VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D61/2012

CATCHWORDS

Adjournment, s98 of the *Victorian Civil and Administrative Tribunal Act* 1998, alleged failure of a solicitor to inform their own client of a hearing date, potential impact of the decision whether to adjourn on both parties, history of the conduct of the proceedings.

FIRST APPLICANT	Mohit Puri
SECOND APPLICANT	Nancy Devgan
RESPONDENT	Viss Group Pty Ltd (ACN 128 944 114) t/as La Vie Homes
JOINED PARTY	Amalgamated Building Approvals Pty Ltd (ACN: 124 294 088)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	5 March 2014
DATE OF ORDER	2 May 2014
CITATION	Puri v Viss Group Pty Ltd trading as La Vie Homes (Domestic Building) [2014] VCAT 502

ORDERS

1. The hearing of 5 March 2014 is adjourned to be heard further by Senior Member Lothian at 10:00 a.m. on 28 May 2014 at 55 King Street, Melbourne.

2. By 14 May 2014 the Applicants must file at the Tribunal and serve on the Respondent copies of:

   i All documents between either or both Applicants and their insurers concerning the alleged burglary;

   ii All reports by either or both Applicants to the police regarding the alleged burglary.

3. I direct the Principal Registrar and the Applicants to serve all future documents and orders (including these orders) on the Respondent care of its director, Mr G. Molloy at PO Box 296, Kyneton Victoria 3444 and at Suite 1, 134 Mollison Street, Kyneton Victoria 3444. Service upon these two addresses will continue to be valid service, even if documents are returned from either or both address, unless the Respondent has notified the Principal Registrar of the Tribunal and Applicants in writing that its address for service has changed.

4. I direct the Principal Registrar to send a copy of these orders to Mr Molloy's email address, gregmolloy@bigpond.com. Service of future orders and documents upon that address will not be necessary, unless so directed by the Tribunal.

5. I direct the Principal Registrar to send a copy of these orders and reasons to the Respondent's previous solicitors. If the Respondent's previous solicitors are no longer acting for it, they must send a Notice of Solicitor Ceasing to Act without delay.

6. The proceeding against the Joined Party is struck out.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicants	Mr M. Puri in person
For the Respondent	Mr G. Molloy, by phone from 11:00 a.m.
For the Joined Party:	No appearance

REASONS

1 The issue is whether the hearing of 5 March 2014 should be adjourned to enable the Respondent to prepare for it, and be heard by a Member other than me or Member Eggleston, or whether the hearing commenced before me should continue. For the reasons that follow, I am satisfied that I should continue to hear this proceeding.

2 On 5 March 2014 there was no appearance for the Respondent at the time the hearing was to commence at 10:00am. Two attempts were made to telephone Mr Molloy, director of the Respondent, shortly after 10:00am, both of which went to message bank. The second message from the Tribunal gave Mr Molloy a telephone number to ring if he wished to participate. He telephoned the Tribunal at approximately 11:00a.m and an arrangement was made to have him attend the hearing by telephone.

3 I arranged for the Tribunal to telephone Mr Molloy because there was an email from him seeking an adjournment on behalf of the Respondent dated 3 March 2014 and there was nothing on file to show that any contact had been made by the Tribunal with the Respondent after that application. It is not satisfactory that a Respondent should be unsuccessful on a technicality, if this can be avoided. It is equally unsatisfactory when an Applicants succeeds, then a Respondent seeks review under s120 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("VCAT Act"), unless there is no alternative to such an application.

4 After Mr Molloy joined the hearing I heard the parties on the matter of adjournment. Because of the serious allegations by Mr Molloy against the Respondent's solicitors, I reserved my decision concerning adjournment. I then commenced to hear the substantive case, on the understanding that if I decided the proceeding should be adjourned to enable the Respondent to prepare, another member would hear the substantive case. This is to avoid the risk of injustice to the Respondent caused by giving evidence unprepared.

