SUPREME COURT OF VICTORIA

COURT OF APPEAL

S ACPI 2014 0109

WILLIAM FALKINGHAM — Appellant

v

PENINSULA KINGSWOOD COUNTRY GOLF CLUB (ACN 004 208 075) — Respondent

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JUDGES:	NEAVE JA and SLOSS AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	15 October 2014
DATE OF JUDGMENT:	31 October 2014
MEDIUM NEUTRAL	[2014] VSCA
JUDGMENT APPEALED FROM:	*Re Peninsula Kingswood Country Golf Club* [2014] VSC 437 (Justice Robson)

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APPEARANCES:	Counsel	Solicitors
For the Appellant	Ms C M Kenny QC with Ms C E M Exell	Lyttletons Lawyers
For the Respondent	Mr N J O'Bryan SC with Mr S Rosewarne	Maddocks

NEAVE JA
SLOSS AJA:

1 There are two applications before the Court. The first is an application brought by the respondent to the appeal, the Peninsula Kingswood Country Golf Club Ltd (ACN 004 208 075) ('the Golf Club'),[1] by summons filed on 22 September 2014.

2 The second application is one brought by the appellant, Mr William Patrick Falkingham ('Mr Falkingham'), by summons filed on 14 October 2014, seeking orders that the Golf Club pay or indemnify him for his costs of the appeal (or part thereof) and pay the costs of the application.

3 We shall deal with each application in turn, noting that because each deals with questions of costs, there is a degree of overlap between the two.

The Golf Club's application for security for costs

4 Under its summons, the Golf Club seeks orders that Mr Falkingham provide security for its costs of the proceeding or such part thereof as the court considers appropriate pursuant to r 64.24(2) of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic). The Golf Club has filed an affidavit of Gemma Louise Wilson, sworn 22 September 2014 ('the Wilson affidavit') in support of its security for costs application.

5 Mr Falkingham opposes the giving of security for costs. He acknowledges that the impecuniosity of an appellant enlivens the court's jurisdiction to order security for costs 'in special circumstances', but says that his appeal raises a point of law of public importance not previously considered by an intermediate appellate court and that it has strong prospects of success.

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1 Formerly known as Kingswood Golf Club Limited.

6 Mr Falkingham also seeks an order releasing his legal practitioners from various undertakings of confidentiality given in respect of exhibits to affidavits filed by the Golf Club during the trial before Robson J and in the Court of Appeal.

7 In support of his application, Mr Falkingham relies on the affidavits of Pranesh Hoteshwar Lal, sworn on 10 October 2014 ('Mr Lal's affidavit') (which refers to his affidavits sworn on 5 September 2014 and 17 September 2014), Kevin Poulter (sworn on 7 October 2014) and the affidavit of Mr Falkingham, sworn on 10 October 2014.

The factual background

8 On 17 September 2013, the members of Kingswood Golf Club ('Kingswood') voted to proceed with a merger with the Peninsula Golf Club ('Peninsula'). As at 30 June 2013, Kingswood had approximately 900 members and Peninsula had 1705 members. At the meeting, Mr Falkingham spoke against the merger and strongly opposed it. He had been a member of Kingswood for more than 30 years and he played golf there almost every day.

9 The key feature of the merger was the sale of the Kingswood golf course at Dingley and the use of the proceeds to pay, amongst other things, debts at Peninsula and to establish a "future fund". With some of the earnings from their future fund being used to meet expenses of the merged club, it was forecast that the merged club would be able to trade at a profit into the foreseeable future.

10 The mechanics of the merger were explained in an information booklet. The trial judge found that:

> In substance, the Kingswood Golf Club Limited was to be used as the merger vehicle and the ongoing corporate entity of the merged club. Thus, the Peninsula members who wished to join the merged club would be admitted as members of the Kingswood Golf Club Limited. The Kingswood Golf Club Limited would acquire Peninsula's golf courses at Frankston and Kingswood Golf Club Limited would sell the Dingley land.[2]

Further, following the merger, club members would play their golf at Frankston, where Peninsula is located. It was envisaged that the Dingley land would not be sold for three to five years, which would permit the combined members to play at Dingley during that time.

11 The vote in favour of the merger at Kingwood was 63% in favour and 27% against. The vote in favour of the merger at Peninsula was some 98%.

12 Mr Falkingham commenced proceedings in this Court by way of originating application filed on 20 August 2014 seeking relief under s 232 of the *Corporations Act* 2001 (Cth). His application relied essentially upon an alleged oppression by the Golf Club of Mr Falkingham and, by inference, other members who opposed the merger. By summons dated 21 August 2014, he also sought an injunction to stop the sale of the freehold of the Golf Club's course at Dingley. The trial of the substantive proceeding commenced on 1 September 2014 and concluded on 2 September 2014.

