IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S CI 2014 04329

IN THE MATTER OF:

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD (ACN 004 208 075)

BETWEEN:

WILLIAM FALKINGHAM — Plaintiff

v

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

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JUDGE:	ROBSON J
WHERE HELD:	Melbourne
DATE OF HEARING:	1 and 2 September 2014
DATE OF JUDGMENT:	3 September 2014
CASE MAY BE CITED AS:	Re Peninsula Kingswood Country Golf Club
MEDIUM NEUTRAL CITATION:	[2014] VSC 437

CORPORATIONS – Oppression proceedings under s 232 of the *Corporations Act 2001* (Cth) Merger of two golf clubs - Merger affected by members of one club being admitted on mass as members of the other club, being a company limited by guarantee - Whether admission of new members of the club to affect the merger was an improper exercise of power by the board to admit new members – Whether conduct of the board admitting the members on mass was oppressive to the plaintiff - Oppression established – Power of the Court to make orders under s 233 of the *Corporations Act 2001* (Cth) enlivened- Discretion to make orders under s 233 – ss 232 and 233 of *Corporations Act 2001* (Cth).

EQUITY – Whether directors breached fiduciary duties in admitting members of another club on mass to affect a merger – Whether admission of new members voidable rather than void – Power to avoid enlivened.

LACHES AND ACQUIESENCE – Whether defence of laches, acquiescence and delay available in answer to the statutory oppression claim and the equitable claim to invalidate

the admission of new members – Effect of orders sought would be to undo the merger – Consideration of balance of justice and injustice - Plaintiff's application dismissed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms C M Kenny QC with Mr A F Solomon-Bridge	Lyttletons
For the Defendant	Mr N J O'Bryan SC with Mr S Rosewarne	Maddocks

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EX TEMPORE (REVISED)

HIS HONOUR:

Introduction and background

1 I have before me an originating process filed on 20 August 2014. The plaintiff, Mr William Patrick Falkingham, is a member of the defendant, the Peninsula Kingswood Country Golf Club Limited (Peninsula Kingswood).

2 Prior to October 2013, Mr Falkingham had been a member of the Kingswood Golf Club for more than 30 years. Until October 2013, the club was known as the Kingswood Golf Club Limited. In October 2013, Kingswood Golf Club merged with the Peninsula Country Golf Club (Peninsula) to become the Peninsula Kingswood Country Golf Club Limited. Essentially, this was achieved by the members of the Peninsula Golf Club becoming members of the Kingswood Golf Club Limited and Kingswood Golf Club Limited changing its name to the Peninsula Kingswood Country Golf Club Limited (Peninsula Kingswood).

3 The Kingswood Golf Club (Kingswood) was located at Dingley. The club had an 18 hole golf course on land that it had owned since the 1930s. In 2013, its land was valued at approximately $52 million, and if re-zoned residential some $71 million. As at 30 June 2013, Kingswood had approximately 900 members.

4 The Peninsula Country Golf Club (Peninsula) was located at Frankston. It has two 18 hole courses. In 2013, its land was valued at approximately $54 million, and if re-zoned residential approximately $72 million. In 2013, Peninsula had 1705 members according to the August 2013 proposed merger information booklet (information booklet).

5 At a general meeting of the Kingswood Golf Club Limited held on 17 September 2013, the members voted to proceed with a merger with the Peninsula Club. The vote was 63 per cent in favour and 27 per cent against. Mr Falkingham strongly opposed the merger and spoke against it at the meeting.

6 The Kingswood Golf Club Limited was constituted as a company limited by a

guarantee; the members of the club being members of the company. The Peninsula Club was an incorporated association recognised under the relevant State act.

7 On 26 August 2013, the information booklet was circulated to the Kingswood members which explained details of the proposed merger and notified members of a special general meeting to be held on 17 September 2013. The information booklet outlined the current and likely financial position of each club if each continued without merging. That information showed each club experiencing falling membership numbers and running into significant financial losses in the future. The information booklet also outlined the financial benefits of a merger.

8 The key feature of the merger was the sale of the Kingswood golf course and the use of the proceeds to pay, *inter alia*, debts at Peninsula and to establish a 'future fund'. The proceeds from the sale of the golf course at Dingley were estimated to yield at least $70 million and after expenses some $65 million. It was forecast that after certain outlays some $39 million would be available for the future fund. It was proposed to invest those moneys and use a portion of the earnings from the future fund to meet expenses of the merged club. Based on an average 6 per cent per annum return it was forecast that the future fund would grow to over $50 million by the year 2023.

9 With some of the earnings from the 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 As mentioned, the information booklet also explained the mechanics of the merger. 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.

11 The merged club anticipated that henceforth the club members would play their golf at Frankston. Provision was made, however, that the Dingley land would not be sold for three to five years, and that the combined members would continue to also play at Dingley for three to five years. The vote in favour of the merger at Peninsula was some 98 per cent.

12 As mentioned earlier, Mr Falkingham and many other members of Kingswood opposed the merger. Prior to the general meeting at which the merger was approved, a 'stay group' had been busy investigating and formulating measures that would allow the club to continue at Dingley.

13 Mr Falkingham brings the proceeding in his own name. He does not purport to bring his complaint on behalf of other members. The evidence establishes, however, that he has a group of club members who are supporting his proceeding. His solicitor is Mr Lal, whose residence backs on to the golf course at Dingley.

14 In November 2013, Mr Lal had published in the "Dingley Dossier" an article headed "The Kingswood Golf Club". In the article, Mr Lal indicated that he was not a member of the club. He raised a question, however, "Can the Kingswood Golf Club be urged (legally or otherwise) from changing its course?"(which I took to be referring to the merger). Mr Lal said that he had a positive legal opinion on the possibility of a legal challenge (I again infer that is a challenge to the merger).

15 Mr Falkingham said that he received and read the "Dingley Dossier" every month. Mr Falkingham said, however, that he could not recall reading the article written by Mr Lal. I am not satisfied that he did not read it. Mr Falkingham admitted that he had a bad memory - which he displayed in the witness box - and that he had associated issues that contributed to his poor memory. Mr Falkingham said that he suffered from depression and anxiety and was undergoing psychiatric care.

16 Mr Falkingham said that Mr Lal spoke at a public meeting in October or November 2013, which was held by the Save Kingswood Organisation, which I understand is a residents' organisation established to stop the proposed re-zoning of the Kingswood

land to residential.