5 The time available for the hearing expired before the parties had the opportunity to present the whole of the substantive case.

When should an adjournment be granted?

6 The power to allow adjournments arises from s98 of the VCAT Act. The relevant parts of s98 are as follows:

> (1) The Tribunal-
>
> (a) is bound by the rules of natural justice;
>
> ...
>
> (d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling

enactment and a proper consideration of the matters before it permit.

...

(3) Subject to this Act, the regulations and the rules, the Tribunal may regulate its own procedure.

7 Part of the rules of natural justice is the hearing rule – parties are entitled to hear all that is said to the Tribunal in relation to their case, and have a reasonable opportunity to put their evidence and argument.

8 At paragraph 98.100 of his book "Annotated VCAT Act 4th Edition" the learned author Jason Pizer said:

> The VCAT's failure to grant an adjournment of the hearing may, in a given case, constitute a denial of natural justice.
>
> The VCAT has a "wide discretion" in relation to adjournments: ... In *MacDiggers Pty Ltd v Dickenson* [2008] VSC 576 Warren CJ made the following observations about that discretion:
>
> - often enough, applications for adjournments and applications that give rise to an adjournment are difficult to determine. They require the exercise of a discretion that weighs up the interests of both parties;
> - the decision about whether to exercise the discretion to grant an adjournment is not a situation to punish an Applicants [for adjournment] for any mistake or otherwise but to ensure a fair and reasonable hearing;
> - as a matter of general principle, a party will be granted an adjournment requested on procedural grounds provided any prejudice to the opposing parties may be compensated by an order for costs;
> - where relevant, the VCAT should consider whether the application [in the proceeding] had been properly served on the party seeking the adjournment;
> - justice is the paramount consideration. Various factors will weigh in the determination of what is just in the circumstances, including the "litigation strain" to all involved, the prejudice to the Applicants if the adjournment is refused, the prejudice to the Respondent if it is granted, and the appropriateness of a costs order.
>
> Several additional observations may be made about the discretion.
>
> First, the history of adjournments in the proceeding is relevant to the exercise of the discretion: *Koutroumanis v Transport Accident Commission* [2008] VSC at 83.
>
> Second, it has been said that an "important aspect" of procedural fairness "is the right to a hearing that is not unreasonably delayed by a reluctant opponent": *Bianca v Dinovic* [2009] VCAT 1126

...

And finally, it has been said that it is "well established" that taking a holiday is not a reason for obtaining an adjournment without the consent of the other parties affected by the application: *Cassar v Yarra CC* [2000] VCAT 763 at [9].

Background

9 A history of this proceeding is that the Applicants' application was received at the Tribunal on 27 January 2012. Since then there have been many appearances before the Tribunal, a number of which have arisen due to the Respondent's claims that it had no, or insufficient, warning of a hearing. The important events are as follows:

a A mediation was listed for 7 March 2012, but was adjourned at the Applicants' request.

b The mediation was held on 28 March 2012 and terms of settlement were signed, in consequence of which the proceeding was struck out with a right to apply for reinstatement. The terms of settlement, which were provided in support of the application for reinstatement, required the works to be finished no later than 14 May 2012.

c The proceeding was reinstated on 31 May 2012 after the Applicants advised the Tribunal that they had paid the Respondent an agreed sum, but that the work the Respondent agreed to do had not been undertaken. The Respondent was not represented at the reinstatement hearing and the proceeding was determined in favour of the Applicants in accordance with s78 of the VCAT Act, subject to a hearing on 7 August 2012 to determine quantum.

d On 7 August 2012 the following orders were made:

1. The Applicants are still not in their premises as the builder has not completed the works.

2. **The hearing is adjourned to 10:00am on 13 November 2012 at 55 King Street Melbourne for the purposes only of determining quantum of damages and/or other relief or remedy sought by the Applicants. At the further hearing the Applicants are to provide evidence in support of the remedy sought and damages.**

e By consent of the parties, the hearing was adjourned from 13 November 2012. The date allocated by the Tribunal was 2:15 pm on 29 January 2013 and the Applicants' reason for consent was:

The Respondent is away and will not [be] in Melbourne to attend the hearing and attached is his email with his consent to adjourn the hearing date.

f Orders by consent were made on 13 November 2012 and sent to the Respondent at 3/2 Colorado Court, Hallam, Victoria 3803, as had all other documents from the Tribunal to that date.

g On 24 January 2013 Mr Molloy wrote to the Tribunal seeking adjournment. It included the following:

> The Respondent has only recently been informed of a scheduled hearing in the above matter on Tuesday 29th January 2012 at a time not known by the Respondent.
>
> The Respondent has been made aware of this via an email from the Applicants.
>
> To the best of the Respondents knowledge, the Tribunal knew of, or should have known of the Respondents address as the Respondent provided the VCAT appointed Mediator a copy of the attached Company minutes at the original mediation held on or about 31st May 2012 & asked the Mediator to amend the Tribunal's records to correctly reflect the Registered Business Address of [the Respondent]
>
> The writer is reliably informed La Vie Homes [a trading name previously confused with the Respondent] has not been a registered business for some time and the address of same has been closed for over 12 months.
>
> ...
>
> The Respondent [sic – Mr Molloy] is driving to Townsville to assist in the short term care of his daughter's children's (grandchildren) care while his daughter is on a military commitment...

h These allegations by Mr Molloy cause some concern because the Respondent was notified of the mediation, which Mr Molloy attended on its behalf, by letter from the Tribunal dated 2 February 2012 to 3/2 Colorado Court, Hallam (within 12 months of Mr Molloy's email of 24 January 2013). Further:

- there is no evidence of the Respondent writing to the Tribunal to give a change of address;
- the multi-page company minutes referred to and provided by Mr Molloy as an attachment to his email give an address for the Respondent but do not indicate the address has changed; and
- the orders by consent signed as part of the ADR report at the conclusion of the mediation do not include an order that the Respondent's address for service be changed.

i The Applicants objected to the proposed adjournment and at 3:30pm on 25 January 2013 an email was sent to Mr Molloy notifying him that the application for adjournment had been refused, but stating that the member hearing the matter may consider an application at the commencement of the hearing.

j Mr Molloy sent the Tribunal a further written application for adjournment by facsimile, received 12:16pm on 29 January 2013.

k The hearing of 29 January 2013 was before me. There was no appearance for the Respondent. The orders included:

1. The Tribunal notes the email from Mr Greg Molloy, of Viss Group Pty Ltd dated 24 January 2013 which commences:

   "The Respondent has only recently been informed of a scheduled hearing in the above mater on Tuesday 29 January 2012 [sic] ..."

   The Tribunal accepts the evidence of Mr Puri that he notified the Respondent of the hearing date on 7 January 2013 and the email correspondence shows that Mr Molloy acknowledged that there would be a hearing although he claimed that:

   "I am not in receipt of any correspondence from VCAT" and requested that Mr Puri send him a copy.

2. The Tribunal notes with concern that the Respondent did not provide written notification of change of address for service. The Tribunal understands that the Respondent's address for service is Suite 1, 222 Plenty Road Preston 3072. I direct the principal registrar to send all future correspondence and orders to that address and also be email to Mr Molloy at gregmolloy@bigpond.com.

3. The Tribunal notes with concern that the first application for an adjournment by the Respondent was not made until 24 January 2013.

4. The matter proceeded in the absence of the Respondent.

5. The Tribunal notes that on 31 May 2012 the proceeding was determined in favour of the Applicants, subject only to determination of quantum.

6. By 4:00pm on 26 February 2013 the Respondent must have completed all outstanding building works, including without limiting the generality hereof [there followed a list]

7. By 19 March 2013 the Applicants must file and serve an updated Particulars of Loss and Damage fully particularizing all outstanding claims. Should the Respondent have failed to provide any or all the items in order 6, provisions of those items by others should be included in the Particulars of Loss and Damage.