13 Mr Falkingham brought the oppression proceeding in his own name. The trial judge found, however, that he had a group of club members who were supporting the proceeding. His solicitor is Mr Lal, whose residence backs onto the golf course at Dingley. Mr Falkingham first engaged Mr Lal as his solicitor in March 2014. Mr Falkingham was told by Mr Lal that to

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2 [2014] VSC 437, [10].

commence legal proceedings some $20,000 - $30,000 was needed. Under cross-examination Mr Falkingham identified the members of a group who were supporting him in a financial way. He referred to Robert Strain, Jeffrey Dinger, Joe Caruso, Michael Benjamin, Kent Waring, Gary Downey, David Pemberton and Anthony Rawlings, amongst others.

14 The trial judge, the Honourable Robson J, delivered his judgment on 3 September. His Honour found that the Golf Club had acted *ultra vires* in passing the 17 September 2013 resolution. His Honour found:

(a) 'that the Board of Kingswood breached their fiduciary duties in admitting the new members from Peninsula on 2 October 2013';[3]

(b) 'the merger did require a constitutional amendment and thus a 75% vote in respect of the admission of members from Peninsula'[4] whereas that vote was held on the basis that 50% of members could pass the relevant resolution;

(c) 'the admission of new members by the board was voidable as the power to admit was exercised for a purpose other than for which it was given';[5]

(d) 'the actions of the board in depriving Mr Falkingham of the protection of a constitutional amendment to effect the merger, was unfair. He has lost the use of the golf club he has been a member of for many years and uses practically on a daily basis';[6]

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3 Ibid [54].

4 Ibid [68].

5 Ibid [69] and see also [79], [80], [87], [93]-[95] in relation to the admission of new members.

6 Ibid [98].

(e) 'the power of the Court to make orders under s 233 of the [*Corporations Act*] has been enlivened';[7] and

(f) 'the power of the Court in its equitable jurisdiction to declare that the admission of the Peninsula members as members of the company has also been enlivened'.[8] Accordingly, 'the decision of the board is voidable and not void.'[9]

15 Against that background, however, the trial judge nevertheless dismissed the appellant's application for relief against oppression, on the basis of laches. Mr Falkingham had retained his solicitors in March 2014. His Honour found that while Mr Falkingham was aware from an update of 5 May 2014 that the Golf Club was in the process of selling the Dingley land, he did not institute the proceeding until 24 August 2014, in circumstances where Mr Falkingham knew that the board was going to make its decision on 28 August 2014. His Honour said that:

> Although the delay has not been great, the damages may be significant. In my opinion, the plaintiff has by his inaction and standing by, placed the defendant and third parties in a situation in which it would be inequitable and unreasonable to place them if the remedy of setting aside the merger would afterwards to be asserted.[10]

In reaching that conclusion, his Honour accepted evidence that if the sale was aborted, the damage that could be suffered by the Golf Club 'could well run into the millions of dollars.'[11]

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7 Ibid [99].

8 Ibid [100].

9 Ibid.

10 Ibid [111] (footnote omitted).

11 Ibid [107].

16 His Honour also took into consideration as 'another relevant matter' the fact that the majority of the members at Kingswood who voted at the general meeting 'voted to approve the merger'.[12] He said this is relevant because:

> the third parties who would be adversely affected by any order to undo the merger obviously include the members of Kingswood as well as the members of Peninsula who have joined Peninsula Kingswood, as well as the potential bidders for the land.[13]

17 His Honour also concluded that if he was wrong as to the application of laches and acquiescence or delay to the statutory oppression claim, then in any event, in the exercise of his discretion under s 233 of the *Corporations Act*, he would not make orders undoing the merger. In forming that view, his Honour said he had 'to balance the harm done to the members of the company as it now stands with the plaintiff's entitlement to relief.'[14] In any event, his Honour went to conclude that '[t]here is no doubt that laches applies as a defence to the equitable claim to invalidate the decision of the company to admit new members from the Peninsula Golf Club'.[15] His Honour also referred to the fact that, as the two clubs have been merged for almost a year, he considered the relief sought by Mr Falkingham to be unwarranted 'bearing in mind the inconvenience and prejudice that would be caused to the members of the Peninsula Kingswood Club today.'[16] He added that he expected that 'if the admission of the new members was set aside, that

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12 Ibid [112].

13 Ibid.

14 Ibid [113].

15 Ibid.

16 Ibid.

the board would probably be able to effect the merger again.'[17]

Relevant principles concerning security for costs

18 Rule 64.24(2) of the *Supreme Court (General Civil Procedure) Rules* 2005 ('the Rules') provides that the Court of Appeal may, 'in special circumstances', make an order that security be given for the costs of an appeal. The courts have declined to prescribe or formulate in advance what does or does not constitute 'special circumstances' for the purposes of the rule, recognising that it involves an exercise of discretion which 'depends entirely on the circumstances of each particular case.'[18] The reported cases give some indication of matters that have been regarded as constituting 'special circumstances' in the context of their particular facts. In *Scerri v Northam Holdings Pty Ltd*,[19] the Full Court said that under 'the long and well-established practice' of the Court, the inability of an appellant to pay a successful respondent's costs of an appeal constitutes special circumstances justifying an order that security for those costs be given by the appellant.[20] However, the impecuniosity of the appellant is not always decisive. In other cases, the courts have recognised that a range of other factors may also bear on the exercise of the discretion to order security in any particular case.

