an offer to surrender the Pod to Bean pending the prosecution of its application, and the solicitor for Jolen concedes from the bar table that the Pod is being operated on Jolen's land by a third party. This would suggest that the Pod has commercial value, which Bean is not currently able to utilise.

67 Jolen concedes that the VCAT Proceeding has not advanced since the filing of the application for leave to appeal. However, there is no evidence as to the reason, and, in particular whether VCAT has treated the application as a default stay on the

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40 Mr Cousin's Second Affidavit [7(b)].

proceeding. There is also no evidence as to whether Jolen, Bella or Bean have sought to reactivate the VCAT Proceeding, in the case of Bean by applying to be joined.

68 It follows that the assertion of prejudice relies on the concession that the Pod remains on Jolen's land, and is being operated there. That deprives Bean of immediate access to the Pod, and potential commercial value. At this stage it is to be assumed that the transfer of the Pod from Bella to Bean was a valid transfer because there is no action on foot, or ever taken, to upset that transaction. In summary, the Pod belongs to Bean yet is in the possession of Jolen, and has been for over four years, and at least at present would appear to have commercial value. While there is no direct evidence that Bean has sought its return, and been denied, if Jolen genuinely wishes to prosecute this proceeding that must be because it claims title to the Pod. Yet Jolen has not prosecuted its application for leave to appeal the finding of VCAT to the contrary for over four years. The procedural complications to prosecution of the proceeding discussed above mean that there will be further delay before the application for leave to appeal is ready to be heard. These procedural complications, due to the inaction by Jolen, thus add to the risk of serious prejudice to Bean. Even if a fair hearing could then be had, I consider that retention of the Pod by Jolen for over four years is sufficient prejudice to Bean within the second limb of the *Bishopsgate* test.

Impact of the CPA

69 As *Sullivan* makes clear, in exercising any power, the Court is now required to have regard to the impact on the litigation landscape of the CPA. In my view, that has two impacts here. The first is that parties to litigation and their solicitors have a statutory duty to comply with various obligations, described as 'overarching obligations'. In the letter from its solicitors dated 24 November 2016, Bean contended that Jolen was in breach of the obligations to use reasonable endeavours to resolve a dispute, to narrow the issues in dispute, and to minimise delay (imposed by ss 22, 23 and 25 of the CPA respectively). By s 29 of the CPA the Court is empowered to make an order by way of sanction for breach of an overarching obligation. Bean does not seek an order pursuant to that section in this application. However, the Court is also

permitted by s 28 of the CPA to take any contravention of an overarching obligation into account in exercising any power, which includes the power to dismiss a proceeding, in a civil proceeding. Bean does rely on the alleged breaches as additional discretionary factors to support dismissal of the proceeding.

70 Jolen has not directly addressed the allegation that it breached these overarching obligations. In my view, the failure to prosecute the proceeding, at least after being reminded by the letters from Bean's solicitors in 2016 that it had failed to do so, is a clear breach of s 25. That section provides:

> **25 Overarching obligation to minimise delay**
>
> For the purpose of ensuring the prompt conduct of a civil proceeding, a person to whom the overarching obligations apply must use reasonable endeavours in connection with the civil proceeding to—
>
> (a) act promptly; and
>
> (b) minimise delay.

71 The failure to substantively respond to the allegations put and offers made by the letters of 18 October 2016 and 7 February 2018 is also arguably a breach of the obligations imposed by ss 22 and 23. Those sections provide as follows:

> **22 Overarching obligation to use reasonable endeavours to resolve dispute**
>
> A person to whom the overarching obligations apply must use reasonable endeavours to resolve a dispute by agreement between the persons in dispute, including, if appropriate, by appropriate dispute resolution, unless—
>
> (a) it is not in the interests of justice to do so; or
>
> (b) the dispute is of such a nature that only judicial determination is appropriate.
>
> **Example**
>
> A proceeding where a civil penalty is sought may be of such a nature that only judicial determination is appropriate.
>
> **23 Overarching obligation to narrow the issues in dispute**
>
> If a person to whom the overarching obligations apply cannot resolve a dispute wholly by agreement, the person must use reasonable endeavours to—

(a) resolve by agreement any issues in dispute which can be resolved in that way; and

(b) narrow the scope of the remaining issues in dispute—

unless—

(c) it is not in the interests of justice to do so; or

(d) the dispute is of such a nature that only judicial determination is appropriate.

72 The obligations imposed by these sections contain exceptions, however, and I do not consider that the argument before me is sufficient to reach a conclusion as to any breach of those sections.

73 While delay could always expose a party to sanction at common law, s 25 of the CPA now imposes a positive duty to avoid delay. In my view, that is a significant change. Jolen should have been aware of this change from the commencement of this proceeding. The CPA was in force when the originating motion was filed, and Mr Flinkier as director and Mr Finkelstein as solicitor each filed the necessary certificates. If reminder of its obligations under the CPA was required, that reminder was given by the letter from Bean's solicitors of 24 November 2016. Despite that reminder, Jolen took no action to correct its defaults.

74 Against this background, breach of the statutory obligation provides an additional discretionary factor supporting dismissal of the proceeding.

75 The second impact of the CPA arises from the obligation on the Court to further the overarching purpose of the Act, which as noted is to 'facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'. By s 8 of the CPA the Court is required to seek to give effect to this overarching purpose in the exercise of any power, which includes that of dismissal for want of prosecution. By s 9 of the CPA, the Court is obliged to further the overarching purpose by having regard to various stipulated matters. For that purpose, s 9(2) provides that the Court may have regard

to various matters, which include the degree to which the parties have complied with the overarching obligations (s 9(2)(e)).

76 Not all aspects of the overarching purpose sit easily together, of course, and on occasion may tend in different directions. For example, the just resolution of the real issues in dispute may require that an application for dismissal for want of prosecution fail, notwithstanding that the proceeding has not been prosecuted in an efficient, timely or cost effective way. There may also be some difference of opinion as to the impact of the CPA on the dismissal of a proceeding, as opposed to its management to determination.[41]

77 In *Sullivan*, the Court of Appeal considered that one further opportunity should be given to the applicant for leave to appeal to adopt submissions prepared for him by pro bono counsel, that may have had some merit. The delay in that case was only slight, however, compared to the over four years in this case, and the applicant was not legally represented. Here Jolen is legally represented, and was given the opportunity of correcting its default nearly two years ago, and again in February of this year prior to the filing of this application for dismissal of the proceeding.

78 Jolen has not taken up the opportunity afforded by Bean's written submissions to direct me to any aspects of the overarching purpose that would tend against dismissal. The contravention of the obligation to minimise delay clearly supports it. Given the length of that delay, and failure to take action despite reminder, I do not consider that justice to Jolen requires any further time, and justice to Bean tends against it. I consider that the overarching purpose is best served in this instance by dismissal of the proceeding, rather than permitting its continuance.

Conclusion and orders

79 At the conclusion of the hearing I pronounced an order for the dismissal of the proceeding. These reasons elaborate my reasons for that order.

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41 Compare the judgments of Kiefel CJ and Bell J [22]-[25] with the judgment of and Gordon and Edelman JJ [73]-[76] in *Rozenblit v Vainer and anor* [2018] HCA 23.

CERTIFICATE

I certify that the 25 preceding pages are a true copy of the reasons for Ruling of Lansdowne AsJ of the Supreme Court of Victoria delivered on 20 September 2018.

DATED this twentieth day of September 2018.

.....
Associate