8. By 9 April 2013 the Respondent must file at the Tribunal and serve on the Applicants' solicitors any response to the updated Particulars of Loss and Damage, failing which orders will be made in chambers in accordance with the Applicants' claim.

9. I direct the Principal Registrar to refer the file to Senior Member Lothian on 11 April 2013.

10. **The proceeding is set down for further hearing before Senior Member Lothian (unless otherwise ordered) commencing at 2:15pm on 18 April 2013 at 55 King Street, Melbourne.**

11. Any application to re-open today's orders under section 120 of the Victorian Civil and Administrative Tribunal Act 1998 must be referred to Senior Member Lothian or Deputy President Aird as a matter of urgency.

...

[Underlining added]

I included the underlined words in order 2 on my own initiative to maximise the chance that an officer of the Respondent would have actual knowledge of the progress of the proceeding and to minimise the possibility that it might lose on a technicality.

l On 12 February 2013 a solicitor announced his appearance on behalf of the Respondent for the first time. I describe that solicitor as Mr X of XYZ Solicitors because the allegations made by Mr Molloy concerning the conduct of the Respondent's solicitor indicate poor practice and Mr X has not had the opportunity to answer those allegations.

It is noted that Mr Molloy had copied an email of 7:56am on 29 January 2013 to Mr X, but did not say that Mr X was the Respondent's legal representative and appears not to have engaged him to appear and seek an adjournment.

m On 8 March 2013 the Tribunal received an application and supporting affidavit, seeking review under s120. In accordance with my instruction, the review hearing was conducted by a member other than me. I gave this instruction because the question of whether orders should be set aside is best dealt with by a member other than the member who made orders in the absence of the party now seeking review.

n The review hearing was conducted by Senior Member Riegler on 5 April 2013 and Mr X appeared for the Respondent. Mr Puri appeared for both the Applicants. Under s120 of the VCAT Act orders 2 and 3 of 31 May 2012 were set aside, as was order 6 of 29 January 2013. The hearing listed for 18 April 2013 was vacated and the proceeding fixed for hearing at 2:15pm on 12 June 2013.

The date by which the Applicants were to file and serve updated particulars of loss and damage was extended to 31 May 2013, and the date for the Respondent's response was extended to 7 June 2013. The orders included:

6. I direct the Principal Registrar to correct the register to record the address of the Respondent as:

   c/o Mr X

Barrister and Solicitor

A Street, B Suburb

7. I direct the Principal Registrar to serve the Respondent with all orders made in the proceeding.

The orders concluded with the following:

OTHER MATTERS

The Tribunal notes that Mr Molloy, director of the Respondent, has indicated that the building works, the subject of the building contract between the parties, will be completed in accordance with the terms of the contract by the end of April 2013.

o The proceeding was before yet another member of the Tribunal, Member Eggleston, for hearing on 12 June 2013. Mr Kotsifas, solicitor, appeared for the Applicants and Mr X appeared for the Respondent. It is noted that Mr Molloy was also present.

p The orders were:

1. The proceeding is adjourned as part heard before myself.

2. The proceeding is set down for hearing before myself on 25 July 2013 commencing at 10:00am with a hearing estimate of half a day.

3. I give the Respondent leave to join Amalgamated Building Approvals Pty Ltd ACN 124 294 088 as a Section 60 Interested Party/Third Party to this proceeding. The Respondent shall provide to the Tribunal as ASIC search detailing the full address particulars within 7 days.