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17 Ibid [114].

18 See *King v Commercial Bank of Australia* (1920) 28 CLR 289, 292, cited with approval in *Rowan v Australian Associated Motor Insurers Ltd*, (Unreported, Supreme Court of Victoria, Full Court, Fullagar J with whom Marks J concurred, 16 December 1988).

19 [1967] VR 674.

20 See also *Mobilia v Voudiotis* [2002] 4 VR 327 (Batt JA with whom Eames JA agreed); *Challenge Charter Pty Ltd v Curtain Bros (Qld) Pty Ltd* [2004] 9 VR 382; *Maher v Commonwealth Bank of Australia* [2008] VSCA 122, [81] (Dodds-Streeton JA with whom Redlich JA agreed); *Rolfe v Investec Bank (Australia) Ltd* [2013] VSCA 293, [38] (Santamaria JA with whom Osborn JA agreed).

19 In *Maher v Commonwealth Bank of Australia,*[21] Dodds-Streeton JA (with whom Redlich JA agreed) referred with approval to the decision of the Federal Court in *Equity Access Ltd v Westpac Banking Corporation,*[22] where the Court identified the following matters as relevant to the exercise of the discretion as to security for costs:

(a) the prospects of success of the appeal;

(b) the quantum of risk that a costs order would not be satisfied;

(c) whether the making of an order would be oppressive in that it would stifle a reasonably arguable claim;

(d) whether any impecuniosity of the appellant arises out of the conduct complained of;

(e) whether there are other aspects of public interest which weigh in a balance against such an order; and

(f) whether there are any discretionary matters peculiar to the circumstances of the case.[23]

We turn now to consider each of those matters in the context of the particular circumstances of the appeal.

(a) The prospects of success of the appeal

20 Mr Falkingham contends that this appeal raises a novel point of law which is of public importance. It is submitted that the appeal has strong prospects of success of overturning the decision on laches because there has never been a case in Australia or England where laches has been raised as a

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21 [2008] VSCA 122.

22 (1989) ATPR 40-972.

23 [2008] VSCA 122, [80] (Redlich JA agreeing).

defence to an oppression suit, let alone succeeded. It appears to be the case that prior to his Honour's decision, laches had not been considered as an available defence to a statutory oppression claim, it being a legal claim rather than an equitable claim.

21 The Golf Club on the other hand contends that the Mr Falkingham's prospects of success on appeal are 'poor'. It contends that he will be unable to show that the decision of Robson J was 'so unreasonable as to bespeak error': see generally *Ballantyne Suites Pty Ltd v Ballantyne Chambers Pty Ltd (in liq)*.[24] Nonetheless, the Golf Club has itself filed an extensive notice of contention 'contending that the decision of the court below should be affirmed on the ground that the trial judge erroneously decided or failed to decide [a number of] matters of fact and law, but does not seek a discharge or variation of any part of the orders below.'

22 In our view, even though the decision appealed from reflects an exercise of discretion by a very experienced trial judge, the matter sought to be argued on the appeal is an important question, and one that may well have relevance in a broader company law context. In making that observation, however, we should not be taken to express any view about its ultimate prospects of success.

(b) The quantum of risk that a costs order would not be satisfied

23 The evidence filed on behalf of Mr Falkingham makes it clear that he has little in the way of assets. On the basis of his financial position and assets as set out in his affidavit, it is self-evident that he does not have the ability to

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24 [2014] VSCA 223, [38]-[46] (Ashley, Priest and Santamaria JJA).

raise funds himself so as to provide security for costs. The evidence below concerning the delay was to the effect that Mr Falkingham was not in a position to issue the proceeding without the assistance of donations from friends and the funds deposited in the trust fund set up by his solicitors so as to enable him to commence the proceeding. In those circumstances, it seems clear that if he were unsuccessful on the appeal there is a high degree of risk that a costs order made against him would not be satisfied.

(c) Whether the making of an order would be oppressive in that it would stifle a reasonably arguable claim

24 The appeal has been set down for hearing on 14 November 2014, the parties having agreed to expedition. The agreed estimate for the length of the hearing is one day.

25 The Golf Club's summons seeking security for costs was not filed until 22 September 2014. On 10 September 2014, however, the Golf Club's solicitors wrote to the Mr Falkingham's solicitors recording their concern as to his ability to satisfy any orders for costs made against him should he ultimately be unsuccessful in the appeal and seeking security for the Golf Club's likely costs of the appeal. This initial request for security was followed up with additional correspondence between the parties and culminated in the filing of the summons.