17 Mr Falkingham said that Mr Lal addressed the meeting and suggested that there might be a legal case to answer. Mr Falkingham said that, as best as he could remember, Mr Lal suggested that members of the Kingswood Golf Club had a right to a legal challenge - which I infer was in relation to the merger. Mr Falkingham clarified this issue in his evidence and said that Mr Lal thought - which I took to be that he expressed a view - that the legal challenge could be mounted basically against the merger of the clubs.

18 Mr Falkingham said that subsequently he was advised by Mr Benjamin, a solicitor, to engage Mr Lal. As discussed below, Mr Benjamin is a member of the group supporting Mr Falkingham in these proceedings and is also leading a campaign in Dingley against the re-zoning of the Kingswood golf course to residential.

19 Mr Falkingham first engaged Mr Lal in March 2014. Mr Falkingham said that in May 2014, after he had instructed Mr Lal, he called and addressed a public meeting at the Yarra Club in order to raise funds to mount a legal challenge against the merger. The holding of the meeting was published and advertised by way of flyers printed by Eagle Stationery and distributed around Dingley. Eagle Stationery is owned by Mr Dinger, who has sworn an affidavit in support of Mr Falkingham's application and is - I take it - a member of his support group.

20 Mr Falkingham said that Mr Lal informed him that he had established a trust account to hold moneys raised to support a legal challenge to the merger. It is not clear whether the trust account or fund had already been established when Mr Falkingham first retained Mr Lal in March 2014. I will discuss this issue further below. Mr Falkingham said that by May 2014, some $5,000 had been raised. Mr Falkingham said that some of the costs of this proceeding are being paid out of the trust account established by Mr Lal.

21 After further questioning by counsel for the defendant, Mr Falkingham said that he did not recall exactly when he was told of the trust account but it was obviously

between his first meeting with Mr Lal in March 2014 and the public meeting that was held in May 2014.

22 Mr Falkingham was told by Mr Lal that to commence legal proceedings some $20,000 to $30,000 was needed. Mr Falkingham was asked if Mr Lal had informed him that Mr Lal had raised $20,000 to $30,000 in his trust account and Mr Falkingham said, "basically that's when we proceeded, yes". Mr Falkingham said this was not long after the May 2014 meeting. Mr Lal had informed Mr Falkingham that the proceeding would not go ahead until there was enough money in the trust account.

23 Mr Falkingham said that there were meetings other than the one held at the Yarra Club in May 2014. These meetings were held each month and they would consist of members who opposed the merger and, I infer, who were supporting Mr Falkingham taking legal action to set aside the merger.

24 Mr Falkingham said the group were supporting him in a financial way. Mr Falkingham identified as members of that group: Robert Strain, Jeffrey Dinger, Joe Caruso, Michael Benjamin, Kent Waring, Gary Downey, David Pemberton and Anthony Rawlings. He also said there were others.

25 Mr Falkingham denied seeing a notice on the Save Kingswood Group website. It was tendered in evidence nevertheless. The document was headed, "Legal Action Against the Golf Course Going Ahead". The notice said as follows:

> A group of golf club members have recently received a preliminary legal opinion in relation to a legal action against the recent "merger". That the legal opinion concluded that there are a number of positive and genuine grounds to mount a legal challenge against the merger.
>
> Consequently, the relevant members are proceeding to the next stage of collecting funds to engage a suitable Barrister and to commence legal proceeding.
>
> **How you can assist**
>
> You can assist by donating amounts to the fund as set up to mount the legal challenge by the members. Any amount you donate (donated amount) will be voluntary and will be utilised for the purposes of the proposed legal challenge against the merger.

> The donated amount will be paid into the trust account of Lyttletons Lawyers (details below) and will only be used for the purposes of the proposed legal action.
>
> **Trust account details: Lyttletons Lawyers Pty Ltd**
>
> **Account Number: ...**
>
> **Bank: CBA**
>
> Should you have any questions in relation to the above, please feel free to contact Lyttletons Lawyers. Telephone: 9551 3155

26 I should add that Lyttletons Lawyers is Mr Lal's firm. The document bears no date. I infer from the reference to the trust account that the document was most likely published around May 2014.

27 In summary, I find that although Mr Falkingham is the sole plaintiff, he is being supported in this case by a group called the Save Kingswood Group. It is not clear whether the group consists solely of members of the Kingswood Golf Club or whether it also includes Dingley residents who are opposed to the subdivision of the Kingswood golf course.

28 What is clear, however, is that the proposed sale and subdivision of the course was of central importance to the group - whether to permit the course to remain as a golf course or to prevent its subdivision.

29 One member of the group, Mr Michael Benjamin, is a local Dingley solicitor who to this day is actively campaigning against the subdivision and currently has a large sign outside his legal practice in Dingley advertising a public meeting on 2 October 2014 to campaign against the proposed subdivision.

30 Importantly, it appears that the group has been active since May 2014 and probably earlier.

31 Mr Falkingham did not present as a man familiar with the niceties of the law, and I infer that he has been guided in his decision to retain Mr Lal in March 2014 by Mr Benjamin, who is a solicitor, is a member of his group and is obviously familiar with the law.

32 By letter dated 5 May 2014, Mr Falkingham received a communication from Peninsula Kingswood entitled "Membership Update No 2 – Merger Implementation". Under the heading of "Land Divestment", Mr Falkingham was informed as follows:

> Following a competitive bid process, the Board has engaged Ernst & Young's Real Estate Advisory Services to advise the Club in connection with the divestment of the Dingley land planned to occur by the end of the transition period.
>
> As a first step Ernst & Young are testing the market through an Expression of Interest process to be advertised in the property sections of the Australian Financial Review and The Age on Thursday 8 May 2014.

33 Mr Falkingham is aware that Kingswood is currently engaged in a process to sell the Kingswood land. He produced, in an exhibit to his affidavit, an advertisement from The Australian Financial Review of 8 May 2014 (which was the date referred to in the update from the club), which says:

> Substantial Potential Residential Infill Opportunity
>
> For Sale by Expressions of Interest
>
> Rare infill development opportunity in a south eastern metropolitan location
>
> Total area 50-60 he approximately.
>
> Expressions of Interest are to be received no later than 3:00 pm on 12 June 2014 at the offices of EY.
>
> Contact EY for submission requirements and further information at infill@au.ey.com

34 The advertisement also refers to Mr Marcus Willison, who gave evidence in this case, of Ernst & Young Real Estate Pty Ltd in Exhibition Street, Melbourne.