4. A copy of this order and the application shall be sent by the registry to the Section 60 Party/Third party immediately.

q There is no indication on the Tribunal's paper or electronic file that the Respondent complied with order 3 within 7 days.

r At 9:00 am on the date of the next hearing, 25 July 2013, the Tribunal received a facsimile from Mr X that he could not attend because he was under cross-examination in the Supreme Court, a matter which had not arisen until late the day before. He sought an adjournment and also advised that Mr Molloy would appear.

s Mr Eggleston adjourned the proceeding for further hearing by himself on 20 August 2013 at 2:15pm and adjourned the Applicants' application for costs to that day. Ms Kirton of Counsel appeared for the Applicants.

t On 1 August 2013 the Tribunal wrote to Mr X, seeking a company search for the "Section 60" party (the joined party) and raising the possibility that this issue could be the subject of a compliance hearing.

u A compliance hearing was arranged for 9:30 am on 19 August 2013 regarding non-filing of the ASIC search. The compliance hearing was before Senior Member Levine, who ordered that the hearing before Member Eggleston continue the next day.

v At 11:16 on 19 August 2013 Mr Molloy, not Mr X, wrote to the Tribunal on behalf of the Respondent and stated among other things that neither he nor Mr X had been made aware of the compliance hearing. This is somewhat surprising as notice was sent to XYZ Solicitors' email address. Mr Molloy also enclosed a copy of the relevant ASIC search.

w On 20 August 2013 a letter signed by solicitors for the Applicants and Respondent advised that the parties were in negotiation to resolve the dispute and requested a two month adjournment.

x By order in chambers Member Eggleston adjourned the matter to himself for further hearing on 22 October 2013.

y On 22 October 2013 Mr Kotsifas appeared for the Applicants and Mr X for the Respondent. There was no appearance for the Joined Party. Member Eggleston struck the proceeding out with a right of reinstatement.

z On 12 November 2013 the Tribunal received a letter from Mr Kotsifas seeking reinstatement on the basis that the Respondent had allegedly failed to abide by various agreements and the terms of settlement.

aa On 2 December 2013 the Tribunal wrote to the parties to say that the Applicants' application for reinstatement would be heard at 12:00 on 16 January 2014. The letter to the Respondent was sent to Mr X's office.

bb On 16 January 2014 Senior Member Levine reinstated the proceeding, to be heard by a member other than Member Eggleston as on 22 October 2013 Member Eggleston "indicated that the settlement [was] not entirely complete but [he] stated he was unable to deal with matters arising from any settlement agreement reached after he was part heard".

Senior Member Levine set the matter down for hearing on 5 March 2014. He ordered that the Applicants file and serve supporting documents by 30 January 2014 (which they did). He also ordered that the Respondent and joined party file and serve particulars of their compliance with the terms of settlement and any further documents upon which they wished to rely at the hearing by 20 February 2014.

cc The Tribunal's records show the orders of 16 January 2014 were sent to XYZ Solicitors on 21 January 2014

dd No documents were received from the Respondent or joined party, even though a reminder letter was sent to Mr X on 25 February 2014.

ee Other than late attempts to obtain adjournments of appearances at the Tribunal, there is no written or electronic record of Mr Molloy giving an address for service.

Recent history

10 On 3 March 2014 Mr Molloy sent the Tribunal an email, apparently copied to Mr Kotsifas and Mr X, the substantive parts of which are as follows:

> **TO WHOM IT MAY CONCERN**
>
> URGENT ATTENTION REQUESTED
>
> The writer is in receipt of the attached correspondence 'attached', from Mr [X] of [XYZ Solicitors] with reference to the VCAT Order(s) dated 16th January 2014.
>
> **Further**, the writer notes [XYZ Solicitor]'s email correspondence referred to below where [Mr X] Lawyer has withdrawn from representing [the Respondent].
>
> **Despite my attempts to date & due to Mr [X]'s Legal schedule**, the writer has been unable to make contact with Mr [X] with reference to the attachments and/or the current status of the proceedings although, in previous correspondence, it is the writers recollection, there is a scheduled hearing in this matter on or about 5th March 2014 where Mr [X] was to represent [the Respondent] in the writers absence while on annual leave in Tasmania. [Underlining added]
>
> **Refer to boarding passes for Melbourne to Hobart for the 20th February 2014 with a return date from Hobart to Melbourne of 25th March 2014.**
>
> As the writer is the Authorized Officer in this matter and as I am away AND given the sudden & unexpected withdrawal of Legal Services by [XYZ Solicitors] who have been and were authorized to represent [the Respondent] the writer respectfully requests an adjournment in any procedure while the writer is on leave & will therefore be unable to attend.
>
> **Further**, the writer proposes to seek alternative Legal [Counsel] & respectfully seeks leave & a reasonable timeframe from VCAT to retrieve all the relevant documentation from [XYZ Solicitors] and/or in Mr [X]'s reluctance, the same from the Applicants' Lawyer and/or the Tribunal directly. [sic]