26 The Golf Club's solicitor estimates the total costs of the appeal to be in the amount of $186,466.50 (including GST and counsel's fees). This estimate includes the costs associated with the second injunction application made

before the Court of Appeal on 17 September 2014[25] and the security for costs application.

27 The sum of $186,466.50 is comprised as follows:

(a) the Golf Club's costs of the second injunction application (senior and junior counsel and instructing solicitors) - $42,997.50;

(b) the Golf Club's costs of the security application – junior and senior counsel and instructing solicitors - $51,695.00; and

(c) the Golf Club's costs of the appeal (junior and senior counsel and instructing solicitors) - $91,774.00.

28 This estimate has been prepared by Ms Gemma Wilson, an experienced practitioner, who is a partner in the Commercial Disputes group of the Golf Club's solicitor. The estimate of costs set out in the Wilson affidavit is 'broad brush', in that it refers to matters such as preparation by counsel on the usual daily basis. As Senior Counsel for Mr Falkingham pointed out, however, any such estimate must be informed by the *Supreme Court (Chapter 1 New Scale of Costs and Other Costs Amendments) Rules* 2012[26] ('the Costs Rules').[27] The estimates of costs referable to each of the applications and the appeal appear to have been prepared by Ms Wilson on the basis of actual daily costs for counsel and actual hourly costs for the solicitors rather than by reference to the scale set out in the Costs Rules. Mr Falkingham also contends that the

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25 In dismissing the application, the Court of Appeal (Kyrou JA and Garde AJA) ordered that the costs of the appellant's application be costs in the appeal.

26 S.R. No. 142/2012. Appendix A sets out the scale of fees and charges for work done on and after 1 April 2013 in relation to matters in the Supreme Court.

27 See *Rolfe v Investec Bank (Australia) Limited* [2013] VSCA 293, [52] (Santamaria JA with whom Osborn JA agreed).

estimates are 'exaggerated and oppressive' and lack the requisite specificity which this Court has found to be necessary.[28]

29 On any view, each estimate represents a significant sum. We are satisfied that even if only the estimated costs of the appeal were in issue, the making of an order for security in the sum sought would be likely to stifle the appeal.

30 In this regard, it will be recalled that the evidence before the trial judge was to the effect that the delay in issuing the proceeding was due in large part to the need to raise funds of $20,000 - $30,000 to cover the Mr Falkingham's costs. Funds were provided by friends and from a trust fund established by the his solicitor. To the extent that the trial judge found that the Mr Falkingham was also supported by funds donated by the 'Save the Kingswood Group', Mr Falkingham now seeks to challenge that finding on the appeal. To that end, in an affidavit sworn by Mr Poulter and filed on behalf of the appellant, Mr Poulter deposes that the 'Save the Kingswood Group' is not funding the Mr Falkingham. Even if we infer that the $20,000 - $30,000 was raised between March and August 2014, it seems very unlikely that a considerably larger sum could be raised from friends and the like who have already donated to fund the trial, within the next few weeks so as to provide security to permit the appeal to proceed.

31 Senior Counsel for the Golf Club submitted that Mr Falkingham bore an evidentiary onus before this Court to show that those who had funded him before would be unlikely to fund him again. He also called on a 'notice to

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28 *Rolfe v Investec Bank (Australia) Limited* [2013] VSCA 293, [52] (Santamaria JA with whom Osborn JA agreed).

produce' directed to Mr Falkingham to produce his solicitor's 'trust account records detailing all receipts and payments in respect of Supreme Court of Victoria proceeding number SCI 2014 04329 and this proceeding.' Senior Counsel for the Mr Falkingham objected to production on various grounds. Argument ensued and in the event, the call for production was not persisted with.

32 The Golf Club relied upon the decision of the Full Federal Court in *Bell Wholesale Co Ltd v Gates Export Corporation*[29] for its contention that it is for Mr Falkingham to establish or satisfy the Court that an order for the provision of security would frustrate the litigation and that those who have funded in the past would not fund the security required for the appeal. It was submitted that the appellant here, like his counterpart in *Bell Wholesale,* failed to demonstrate that 'the people who stand behind the litigation are without means'. In *Bell Wholesale,* the Full Federal Court stated:

> In our opinion a court is not justified in declining to order security on the ground that to do so will frustrate the litigation unless a company in the position of the appellant here establishes that those who stand behind it and who will benefit from the litigation if it is successful (whether they be shareholders or creditors or, as in this case, beneficiaries under a trust) are also without means. It is not for the party seeking security to raise the matter; it is an essential part of the case of a company seeking to resist an order for security on the ground that the granting of security will frustrate the litigation to raise the issue of the impecuniosity of those whom the litigation will benefit and to prove the necessary facts.[30]

33 Reference was also made to *Epping Plaza Fresh Fruit & Vegetables Pty Ltd v Bevendale Pty Ltd*[31] where the application for security for costs was one made

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29 (1984) 2 FCR 1.