35 On 25 June 2014, an article appeared in "Golf Industry Central" that Mr Falkingham refers to in his affidavit. It was headed, "Mirvac keen to buy Dingley's Kingswood Golf Course", and went on to say:

> Mirvac has confirmed it is among the bidders for the Kingswood Golf Course site in Dingley Village in Melbourne's south-east.
>
> The 53.4 - hectare site has the capacity for about 700 dwellings.
>
> The Australian Financial Review says it is expected to sell for about $100

million.

The sale is being handled by EY for the Peninsula-Kingswood Country Club.

The 105 year old Dingley club merged with the Peninsula Golf Club to ensure its financial viability last year, and the decision was made to sell off the Dingley course by the members of the private golf club where 63 % of their members voted in favour.

Locals have produced a 20-page book, *Kingwood: The Central Park in Dingley Village*, covering the loss of the amenity and the possible environmental and social impacts of any housing redevelopment.

The club is currently reviewing the expressions of interest, general manager Heath Wilson said.

36 It is convenient at this point to finish the chronology of events relating to the proposed sale of the Kingswood golf course before returning to Mr Falkingham's complaints.

37 On 22 February 2014, Ernst & Young delivered a presentation to the board of Peninsula Kingswood which outlined how Ernst & Young proposed to run the sales campaign for the sale of the Kingswood golf course.

38 On 26 March 2014, Ernst & Young was engaged by Peninsula Kingwood to conduct a sale campaign for the sale of the Dingley land. Subsequently Ernst & Young prepared an information memorandum and an advertisement for the sale of the land on 8 May 2014, which I have already referred to.

39 The information memorandum was delivered to nineteen parties who had returned confidentiality agreements. Expressions of interest were required to be received by 12 June 2014, which is referred to in the advertisement exhibited by Mr Falkingham. Ernst & Young received fourteen expressions of interest.

40 In July 2014, Ernst & Young reported to the board that a title re-establishment survey and a Phase 2 environmental assessment had been completed, amongst other things. Requests for proposals by potential buyers closed on 8 August 2014. Nine applicants progressed to the due diligence stage.

41 The club had specified that it required unconditional contracts, a sale for more than

the club's valuation benchmark ($70 million) and a buyer with the experience and financial resources to complete the purchase. After reviews of the offers received by Ernst & Young, on 14 August 2014, Ernst & Young attended a Peninsula Kingswood board meeting and delivered a presentation explaining the offers. At this meeting, the board resolved to enter into final negotiations with four bidders with final offers to be presented to the board by 30 August 2014.

42 On 18 August 2014, Ernst & Young sent a letter to the preferred bidders confirming that the board had accepted their proposals for further consideration and requesting final offers based on the Peninsula Kingswood criteria, together with marked up contracts by 29 August 2014.

43 On 21 August 2014, Ernst & Young were notified by Peninsula Kingswood that this proceeding had commenced and notice was given to the preferred bidders of the proceeding.

44 Mr Willison, of Ernst & Young, estimates that, to date, each of the preferred bidders has invested approximately $100,000 to $200,000 in the sale process, including completing their due diligence and preparing contracts.

45 Mr Willison, who is the partner of Ernst & Young in charge of real estate advisory services nationally, deposes in his affidavit of 25 August 2014, which is admitted into evidence in this case, as follows:

> If an injunction is granted which delays or prevents the sale of the Kingswood land, this will substantially and adversely impact any sale (assuming one eventually occurs). It is likely in those circumstances some, if not all, of the Preferred Bidders will not submit final proposals to purchase the land. If any of the Preferred Bidders do in fact submit a final offer, it is likely that the competitive tension that currently exists between them (and which all those involved in the sale process have worked deciduously to promote) will be substantially reduced, if not eliminated altogether. As evidence of this, I note that one of the Preferred Bidders has indicated to Ernst & Young that their bid will remain open for acceptance only for 14 days, after which they will withdraw their final offer and not wait until the court action has completed. All of the Preferred Bidders are substantial property development companies with many projects on their books and many opportunity before them. This is only one of several transactions to which they might turn their attention in the event that the sale of Kingswood was enjoined. Accordingly, it is my view based on my knowledge of the

Preferred Bidders and my experience in transactions of this nature over many years that if an injunction is granted, it may adversely impact the final sale price of the Kingswood land by between approximately $10,000,000 and $20,000,000. This does not include the costs incurred by the Preferred Bidders to date, which they may seek to recoup from PKCGC if it is restrained from completing the sale. It also does not include the costs incurred by PKCGC itself in the course of this process.

46 This evidence was not challenged by the plaintiff.

The plaintiff's claims

47 I return now to Mr Falkingham's complaints. Mr Falkingham's application relies essentially upon an alleged oppression by the Peninsula Kingswood Country Golf Club Limited of Mr Falkingham and, by inference, other members who opposed the merger. The particulars of oppression have been provided as follows:

> The plaintiff gives the following particulars of acts of oppression:
>
> (1) In respect of the admission of Peninsula Golf Club members in or about October 2013, the board and/or the directors acted oppressively in exercising their discretionary powers to consider, sponsor, or accept applications from 1044 Peninsula Golf Club members not personally known to members of the Kingswood Golf Club by:
>
> (a) Exercising those powers for a purpose other than that for the which they were conferred; and/or
>
> (b) Diluting the vote of the Kingswood Golf Club members.
>
> (2) In respect of the admission of Peninsula Golf Club members in or about October 2013, the board and/or the directors acted oppressively in that they acted in breach of the Kingswood Golf Club's Constitution by:
>
> (a) Failing to exercise an independent discretion in respect of the consideration, sponsorship, or admission of each member of Peninsula Golf Club;
>
> (b) Not displaying the required notices of candidates for admission in a conspicuous place in the clubhouse for at least a week before the ballot;
>
> (c) Further or alternatively, displaying notices of candidates for admission which were deficient.
>
> (3) The board and/or the directors acted oppressively in putting a resolution to members at the special general meeting on 17 September 2013 as an ordinary resolution when it was properly the subject of a special resolution.
>
> (4) The board and/or directors acted oppressively in failing to explain at

the meeting on 17 September 2013 that the new Constitution of the merged Club would remove the members' ability to approve any sale of the Kingswood Golf Club land and that the proposal was to admit more than 1000 Peninsula Golf Club members other than in accordance with the Constitution.