11 Mr Molloy attached a document that might or might not have been boarding passes – I do not have the technical expertise to know – and the email from Mr X to him of 28 February 2014 which states:

> I refer to our recent conversations and your advice that [the Respondent] is no longer able to trade as a builder following the lapsing of the registration of the DBU as a registered builder.
>
> In those circumstances and … given the funding issues that ensue [I] cannot continue to [act in] this matter.

> Please see attached letter from VCAT regarding the non-filing of particulars of compliance.

12 The Tribunal has no record of receiving a notice of solicitor ceasing to act from XYZ Solicitors.

13 Mr Molloy sent the attached document, which was the Tribunal's letter to XYZ Solicitors of 25 February 2014. It refers to the Tribunal's order of 16 January 2014 and to the Respondent's failure to file and serve documents by 20 February 2014, but makes no reference to the hearing date.

Mr Molloy's evidence on 5 March 2014

14 As stated above, Mr Molloy joined the hearing by telephone at approximately 11:00am. After making an affirmation he gave evidence and made submissions about why an adjournment should be granted. He said he was not aware of the hearing date until 3 March 2014, he was already in Tasmania by that date and that the Tribunal had failed to follow its own orders to send copies of orders and notices to him as well as to XYZ Solicitors.

15 Mr Molloy also said that the Respondent could not trade because the Domestic Building licence of the only licensed director had lapsed. He said the Respondent was therefore "technically insolvent", although not under external administration.

Should the Tribunal have notified Mr Molloy as well as the Respondent's solicitors?

16 Mr Molloy asserted that the Tribunal was at fault for failing to send copies of all orders, including those of 16 January 2014, to him as well as to Mr X. He said the meaning of order 7 of 5 April 2013 was that copies of future orders should continue to be sent to him. I said I believed it meant previous orders should be sent to Mr X. I have since had the benefit of listening to the recording of that reinstatement hearing. At 4:16pm Mr X gave his address as the address for service. At 4:21pm Mr X said the Respondent was at a disadvantage in not having seen the orders of 31 May 2013. Senior Member Riegler then made order 7 directing the Principal Registrar to serve copies of all orders in the proceeding on the Respondent. At no time during the whole of the reinstatement hearing was there any suggestion that copies of orders should be sent to Mr Molloy as well as to the Respondent's solicitors.

17 During the hearing before me on 5 March 2014, Mr Molloy said the reason he wished documents to go to him as well as to Mr X, and that I should accept his evidence on that point, was:

> ... because I was there and that was the intent. And the reason I did that was because I had lost some faith in Mr [X], and I wanted to ensure that I wasn't in a situation where notices were slipping through the cracks ...

I later made reference to Mr Molloy not "trusting" Mr X. He objected to my use of the word "trust", and rightly so. Nevertheless, given Mr X had not been responsible for a missed hearing in this proceeding at that point, or possibly at all, there is no obvious reason why Mr Molloy might have lost faith in him, at least at such an early date in Mr X's involvement.

18 Having regard to the recording of 5 April 2013, I find that there was no order to serve or give notice to the Respondent other than care of its solicitors, relevant to the hearing of 5 March 2014.

Mr Molloy's evidence about when he first became aware of the hearing

19 Mr Molloy said he first became aware of the hearing on 3 March 2014, when he received Mr X's email to him dated 28 February 2014. He said Mr X:

> ... would have normally represented me in my absence and frankly he didn't advise me of a hearing date anyway.