30 Ibid 4.

31 [1999] 2 VR 191.

under s 1335 of the Corporations Law. On appeal from orders made by a judge requiring the company to provide security, the Court of Appeal dismissed the appeal, having found that the judge's discretion was not shown to have miscarried. Their Honours (Winneke P and Phillips JA) said that the judge was:

> entitled to take into account the fact that the litigation had not, so far, been stifled and also the fact that there was no material before him tending to demonstrate that the beneficiaries of the trusts were unable, or unwilling, to contribute to the costs of the litigation.[32]

34 Further, they said that he was entitled to 'take into account, as he did, matters which suggested that the claim was likely to be lengthy and expensive in its resolution and that there were reasons to doubt the bona fides of the claim.'[33] The Golf Club submits that in the present case, the Court should infer that the fact that Mr Falkingham 'is without substantial assets was one of the reasons why he ultimately became the notional plaintiff'. Further, the Golf Club also said that it should be inferred that those who have supported Mr Falkingham to date would be able to assist in providing security should the appellant wish to continue with his appeal.

35 The Golf Club also relied upon the decision of the Court of Appeal in *Mobilia v Voudiotis*[34] where Batt JA (with whom Eames JA agreed) said that 'in the absence of rebutting evidence, it is to be inferred not only that the appellant's costs of the appeal are likely to be funded by Trispar Pty Ltd but also that the company can provide security for the respondent's costs of the

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32 Ibid 198.

33 Ibid 199.

34 [2002] 4 VR 327.

appeal'.[35] The Court went on to observe that whether security will be able to be provided is a matter within the knowledge of the appellant, pointing out that answering evidence could have been filed as to why, if security were ordered, the appeal would be stifled, but it was not. Batt JA said that after having regard to all of the circumstances, he 'did not believe that an order for security of the amount I have in mind[36] will stifle the appeal'.[37]

36 Mr Falkingham contends that there is no need for him to file any further evidence. He has made clear his own financial position and his inability to raise any funds to meet the security sought. The evidence is that he was not in a position to issue proceedings without the assistance of friends, some of whom he mentioned by name at the trial. There was also evidence that his solicitor set up a trust fund into which donated funds were deposited. Further, Mr Falkingham has filed evidence from Mr Poulter, the secretary of the 'Save Kingswood Group', challenging his Honour's finding that the group was supporting him in his trial and confirming that the group 'has not provided any financial support or other active support to Mr Falkingham's legal action'.[38]

37 It was submitted that the present case is very different from those relied upon by the Golf Club. First, Mr Falkingham is a genuine plaintiff who is pursuing a genuine claim with some financial support from friends and others. It cannot be said that he is not a 'real party' to the litigation. This is a

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35 Ibid 329 [5].

36 His Honour considered that the amount sought was 'somewhat high': [2002] 4 VR 327, 330 [8].

37 [2002] 4 VR 327, 330 [7].

38 Affidavit of Mr Kevin Poulter sworn on 7 October 2014, [22].

very different situation to that which applied in *Mobilia v Voudiotis* where the appellant was an undischarged bankrupt who had failed to pay any of the earlier orders for costs, and in circumstances where the court inferred that the associated companies may well have funds available to meet the security sought. Here, Mr Falkingham seeks to preserve the principal asset of the company, namely the Dingley land, in circumstances where the events that led to the sale transaction have been impugned by the Court. Further, as Senior Counsel for Mr Falkingham said those friends and others who donated funds initially to enable the proceeding to be commenced are not under any obligation of any kind to assist him further. Nor is Mr Falkingham under any obligation to provide details of their financial means. In this regard, reference was made to *Knight v F.P. Special Assets Ltd.*[39]

38 In our view, essentially for the reasons advanced on behalf of Mr Falkingham, we are satisfied that the present case is very different from the position that applied in the cases referred to and relied upon by the Golf Club. Here, Mr Falkingham has demonstrated a real and genuine interest in pursuing the case on behalf of the company. The trial judge found that Mr Falkingham was someone who played golf at the Dingley course 'practically on a daily basis' and that he has no 'lost the use of the golf club he has been a member of for many years'.[40] Further, his Honour was of the opinion that 'the actions of the board in depriving Mr Falkingham of the protection of a constitutional amendment to effect the merger, was unfair.'[41] In those circumstances, he has an obvious interest in pursuing the proceeding. He

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39 (1992) 174 CLR 178, 188 (Mason CJ and Deane J), 202-203 (Dawson J).

40 [2014] VSC 437, [98].

41 Ibid.

required the assistance of friends and contributors to bring the matter to this point, and having succeeded at all but the final hurdle before the trial judge, now seeks to vindicate the correctness of the position he contends for before the Court of Appeal. This is not a case where it could seriously be said that a straw horse has been advanced whilst the real protagonists lie behind the scenes, to protect themselves from the risk of an adverse costs order.

(d) Whether any impecuniosity of the appellant arises out of the conduct complained of

39 The present case is not one where the impecuniosity of the appellant arises out of the conduct complained of. The affidavit material filed to date suggests that Mr Falkingham's probable inability to satisfy any order for costs which may be made against him has not changed as result of the conduct complained of.