(5) The board and/or the directors acted oppressively in representing to members until at least 26 August 2013 that approval to merge Kingswood Golf Club with Peninsula Golf Club would require a 75 %vote.

(6) The board and/or the directors acted oppressively in allowing the newly admitted Peninsula Golf Club members to vote in respect of the special resolutions put to the members at the special general meeting held on or about 29 October 2013.

(7) The board and/or the directors acted oppressively in the failure to convene a special general meeting when requisitioned to do so in or around May 2013 and by suspending members who spoke out against the proposal to merge with the Peninsula Golf Club.

(8) The board and/or the directors acted oppressively in failing to properly investigate and/or report to members on the possibility of the Kingswood Golf Club remaining at the Dingley site.

(9) The board and/or the directors acted oppressively in representing to members up until at least 29 October 2013 that members would, following the merger, continue to enjoy the golf course on which the Kingswood Golf Club was situated for at least 3-5 years.

48 I mention these particulars of oppression as they also inform some of the relief sought by the plaintiff in the originating process.

49 In the originating process, it said that this is an application under ss 232, 233 and 247A of the *Corporations Act 2001* (Cth) (the Act) for orders based on the facts stated in the supporting affidavit. The plaintiff seeks:

1 Pursuant to s 247A of the Act, an order for the inspection of the books of Peninsula Kingswood Country Golf Club (formerly known as the Kingswood Golf Club Limited) (the Company).

2 A declaration that the defendant contravened and continues to contravene one or more of the grounds in s 232 of the Act.

3 Pursuant to s 233(i) of the Act, orders restraining the defendant whether by its servants, agents or officers, from:

(a) taking any steps whatsoever in relation to the sale, disposal, transfer, demise or lease of any part of the land otherwise known as the Kingswood Golf Course in Dingley Village, Melbourne, Victoria (the Land) until further order;

(b) taking any steps in relation to expressions of interest regarding the Land until further order; and

(c) taking any steps in relation to the zoning, use or planning associated with the Land until further order.

4 A declaration that any purported admission of persons as new members of the Company after 17 September 2013 from the Peninsula Country Golf Club, was invalid and void.

5 Pursuant to section 233(j) of the Act, orders that the defendant remove from the register of members of the Company, the names of any persons added as members since 17 September 2013 from the Peninsula Country Golf Club.

6 A declaration that resolutions passed by the Company between 18 September 2013 (including resolutions on or about 29 October 2013) and the present time (including any resolutions processed by ASIC on 16 December 2013, 31 October 2013 and 8 October 2013 bearing Doc ID numbers 028819142, 1E9933109, 1E9933110, 1F0499933 respectively), are invalid and void.

7 Pursuant to s 233(b), orders that the defendant repeal the constitution of the Company purportedly adopted on 29 October 2013.

8 A declaration that the resolution passed by the Company on 17 September 2013 was invalid and void.

9 The defendant pay the plaintiff's costs of the proceeding.

10 Such further or other orders as may be appropriate.

50 The relevant provisions of the Act relating to the claim are as follows.

51 Section 232 provides:

Bringing, or intervening in, proceedings on behalf of a company

The Court may make an order under section 233 if:

(a) the conduct of a company's affairs; or

(b) an actual or proposed act or omission by or on behalf of a company; or

(c) a resolution, or a proposed resolution, of members or a class of members of a company;

is either:

(d) contrary to the interests of the members as a whole; or

(e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

For the purposes of this Part, a person to whom a share in the company has

been transmitted by will or by operation of law is taken to be a member of the company.

52 Section 233 provides:

Orders the Court can make

233 (1) **[Powers of the Court]** The Court can make any order under this section that it considers appropriate in relation to the company, including an order:

(a) that the company be wound up;

(b) that the company's existing constitution be modified or repealed;

(c) regulating the conduct of the company's affairs in the future;

(d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;

(e) for the purchase of shares with an appropriate reduction of the company's share capital;

(f) for the company to institute, prosecute, defend or discontinue specified proceedings;

(g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;

(h) appointing a receiver or a receiver and manager of any or all of the company's property;

(i) restraining a person from engaging in specified conduct or from doing a specified act;

(j) requiring a person to do a specified act.

233 (2) **Order that the company be wound up**. If an order that a company be wound up is made under this section, the provisions of this Act relating to the winding up of companies apply:

(a) as if the order were made under section 461; and

(b) with such changes as are necessary.

233 (3) **Order altering constitution**. If an order made under this section repeals or modifies a company's constitution, or requires the company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:

(a) the order states that the company does have the power to make

such a change or repeal; or

(b) the company first obtains the leave of the Court.

53 The prayers for relief referred to above seek relief under the Act and in equity.

54 Under paragraph 4 of the originating process, the plaintiff seeks a declaration that any purported admission to the Peninsula Kingswood Country Golf Club of persons as new members of the company after 17 September 2013, was invalid and void. This prayer for relief is of importance as I have formed the view, as explained later, that the board of Kingswood breached their fiduciary duties in admitting the new members from Peninsula on 2 October 2013.

55 In paragraph 5 of the originating process, pursuant to s 233 (j) of the Act, the plaintiff seeks orders that the defendant remove from the register of members of the company, the names of any persons added as members since 17 September 2013 from the Peninsula Country Golf Club. This paragraph seeks relief under s 233 of the Act based on the allegation of oppression.

56 Paragraph 6 says that the plaintiff seeks a declaration that resolutions passed by the company between 18 September 2013 (including resolutions on or about 29 October 2013) and the present time (including any resolutions processed by ASIC on 16 December 2013, 31 October 2013 and 8 October 2013 bearing certain identification numbers), are invalid and void.

57 Under paragraph 7 the plaintiff seeks leave that pursuant to s 233 (b) - again this is an oppression proceeding seeking relief - orders be made that the defendant repeal the constitution of the company purportedly adopted on 29 October 2013.