I remarked that because the hearing was not a directions hearing but the substantive hearing of the dispute, it always needed someone from the Respondent to attend; probably Mr Molloy, because he was the person who was dealing with the matter.

20 Later Mr Molloy said:

> ... that's when I rang the Tribunal Monday [3 March] and wrote the letter the same day and sent it to you by email... we've had no response or correspondence from anyone because we did seek the adjournment, as you know, for today.

21 The Tribunal keeps electronic records of notes which includes telephone conversations. There is no note of a conversation with Mr Molloy on 3 March 2014. The presence of such a note could have confirmed Mr Molloy's recollection. The absence of a note does mean Mr Molloy's recollection is necessarily inaccurate. Nevertheless, Mr Molloy's style of correspondence tends to be direct, and is on occasions strident. He did not say, in his email of 3 March 2014 that he had only just been made aware of a hearing two days hence by telephone, but:

> ...although, in previous correspondence, it is the writer's recollection, there is a scheduled hearing in this matter on or about 5th March 2014

Mr Molloy's email indicated an inexact memory of previous advice to him. Further, the email makes no reference to a telephone conversation.

22 In oral evidence Mr Molloy did not refer to "our recent conversations" referred to by Mr X in his email to Mr Molloy of 28 February 2014, or say whether they were of any relevance to this proceeding.

23 I am satisfied that if Mr Molloy was unaware of the hearing on 5 March 2014, it can only have been due to a failure by the Respondent's solicitors.

The Respondent's failure to file and serve documents

24 Order 4 of 16 January 2014 required the Applicants to file and serve copies of quotations and other documents not common to the parties upon which they intended to rely at the hearing by 30 January 2014, which they did.

25 Order 5 of the same date required the Respondent and Joined Party to file and serve by 20 February:

> particulars of their compliance with terms of settlement and any documents not common to all parties upon which they intend to rely at the hearing.

26 In oral evidence on 5 March 2014 Mr Molloy complained that the Applicants had not advised the Respondent they were no longer represented and added:

> In fact the only correspondence we've had, according to my lawyer, who I finally got onto late yesterday, was that Mr Puri had sent him some documents, unsolicited, without any explanation as to why they were sent, simply copied him in to a series of documents he had allegedly sent to the Tribunal.

27 If Mr Molloy had only just been made aware of the Respondent's obligation to file and serve documents, it is surprising that he did not say so in his email to the Tribunal.

Seeking an adjournment then failing to appear

28 Having regard to the Respondent's long history with the Tribunal in seeking, and not necessarily being granted, adjournments Mr Molloy could not assume that the Respondent had been granted an adjournment unless this was confirmed to him by the Tribunal. For example, Mr Molloy also sought adjournment of the hearing of 29 January 2013 by email and it was not granted, although some of the orders made that day were later set aside.

29 In the course of the application for adjournment on 5 March 2014 Mr Molloy said:

> This matter shouldn't have gone to a hearing. It should have been adjourned.

If Mr Molloy was suggesting that the adjournment should have been granted "on the papers" without the consent of the Applicants, this position is clearly untenable. The need for the Tribunal to contact Mr Molloy to enquire whether he would attend by telephone indicates a lack of respect for the Tribunal, and more importantly, for the Applicants.

Notice to "the Respondent" as distinct from Mr Molloy

30 Mr Molloy is not the Respondent. Viss Group Pty Ltd is. As found above, during the time they were acting, service upon XYZ Solicitors was sufficient for service upon the Respondent, without service on Mr Molloy as well. XYZ Solicitors were sent the orders of 16 January 2014 on 21

January 2014. On receipt by its solicitors of the orders the date of the hearing and the obligation to file and serve documents were matters constructively known to the Respondent, regardless of whether Mr X spoke to Mr Molloy about them. The Respondent did nothing to seek an adjournment because of Mr Molloy's holiday in Tasmania and neither did it file and serve documents.