(e) Whether there are other aspects of public interest which weigh in a balance against such an order

40 This aspect has effectively been addressed in issue (a) above. Having formed the view that the question raised by the appeal is one of general importance, that is a matter which must be weighed in the balance in determining whether security for costs should be ordered.

41 In *Smail v Burton; re Insurance Associates Pty Ltd (in liq)*,[42] the Full Court recognised that in determining whether special circumstances existed for ordering security, it was a relevant circumstance that the decision on the points of law raised by the appeal might affect matters of public importance.

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42 [1975] VR 776.

The Court (Gillard J, with whom Newton and Norris JJ agreed) said the practice was 'fairly well-established' that in such a case security for costs will generally not be required. However, a different view was taken in *Kardynal v Dodek*.[43] There, a differently constituted Full Court considered that the public importance of the matters raised by the appeal was merely something to be taken into account in deciding whether an order for security for costs should be made.

(f) Whether there are any discretionary matters peculiar to the circumstances of the case

42 Under the description of 'other factors', Mr Falkingham also relies on the fact that there are no outstanding orders for costs. (On the injunction application made before the Court of Appeal (Kyrou JA and Garde AJA) the Court ordered that those costs be costs in the appeal.) Senior Counsel for the Mr Falkingham also relies on the fact that because expedition was ordered, by consent, most of the steps required to be taken in readiness for the appeal have been taken. In those circumstances, where the appellant has already incurred those costs, it would be productive of unfairness if security were to be ordered at this point, and particularly so in circumstances where to do so would have the effect of stifling the appeal.

Mr Falkingham's application for an order that the Golf Club pay or provide an indemnity for his costs

43 On 13 October 2014, Mr Falkingham filed a summons seeking orders that the Golf Club pay or indemnify him for his costs of the appeal (or part

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43 [1978] VR 414.

thereof) and pay the costs of the application. That application is opposed by the Golf Club.

44 In essence, Mr Falkingham contends that where an action is brought by a member bona fide for the benefit of the company, and not by the member personally, there is no reason why the court should not order the company to indemnify the member's costs. The application is not one made under Part 2F.1A of the *Corporations Act*. Rather, Mr Falkingham points to the ability of a member to bring a derivative proceeding with an indemnity from the company as a basis for arguing that in an analogous proceeding, such as the present one where, in effect, he is seeking relief on behalf of the company, the court should order that the company pay or indemnify him for the costs of the appeal.

45 In making this submission, Mr Falkingham relies upon the decision of Marks J in *Farrow v Registrar of Building Societies*.[44] In *Farrow*, each of the plaintiffs being members (or the holder of an interest analogous to that of a member) of the building society was entitled to sue in their own right. They commenced proceedings in their own names but contended that the action was one that was brought derivatively for the benefit of the building society within an exception to the rule in *Foss v Harbottle*.[45] Accordingly, they applied to have the building society added as a defendant and sought an order that the building society indemnify them for their costs. His Honour made the orders sought. His Honour found that the court is empowered to exercise the discretion to make the costs order sought (on the basis of what was said by

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44 [1991] 2 VR 589, 595 ('*Farrow*').

45 (1843) 67 ER 189.

the Court of Appeal in *Wallersteiner v Moir (No. 2)*[46] in circumstances where it is satisfied that 'the relief sought is essentially for the benefit of the company'.[47]

46 The allegations made by the plaintiffs in *Farrow* were that the wrong done to the companies by the administrator of the group of which the building society formed part 'is in the way of wilful misconduct in unauthorised payment out of funds and conduct of the administration as a liquidation and otherwise so that the value of the assets have been or will be depreciated.'[48] In those circumstances, his Honour said that where the decision of the administrator, and his conduct, were under attack, no entity controlled by the administrator could be expected to sue for relief of the kind that the plaintiffs seek.[49] He found the position of the administrator is analogous to that of majority shareholders in direct control of a company, and the position of the plaintiffs is analogous to that of the minority shareholder. He said:

> The law here invoked does not depend in my opinion exclusively on a plaintiff being a minority shareholder, but on his being a shareholder or a person in a sufficiently analogous position suing in the interests of a company under the control of a person or persons whose conflict of interest makes the action by the company itself an unreality.[50]

47 Further, his Honour emphasised that the power to accede to such an application is not one that is exercised 'on a view of the ultimate result of the case, but on a view that there are reasonable grounds for the proceeding being

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46 [1975] QB 373.

47 [1991] 2 VR 589, 590.