58 In paragraph 8 the plaintiff seeks a declaration that the resolution passed by the company on 17 September 2013 was invalid and void. As I will explain below, the resolution on 17 September 2013 was not invalid but it did not authorise the board to do something that it could not otherwise do under the constitution.

The plaintiff's claims in relation to the way in which the merger was affected

59 It is now convenient to turn to the constitution of the Kingswood Golf Club Limited before the merger. I set out the relevant clauses below.

60 Clause 3 of the constitution of the Kingswood Golf Club Limited provided that:

> The club is established for the purposes expressed in this Constitution and particularly for the purpose of providing and maintaining from the joint funds of the Club a suitable golf course and club house for the members and their guests. The income and property of the Club whensoever derived shall be applied solely towards the promotion through sponsorship or otherwise of the objects of the Club as set forth in the said constitution and no part thereof shall be paid or transferred directly or indirectly by way of dividend bonus gratuity or otherwise howsoever by way of profit to the members of the Club.

61 Clause 3 continued and dealt with other permitted payments.

62 Clause 4 provided, *inter alia*, that:

> (A) The members of the club shall be the following persons:
>
> (i) Every person who is a member of the Club as at the date hereof.
>
> (ii) Every person who on or after the date hereof is elected as a member of the Club.

63 Paragraph 8 dealt with the nomination of members. It provided:

> (A) (i) Except as herein after provided every candidate for membership of the Club except for Honorary Life Members shall be proposed by one and seconded by another of the General Body of Members of the Club to both of whom the candidate shall be personally known.
>
> (ii) The Board may consider applications from persons not known to Club members. In these cases, after completion of formalities required by Rule B, the applicant may be sponsored pro forma by two members of the Board.
>
> (iii) Every nomination for membership shall be made in writing and signed by the candidate and by the proposer and seconder and shall be in such form as the Board may from time to time approve.
>
> (B) Until the Board shall otherwise prescribe, the procedure relating to the nomination of candidates for the membership of the Club, other than Honorary Life Members shall be as follows:-
>
> The proposer will submit to the Secretary on the prescribed form of application full information as to:
>
> (1) Full name of Nominee.
>
> (2) The full name of the Proposer and Seconder.

(3) The business and private address, profession or occupation of the Nominee the clubs to which the Nominee belongs or belonged and the names of any members of the Club prepared to act as referees.

(4) Any other information that would or may be useful to the Board arriving at a decision. Such information shall include the category of membership sought on behalf of the applicant.

(C) The Board shall not be bound to accept the application for membership of any person and shall not be bound to give any reasons for refusal.

64 Clause 9 provided, *inter alia*, that:

(A) Save and accept for Honorary Life Members the name and address and description of every candidate and the name of the proposer and seconder shall also be sent to the secretary fourteen days at least before the ballot and shall be displayed in a conspicuous place in the clubhouse for at least a week before the ballot...

65 Clause 35 provided:

The Board shall not without the sanction of a general meeting of the Club demise or lease for a period in excess of three years or exchange sell or otherwise dispose of the whole or any part of the real property of the Club.

66 Clause 53, regarding the alteration of the constitution, provided, *inter alia*, that:

(A) The Constitution of the Club may from time to time be added to rescinded, altered or amended and any new Rule or Rules may from time to time be made at any general meeting subject as follows:-

(1) Any member entitled to attend and vote at a meeting of the Club and wishing to propose any addition, rescission, alteration or amendment to this Constitution shall give notice thereof in writing to the Secretary of the Club together with a copy of the proposed addition, rescission, alteration or amendment.

(2) The proposed addition, rescission, alteration or amendment of any new Rule or Rules shall be submitted by the Board at the next Annual General Meeting or at a Special General Meeting called for the purpose and if seconded a vote may be taken thereon and shall be resolved by a majority of three quarters of the members present and entitled to vote or the meeting may be adjourned from time to time as may be deemed necessary.

67 The plaintiff, as indicated by his originating process and supported by the affidavits he relies upon, complains about several matters including that members and himself were informed that the merger would require a 75 per cent vote as a special resolution but only a 50 per cent vote was sought at the general meeting to approve

the merger.

68 As explained below, in my view, the merger did require a constitutional amendment and thus a 75 per cent vote in respect of the admission of members from Peninsula.

69 Further, the plaintiff complains that the procedure for admitting members was not followed. I find that it is unnecessary to decide those issues as I find that the admission of the new members by the board was voidable as the power to admit was exercised for a purpose other than for which it was given.

70 It is unnecessary therefore to consider whether names were properly posted and the other complaints about the procedure. If I am wrong about the improper purpose, then in my opinion the regular postings and so forth would be saved by s 1322(2) of the Act.

71 Further, Mr Falkingham complains that the 'stay case' was not given to Price Waterhouse Coopers when it was asked to assess the financial position of Kingswood. It think it is fair to say that Mr Falkingham contends that the board did not act fairly and even-handedly in presenting the 'go' and 'stay' cases to the members of the club and the board was determined to push through the merger proposal.

Heads of Agreement between Kingswood and Peninsula

72 On 26 March 2013, the Kingswood Golf Club and Peninsula Country Golf Club entered into a heads of agreement. Mr Sweeney exhibits a copy of the heads of agreement to this affidavit. It is entitled, "Heads of Agreement" and provides that:

> The parties to this Heads of Agreement are:
>
> - Kingswood Golf Club and
> - The Peninsula Golf Club Inc
>
> The purpose of this agreement is to:
>
> - Record the agreement reached by both parties, acting as equal partners,, to investigate and, subject to mutually satisfactory outcomes of that investigation and approval through Membership votes, proceed to a merger of the two parties.

73 There are other clauses about conducting due diligence and acting in good faith. The document is then signed by the Kingswood Golf Club and the Peninsula Country Golf Club.

74 On the night of 26 March 2013, at a meeting of the members of the Kingswood Golf Club, Mr Sweeney, the president of the club, according to his affidavit,[1] informed the members as follows. According to his affidavit in paragraph 43, he said:

> At the 26 March 2013 meeting, I presented to members on the options for Kingswood looking forward and confirmed that the 2 options the Board had decided on were to remain at the current site or for a full sale and merger with Peninsula. I also advised the meeting that the Kingswood Board had entered into a heads of agreement with Peninsula to look into each other's business for a possible merging of the two clubs. Members were also advised that 2 working groups made up members of the Board and members, would be formed to assess the Stay Option and the Go Option.