31 According to the email sent by Mr X to Mr Molloy of 28 February 2014, XYZ Solicitors ceased to be the Respondent's address for service before the hearing date. Nevertheless, I am not satisfied that the Respondent was able to claim ignorance of matters previously known to it, because of its solicitor's knowledge. Further, as mentioned above, until the orders of today were made, XYZ Solicitors' address remained the Respondent's address for service.

Should the alleged sins of the solicitor be visited upon the client?

32 Mr Puri submitted that any failure by Mr X to notify his client of the hearing should be the basis of a dispute between client and solicitor, not a matter that should allow an adjournment to the Respondent.

33 Mr Puri said:

> It's been nearly 5 years in our dealing with [the Respondent]. The house wasn't completed and VCAT is fully aware of that. We don't want to come back again and again in this matter. We want this matter to be fully resolved. ... Numerous chances were given to [the Respondent] to comply with the contract, and with the settlement agreement, and with the mediation [agreement] and if [the Respondent] believes they can enjoy their holidays whereas the Applicants[s] and [their] family is suffering ... and needs to come to VCAT to seek justice again and again, I think that's not fair [to] the Applicants.

34 On the assumption that the fault was Mr X's, or that of XYZ Solicitors, the issue is whether an adjournment should be granted because of that failure. I accept Mr Puri's submission that the Respondent's failure to attend, whether due to Mr Molloy's failure or that of the Respondent's solicitors, is a matter for dispute between them and should not penalise the Applicants.

CONCLUSION

35 The Respondent has failed to complete the home when it promised to do so at least once, possibly twice and potentially on three occasions. I note it is alleged there was a burglary at the home that prevented the Respondent from completing on one occasion.

36 Having regard to *Koutroumanis*, there is an extensive history of adjournments which, when considered together, give an impression of a reluctant Respondent in accordance with *Bianca.*

37 Having regard to *McDiggers,* I am satisfied that an adjournment to have the proceeding heard by another member would cause further delay while the Respondent pleads out its case against the Joined Party and provides documents which it has repeatedly failed to file and serve to date.

38 Also in accordance with *McDiggers*, I am not satisfied that an order for costs, even if it were available to an unrepresented party, would be sufficient to compensate the Applicants for the adjournment. Further, Mr Puri's evidence accords with her Honour's reference to "litigation strain".

39 I am not satisfied that the Respondent, or anyone on its behalf, has behaved in a way that justifies adjournment of the hearing of 5 March 2014. The Respondent had timely knowledge of the hearing through its solicitors and as Mr Pizer said in quoting *Cassar*, a holiday is not a good enough reason for an adjournment.

40 The hearing of the substantive proceeding which commenced before me on 5 March 2014, will continue before me at 10:00 am on 28 May 2014 with an estimated hearing time of one day.

THE JOINED PARTY

41 Most regrettably, no orders were made requiring the Respondent to plead its case against the Joined Party. Neither the pleadings nor any other document on the Tribunal's file indicate why the Joined Party might share any liability of the Respondent to the Applicants, or be required to indemnify the Respondent for liability to them. I note in particular that the most recent settlement, in the form of the Deed of Settlement and Release was dated 20 August 2013, after the Joined Party was joined to the proceeding. It was prepared by solicitors for the Applicants and the Respondent and makes no reference to the Joined Party.

42 As foreshadowed on 5 March 2014, the proceeding against the Joined Party is struck out.

FURTHER EVIDENCE

43 As also foreshadowed on 5 March 2014, there is an issue between the parties about the extent to which the Applicants have been compensated for losses sustained by an alleged burglary. By 14 May 2014 the Applicants must file at the Tribunal and serve on the Respondent copies of:

iii All documents between either or both Applicants and their insurers concerning the alleged burglary;

iv Copies of all reports by either or both Applicants to the police regarding the alleged burglary.

SENIOR MEMBER M. LOTHIAN