48 Ibid 595.

49 Ibid 592.

50 Ibid.

brought.'[51] His Honour found that the proceeding brought by the plaintiffs was one that was 'very important to them, the Pyramid group, the members and the depositors'[52] and in his view they had demonstrated 'reasonable grounds for taking the proceeding.'[53] He concluded that:

> If the proceeding is *bona fide* to protect the society and the society will receive the benefit of success, there is no good reason why the expenses should be met out of the private resources of one or more shareholders. In principle, for the reasons given by Lord Denning in *Wallersteiner*, no distinction should be made if they fail.[54]

48 Since the decision in *Farrow*, Part 2F.1A was introduced to the *Corporations Act*. Part 2F.1A abolished the exception to the rule in *Foss v Harbottle* and in its place established a regime whereby certain persons, not limited to shareholders, may apply for leave to bring an action on behalf of the company. Section 237(2) specifies five conditions which must be satisfied to obtain leave: (1) it is probable that the company itself will not bring the proceeding; (2) the applicant is acting in good faith; (3) it is in the best interests of the company that leave be granted;[55] (4) there is a serious question to be tried; and (5) notice of the application has been given to the company. Where proceedings are brought with leave, s 242 permits the court to make any order it considers appropriate for the costs of such proceedings.

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51 Ibid.

52 Ibid 595.

53 Ibid.

54 Ibid.

55 Section 237(3) provides that a 'rebuttable presumption that granting leave is not in the best interests of the company arises' if certain matters are established.

49 In *Woods v Links Golf Tasmania Pty Ltd*,[56] Finkelstein J conveniently summarised the background to the introduction of Part 2F.1A and the effect of those provisions on the principle adopted by Marks J in *Farrow*. In dealing with the question of costs orders, his Honour said that the purpose of Part 2F.1A is 'to increase the likelihood that someone brings a claim which the company ought to have commenced'[57] and thus 'the principle adopted by Marks J should continue to apply under the statute.'[58]

50 Further, his Honour observed:

> If a costs order is made and at any later time it turns out the claim is unmeritorious, the costs order can be recalled. That is what happened in *Farrow v Registrar of Building Societies*. At the time the costs order was made, the plaintiff appeared to have a good claim, although, as Marks J said, he was not able to fully assess the strength of the claim. During the trial, however, things took a turn for the worse. Ultimately the plaintiff was forced to discontinue the suit. As a result, the judge was asked to, and he did, revoke the costs order.[59]

51 In that case his Honour made an order that the company 'meet the fair and reasonable costs of running the action.'[60]

52 We note that at the conclusion of the trial in the derivative proceeding brought following Finkelstein J's decision in *Woods v Links Golf Tasmania Pty Ltd*, the company was largely unsuccessful in its claims and it was ordered to pay 85% of the costs of Mr Sattler (a director and shareholder of the company) and Sattler Nominees Pty Ltd (a company controlled by Mr Sattler).[61] The

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56 [2010] FCA 570.

57 Ibid [9].

58 Ibid.

59 Ibid [11].

60 Ibid [12].

61 *Links Golf Tasmania Pty Ltd v Sattler* (2012) 292 ALR 382.

company applied for a variation of the costs orders that had been made. The trial judge, Jessup J, made orders limiting the amount of costs that the company ought be required to pay and made orders requiring the individuals who had sought leave to bring the proceeding to contribute to the costs which the company would be obliged to pay as a result of the success achieved by Mr Sattler and his company.

53 In the present case, Mr Falkingham does not seek an order that the appeal continue as a derivative proceeding. Rather, his application for the company to pay or indemnify him for his costs is put forward on the basis that this proceeding is analogous to a derivative proceeding. In essence, he says he is seeking to uphold the constitution of the company and to have its affairs conducted in accordance with the constitution. In that sense he is seeking to vindicate the company's rights, and to protect the minority, not his personal rights. He relies on the decision in *Farrow* as confirming the appropriateness of the Court making an order of the kind sought, in a situation where the company's rights are being pursued.

54 There is an area of overlap between this application and the security for costs application. In effect, Mr Falkingham says that rather than he being ordered to give security, the Golf Club should be paying or indemnifying him for the costs he is incurring to vindicate the company's rights. The argument is put as both a defence to the Golf Club's security for costs application and as a stand-alone claim. The Golf Club relied upon the decision of the English Chancery Division (Companies Court) in *Re Sherborne Park Residents Co Ltd.*[62] There, Hoffman J held that where a claim brought by a shareholder alleges a

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62 (1986) 2 BCC 99,528.

breach of fiduciary duty arising from an allotment of shares, the substance of the complaint is that the shareholder's rights as a shareholder have been infringed, and therefore the case is not an appropriate one for making an indemnity order under the principle in *Wallersteiner v Moir* (No. 2).[63] His Honour observed that:

> Although the alleged breach of fiduciary duty by the board is in theory a breach of its duty to the company, the wrong to the company is not the substance of the complaint. The company is not particularly concerned with who its shareholders are. The true basis of the action is an alleged infringement of the petitioner's individual rights as a shareholder. The allotment is alleged to be an improper and unlawful exercise of the powers granted to the board by the articles of association, which constitute a contract between the company and its members. ... An abuse of these powers is an infringement of a member's contractual rights under the articles.[64]

55 There is a real issue in the present case as to whether the fundamental issue sought to be agitated by Mr Falkingham is akin to that considered by the courts in the allotment of shares cases, as his Honour found. Senior Counsel for the Golf Club submitted that the notice of contention filed by the respondent effectively challenged the approach the trial judge adopted, contending that his Honour fell into error by finding a breach of fiduciary duty based on the share allotment cases such as *Howard Smith Ltd v Ampol Petroleum Ltd.*[65] In those circumstances, we regard it as premature to decide Mr Falkingham's application.