75 One may think that the heads of agreement indicated a greater degree of agreement on the merger than merely to look into each other's business for a possible merger of the two clubs. In my view, there may be much to suggest that the board may not have been even-handed on the 'stay and go' proposals that were thereafter considered. Mr Sweeney's evidence did not fill me with confidence that he would have been fully frank with his members.

76 The board's approach to the calling of a general meeting by the members may also suggest that the board was taking all possible steps to quell the stay proposal, and that is further evidenced by their past treatment of people who spoke out against the 'go' proposal.

77 As it is I do not need to decide that issue.

Did the board validly admit the Peninsula members?

78 I now turn to whether the board validly admitted the thousand odd Peninsula members.

79 The merger scheme involved the admission of a thousand new members of the club,

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1 Paragraph [43].

from the Peninsula club. In my opinion, there was nothing wrong with such a proposal if the constitution was amended to permit the merger. I find, however, that it was not permissible to admit the thousand odd members to enable the merger to be approved.

80 The purpose of giving the board the power to admit new members may only be exercised for the purpose for which it was given. In this case, I find that the substantial object of the board in admitting new members was to give effect to the merger agreement.

81 In assessing the validity of the board's powers in exercising the power to admit new members, the Court is to ascertain the substantial object the accomplishment of which formed the real ground for the board's action.

82 In *Howard-Smith v Ampol Limited*,[2] Lord Wilberforce, who delivered the judgment on behalf of the Privy Council said as follows:

> Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether the purpose was proper or not. In doing so it well necessarily give credit to the bona fide opinions of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls.[3]

83 In *Whitehouse v Carlton Hotels Pty Ltd*,[4] the High Court of Australia held that an allotment of shares was made by the governing director for the purpose of ensuring that his wife and daughters (who had shares) would not gain control of the company after his death. The majority held that the power to issue shares had been issued for an improper purpose and the issue was voidable. They held that a company cannot

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2 [1974] AC 821, 831 per Lord Wilberforce who delivered the judgment of the Privy Council.

3 Ibid, 835.

4 (1987) 162 CLR 285 (*Whitehouse*).

ordinarily issue shares for the purpose of defeating the voting rights of existing shareholders by creating a new majority.[5]

84 It was held that in this area, as in other areas involved in the exercise of fiduciary power, the exercise of the power for an ulterior or an impermissible purpose is bad, notwithstanding that the motives of the donee of the power in so exercising are substantially altruistic.[6] The majority said:

> Indeed, in the ordinary case of a purported allotment of shares for such an impermissible purpose, it is likely that the directors will genuinely believe that what they are doing to manipulate the voting power is in the overall interest of the particular company: see *Piercy v S.M. Mills and Co; Hogg v Crampthorn*.[7]

85 As to the issue of whether the purpose has to be substantial or moving cause, the majority said:

> As a matter of logic and principle, the preferable view would seem to be that, regardless of whether the impermissible purpose was the dominant one or but one of a number of significantly contributing causes, the allotment will be invalidated if the impermissible purpose was causative in the sense that, but for its presence, "the power would not have been exercised": per Dixon J., *Mills v Mills*.[8]

86 On the issue of whether the allotment of shares - being the admission of members - is void or voidable, the majority said:

> It was submitted on behalf of the appellants that the effect of the allotment being tainted by the impermissible purpose was that it was voidable and not void and that the allotment had been subsequently ratified by the company. We agree with the first branch of that submission. The preferable view, both on principle and on authority, is that an allotment of shares which would otherwise be valid and biding is rendered voidable and not void if vitiated by an impermissible purpose.[9]

87 The directors' power to admit new members under clause 8 of constitution of the

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5 Ibid, 289.

6 Ibid, 293.

7 Ibid, 293 (citations omitted).

8 Ibid, 294 (citation omitted).

9 Ibid, 295.

company was a fiduciary power. Accordingly, although the exercise of the power may have been formally valid, it may be attacked on grounds that it was not exercised for the purpose for which it was given.

88 In ascertaining the purpose, the Court is required to have regard to the substantial purpose. As mentioned above in *Whitehouse*, the High Court held that the allotment of shares there at issue would be invalidated if the impermissible purpose was causative in the sense that, but for its presence, "the power would not have been exercised".

89 The defendant says that the purpose of admitting the Peninsula members was merely to admit new members. But as the authorities have shown on the issuing of shares, the question one needs to ask is: for what purpose did the board admit the new members? In the share cases, the question is: for what purpose did the board issue the new shares?

90 One purpose may have been to add to the membership for the benefit of the club and the existing members. Another purpose may have been to give effect to the merger of the Kingswood club with the Peninsula club.

91 In those circumstances, the question the Court must ask is which, if any, was the substantial purpose?

92 The High Court in *Whitehouse* said that the relevant question to be asked is whether, but for the purpose's existence, would the power have been exercised?

93 I have no doubt that but for the intention of the board to achieve the merger, the power to admit the members would not have been exercised. The Peninsula members would not have applied to become members but for the merger.

94 Applying those principles, I find that the substantial purpose of admitting the 1000 odd new members was to give effect to the merger. The board had no power under the constitution to affect a merger that involved the admission of 1000 odd new members from another club, and to sell the existing golf course at Dingley to play at

another course in Frankston. The constitution did not envisage a merger of that sort with another club.

95 What, however, of the resolution of the members directing the directors to affect the merger, including by admitting the Peninsula members to membership of Kingswood? The members, by ordinary resolution, did not have the power to amend the member admitting power of the constitution of the club. Their resolution to the board directing the board to act contrary to the constitution was invalid or ineffective to authorise the conduct of the board in admitting the Peninsula members.

96 Great weight was given during the submissions to the will of the majority of the members of Kingswood. One purpose of company constitutions is to check the unfettered power of the majority. Constitutions protect the rights of the minority, not only those in majority. The fact that the members in the general meeting approved the merger does not alter the constitutional obligation to the board to only exercise their powers for the purposes for which they were given.

Was the conduct of the board oppressive?

97 The authorities establish that the conduct complained of must be unfair to the member as a member.[10] Also, the conduct must relate to the affairs of the company.

98 In my opinion, the actions of the board in depriving Mr Falkingham of the protection of a constitutional amendment to affect 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. The oppression must also be continuing at the time of the application. In my opinion, the presence of the Peninsula members as members of the club satisfies that requirement.

99 In my view, the power of the Court to make orders under s 233 of the Act has been enlivened.

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10 *Re Hollen Australia Pty Ltd* [2009] VSC 95.

100 Further, in my opinion, 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. As I indicated above, the decision of the board is voidable and not void.

Laches and acquiescence

101 The defendant pleads laches, acquiescence and delay. For present purposes it is merely necessary to go to Meagher, Gummow & Lehane's *Equity: Doctrines & Remedies*.[11] In chapter 36 under the heading, "Laches and Acquiescence", the learned authors say of laches:

> It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution of prosecution of his case, has either: (a), acquiesced in the defendant's conduct; or (b) caused the defendant to alter his position in reasonable reliance and the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb: *Lindsay Petroleum Co v Hurd*.[12]

102 They cite as authority for that proposition the judgment of Sir Barnes Peacock in *Lindsay Petroleum Co v Hurd*.[13] That authority has also been approved by the High Court of Australia in *Orr v Ford*,[14] by Deane J.

103 In *Lindsay Petroleum*, Sir Barnes Peacock said:

> Now the doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence

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11 Meagher, Heydon and Leeming, *Meagher, Gummow and Lehane's Equity Doctrines & Remedies* (Butterworths LexisNexis, 4th ed, 2002).

12 Ibid, 1031 [36-005] (citations omitted).

13 (1874) LR 5 PC 221 (*Lindsay Petroleum*).

14 (1989) 167 CLR 316.

> must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as it relates to the remedy.[15]

104 As indicated in the above passage, delay by itself is not sufficient. Further authority for that proposition can be found in the High Court of Australia's decision in *Fitzgerald v Masters*.[16]

105 I have already set out in some detail the delay on the part of Mr Falkingham in bringing this proceeding. Amongst other matters, Mr Falkingham retained his solicitors in March 2014 but did not institute this proceeding until 24 August 2014, a delay of five months. On the other hand, the admission of the new members took place in October 2013. Mr Falkingham was well aware of the merger by December 2013, when he received the first update for the new board, of the position, that Mr Falkingham exhibits to his affidavit a letter dated 20 December 2013, written to him, signed by Gerry Ryan and Peter Sweeney, entitled "A Welcome, Update and Best Wishes", which said:

> Dear Bill,
>
> We are writing to welcome you as a founding Member of our new Club, to update you on developments and plans, and to extend the Club's best wishes for the season.
>
> Firstly we are pleased to advise that our new Club has been legally established through ASIC's registration of its name - *Peninsula Kingswood Country Golf Club* - and of its Constitution.
>
> The Club's Board has met and begun the preparatory work to establish governance arrangements, finalise our strategic and implementation plans, and to address financial, land, course, Clubhouse and Club unification issues over the transition period [anticipated to be a least three years].
>
> We have attached a report on these matters which we hope you find informative and helpful.
>
> The Board is committed to delivering the Vision that Members of the Founding Clubs have strongly endorsed to create a premier private Members Club of which you will be proud to be a Member.

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15 *Lindsay Petroleum*, 239-240.

16 (1956) 95 CLR 420.

> May we extend the Club's best wishes to you for Christmas and the New Year.

106 Mr Falkingham was aware that Peninsula Kingswood was in the process of selling the Dingley land since receiving the 5 May 2014 update. Further, the information booklet made it clear that the sale of the Dingley land was the key to the merger. Mr Falkingham must have been well aware of the enormous expenses being incurred by Peninsula Kingswood and the potential buyers in preparing for their bids. As it was, the board was going to make its decision on 28 August 2014. The Court has been advised of the bid that the board is most likely to accept. In my view, it more than satisfies the criteria laid down by the board for a sale referred to above.

107 I accept the evidence referred to above that if the sale was aborted the damage that could be suffered by Peninsula Kingswood could well run into the millions of dollars.

108 There has been no explanation for the delay in the plaintiff commencing this proceeding save for the time needed to build up a 'fighting fund'. No submission or authority was tendered to me that made this factor of great significance in assessing the relevant circumstances.

109 In *Crawley v Short*,[17] Young JA of the New South Wales Court of Appeal held that a defence of laches was available to the statutory remedy in an oppression case even though he said that he was unable to find any case in Australia or England where laches had been raised as a defence to an oppression suit. His Honour said:

> There are at least two explanations for this. First, laches only applies as a defence to an equitable claim. Second, if there is acquiescence in a course of conduct then it is difficult to maintain that the conduct was oppressive; see for example *Jesner v Jarrad Properties Ltd*. Even lack of interest by the plaintiff over a period may have this effect: *Re RA Noble and Sons (Clothing) Limited* and *Re London School of Electronics Limited*.[18]

110 His Honour continued to consider the application of laches to an oppression proceeding:

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17 (2009) 262 ALR 654 (*Crawley v Short*).

18 Ibid, [155] (citations omitted).

By analogy of reasoning, if, in a case of oppression based on breach of fiduciary duty, the claim for fiduciary duty would fail because of laches, it could not be said that at the date of the hearing the court could find that the plaintiffs were being oppressed.

As I said, in *Campbell v Backoffice Investments Pty Ltd*, and the High Court affirmed an appeal in (Campbell v Backoffice Investments), the thrust of the oppression remedy is to remedy oppression that exists at the date of the hearing.

This is because the purpose of the legislation is to release a person from having his or her capital locked up in a corporate enterprise under unfair conditions. The section is not there to compensate the legal or equitable wrongs done to the plaintiff.

That is however, irrelevant in the instant case as oppression was conceded.

I thus have difficulty in seeing how laches can be a real issue in the case.

In Re Gold Co is authority for the proposition that a delay may lead to dismissal of a suit to wind up a company on the just and equitable ground. However, F H Callaway, in his *Winding Up on the Just and Equitable Ground* (Law Book Co, Sydney, 1978) notes that there is no reported case delay ever leading to dismissal of a petition.

However, as the issue was raised and, in the light of what is relevant on a just and equitable winding up, and further the fact that both sets of counsel made submissions on the basis that laches was relevant, I must deal with the argument.

The elements of the defence of laches are: (i) knowledge of the wrong; (ii) delay; and (iii) unconscionable prejudice caused to the opponent by the delay.