56 Ordinarily a complaint arising from a share allotment would involve the pursuit of a personal right rather than one brought on behalf of the

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63 [1975] QB 373.

64 (1986) 2 BCC 99,528, 99,530-99,531.

65 [1974] AC 821.

company. But there are features of Mr Falkingham's argument that involve the enforcement of the company's constitution and, in that sense, reflect notions of seeking to have the affairs of the company conducted in the best interests of its members. In our view there are, to adopt the approach of Marks J in *Farrow*, 'reasonable grounds for the proceeding being brought' by Mr Falkingham. Whether the claim is ultimately to be characterised as one brought by him on behalf of the company may well be affected by the outcome of the contentions raised by the Golf Club in its notice. As the appeal is listed for hearing in a few weeks' time, in our view, it would be preferable for the Court hearing the appeal to determine this application once the arguments in the substantive appeal have been heard. At that point it will be clear whether, given the arguments advanced on the appeal, Mr Falkingham would be regarded as seeking to remedy a wrong done to the company, and if so, whether it is appropriate to make an order of the kind sought.

Mr Falkingham's application for release from confidentiality orders

57 Mr Falkingham also sought to be released from confidentiality orders imposed by the trial judge and by the Court of Appeal. The application for access to the confidential documents was made orally and supported by Mr Lal's affidavit. Relevantly, that affidavit refers to:

- A contract of Sale dated 5 September 2014 – which forms confidential exhibit 'GPR-4' to the affidavit of Gerald Patrick Ryan sworn 16 September 2014 (see Mr Lal's affidavit at [4]) – the Court of Appeal (Kyrou JA and Garde AJA) made an order for confidentiality in respect of that exhibit and all of the Mr Falkingham's legal practitioners gave an undertaking as to confidentiality – see Mr Lal's affidavit at [4].

- Documents relating to the purchase of the golf course - confidential exhibit MGW-1 to the affidavit of Marcus Geoffrey Willison sworn 25 August 2014 – Robson J made orders that these documents remain confidential to the legal practitioners of Mr Falkingham - see Mr Lal's affidavit at [7].
- An offer for the purchase of the land – contained in the affidavit of Marcus Geoffrey Willison sworn 2 September 2014 – Robson J made orders that this document remain confidential to counsel for Mr Falkingham - see Mr Lal's affidavit at [8].

58 Senior Counsel for Mr Falkingham contended that the advice to potential bidders was relevant because it was the basis on which the offer was made. Further, it was said that in circumstances where the contract of sale has now been entered into, there is no reason why confidentiality should be maintained. The gist of the submissions made was that there were three documents to which they sought access – that counsel and Mr Lal needed to be able to view those documents and discuss them with Mr Falkingham – most importantly, in the short term they needed to be able to give him advice so that he could make a decision about joining the purchaser to the appeal – and they needed to be able to present their submissions at the appeal in open court.

59 The Court was satisfied that a proper basis had been demonstrated for giving the access sought. In circumstances where the appeal had been expedited, and decisions which will affect the running of the appeal need to be made quickly, the Court was minded to make orders allowing Mr Falkingham, his counsel and solicitor to access the documents referred to in

Mr Lal's affidavit, on the basis that the specified documents be used solely for the purposes of the proceeding (in accordance with the principle in *Home Office v Harman* [1983] 1 AC 280) and that there be no further disclosure to any other person. Formal orders were authenticated accordingly on 20 October 2014.

Conclusion and orders

60 On the Golf Club's summons seeking security for costs, we would order as follows:

(a) That the application be dismissed.

(b) That the Golf Club pay Mr Falkingham's costs.

61 On Mr Falkingham's summons seeking orders for payment of his costs, or an indemnity, by the Golf Club, we would order as follows:

(a) That Mr Falkingham's application be referred for determination by the Court hearing the appeal.

(b) That Mr Falkingham file and serve a short outline of submissions on this point (of no more than 5 pages) by 4.00 pm on Thursday, 6 November 2014.

(c) That the Golf Club file and serve a short outline of its submissions in reply (of no more than 5 pages) by 4.00 pm on Tuesday, 11 November 2014.

(d) That Mr Falkingham file and serve any response to the respondent's submissions in reply (of no more than 3 pages) by 4.00 pm on Friday,

14 November 2014.

(e) That the costs of the hearing of Mr Falkingham's application on 15 October 2014 be costs in the appeal.

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