The key element is whether, in all the circumstances, "it would be practically unjust to give a remedy": per Lord Selborne LC in *Lindsay Petroleum Co v Hurd*. Normally, that means that the defendant must show both delay and detriment suffered by the delay, *Fisher v Brooker*, per Lord Neuberger with whom Lord Hope, Lord Walker, Baroness Hale and Lord Mance agreed..

It is sometimes said that the essential nature of the defence is that the claim of the plaintiff is released in equity. This is often, but not always the case. Sometimes laches operates as an estoppel, see *Fisher v Ashburner's Principles of Equity* 2nd ed (Butterworth & Co, London, 1933) p 520. The result of a successful plea of laches is that the plaintiff's equitable claim is dismissed.

In the instant case, the primary judge found all three elements in favour of the appellants. The second and third elements were clearly matters of fact and the first may also be. However, the first element throws up the question, "What degree of knowledge of the wrongdoing must a plaintiff have before he or she may be guilty of laches?"

There is no doubt on the findings of the primary judge that as at July 1997 the respondents had some awareness that Mr Crawley had done some secret deal with the Davis interests. There is also little doubt that the full extent of Mr Crawley's machinations were not known to the respondents until about 2004.

The authorities give little guidance on the extent of the knowledge required. One of the leading statements is in Lord Blackburn's speech in *Erlanger v New Sombrero Phosphate Co* that the plaintiff must be shown to have "such notice or knowledge as to make it inequitable to lie by". That statement was approved by this court in *Savage v Lunn*. Lord Blackburn acknowledged that his statement was very general, but said that he had "looked in vain" for any more distinct rule.

That general statement does not, of itself, assist in fixing the degree of knowledge required, but points to it being a question of fact and degree in each case to be taken together with all the other facts of the particular case.

Indeed, in most of the treatments of laches, the element of knowledge was clear, many cases involve a person who signed away her rights under improper pressure. Apart from an indication in an unreported decision of Hodgson J in *Wright v Union Fidelity Trustee Co of Aust Ltd* and this court's remarks in *Savage* that a plaintiff must have knowledge of the facts as well as his or her rights, I have found no assistance in the authorities on this point.

When the equity sought is rectification, the cases digested in *Pomeroy's Equity Jurisprudence 5th ed (1941)* indicate that if there is no reason for the plaintiff to have looked for a mistake, the fact that the document on the face of it contains an error is insufficient to bar a claim by reason of laches.

In *Orr v Ford*, the majority of the High Court were looking to see if the plaintiff's inactivity in the face of knowing that the opponent wrongly held a particular belief amounted to a release of a claim in equity. The majority held, "No": however, Mason CJ and Deane J dissented, the latter delivering what has been held to be the leading analysis of the principles of laches.

Deane J said that in any case where laches is raised, one must identify with precision the substantive nature of the claim to which laches is said to constitute a defence.

As Deane J said, there was no debate about the degree of knowledge in *Orr* thus that case is not of direct assistance here, save that it tells us to focus on the claim of relief against oppression or, perhaps, breach of fiduciary duty.

The authorities show that in considering the defence of laches, all three elements must be taken together and the ultimate question asked as to whether, in all the circumstances, the plaintiff has impliedly, in equity, released the defendant from his or her claim or has so acted as to make it unfair that the claim should now succeed.

In cases of equities to set aside invalid allotments of shares, a very strict line is taken with respect to the delay factor; see for example *Haas Timber & Trading Co Pty Ltd v Wade* and *Ansett v Butler Air Transport Ltd (No 1)*.

There been a series of cases where former partners in a mining partnership had acted unconscionably, but action was not taken until after the former partners had, at great expense, made the mine prosperous. Examples are *Senhouse v Christian; Norway v Rowe* and *Hart v Clarke*. Such claims were barred by laches. This was even the result where the mine did not require large sums to be spent on it, but the plaintiffs had protested for many years but took no action, *Clegg v Edmondson*. Such cases are factually close to the

present.

> The philosophy considered in those cases has been applied in modern times; see egg *Fysh v Page* and *Baburin v Baburin (No 2).*
>
> In other cases, where there was no volatile commercial property involved, equity has been more tolerant of delay, with the classic being *Hatch v Hatch* where 20 years' delay with respect to a grant of an advowson was excused.
>
> Thus the degree of knowledge, the type of transaction and the prejudice to the defendant caused by the delay are all matters which need to be evaluated when assessing whether the defence of laches has been made out and it is an unrewarding task to search for some formula as to just what degree of knowledge must exist in any particular case.[19]

111 Taking into account all the circumstances as Young JA suggested I must, I should weigh up the delay against the potential damage to Peninsula Kingswood and third parties. 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.[20]

112 In my opinion, another relevant matter to take into account is that the majority of the members at Kingswood who voted at the general meeting voted to approve the merger. This is relevant, as the third parties who would be adversely affected by any order to undo to 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.

Conclusion

113 If I am wrong as to the application of laches and acquiescence or delay to the statutory oppression claim, then in any event, in my discretion under s 233 of the Act, I would not make orders undoing the merger as sought by the plaintiff. I have to balance the harm done to the members of the company as it now stands with the plaintiff's entitlement to relief. There is no doubt that laches applies as a defence to

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19 Ibid, [156]-[180] (citations omitted).

20 Adapting the words in *Lindsay Petroleum* quoted above.

the equitable claim to invalidate the decision of the company to admit new members from the Peninsula Golf Club.

114 In the circumstances where the clubs have been merged for almost a year, I consider the relief sought by the plaintiff to be unwarranted, bearing in mind the inconvenience and prejudice that would be caused to the members of the Peninsula Kingswood Club today.

115 Another factor that I take into account is that the group supporting Mr Falkingham appears to be only a handful of members out of some now two thousand plus members of Peninsula Kingswood. I expect that if the admission of the new members was set aside, that the board would probably be able to affect the merger again.

116 For these reasons, I dismiss the plaintiff's application.

CERTIFICATE

I certify that this and the 28 preceding pages are a true copy of the reasons for Judgment of Robson J of the Supreme Court of Victoria delivered on 3 September 2014.

DATED this third day of September 2014.

Associate

SUPREME COURT OF VICTORIA
Associate of a Judge of the Court