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:	25 September 2014
CASE MAY BE CITED AS:	Re Peninsula Kingswood Country Golf Club (No 2)
MEDIUM NEUTRAL CITATION:	[2014] VSC 483

COSTS – Proportion of costs – Plaintiff successful on claims but defendant successful on defence based on laches, acquiescence and delay – Whether costs should take into account success on separate issues - Ordered that there be no order as to costs.

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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HIS HONOUR:

1 The facts relating to this litigation are set out in my judgment *Re Peninsula Kingswood Country Golf Club.*[1]

2 The trial of the proceeding was heard on 1 and 2 September 2014. Earlier, on Friday 22 August 2014, the plaintiff applied for interlocutory relief. The defendant gave an undertaking not to sell, dispose, transfer or demise or lease any part of the golf course at Dingley until 4.00 pm on Tuesday 26 August 2014 and the application was adjourned for hearing to 26 August 2014.

3 On Tuesday 26 August 2014, the interlocutory injunction application came on for hearing and the matter was resolved by the trial of the proceeding being fixed for the following Monday, 1 September 2014. The defendant continued its undertaking set out above until 4.00 pm on 2 September 2014, or further order.

4 The trial raised two major issues. First, whether the defendant had engaged in oppressive conduct towards the plaintiff in effecting the merger of the two clubs; and secondly, whether the board of the defendant had exercised its powers to admit new members under the constitution of the Kingswood Golf Club Ltd for an improper purpose, that being to effect the merger, in breach of their fiduciary duty.

5 The defendant denied these allegations. The defendant also relied upon the defence of laches, acquiescence and delay in the plaintiff bringing the proceeding.

6 The issue of delay had earlier been raised by the court on 26 August 2014 in discussion between the Court and counsel for the plaintiff.[2] The plaintiff made submissions on delay[3] and submitted that the plaintiff only became aware of the sale of the Dingley land in May 2014 when the plaintiff observed the advertisement for

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1 [2014] VSC 437.

2 Transcript 26 August 2014, page 16, line 13.

3 Transcript 26 August 2014, pages 16 to 18.

the sale of the golf course.

7 The defendant raised the issue of delay and laches in resisting the application for interlocutory injunction in its written submissions dated 26 August 2014.[4] Attachment A of those submissions also contained a chronology of events relevant to the defence of laches.

8 On the first day of the trial on 1 September 2014, senior counsel for the defendant made clear, in his cross-examination of Mr Falkingham, that the defendant was pursuing a defence of laches, acquiescence and delay to his claims.[5]

9 During the cross-examination of Mr Falkingham on 1 September 2014, senior counsel for the plaintiff objected to questions going to the issue of delay. Senior counsel submitted they were irrelevant.

10 Senior counsel for the plaintiff submitted in support of the objection that it was not their understanding that laches was a defence to s 232 of the *Corporations Act*. Senior counsel said "So it is not clear to me as a matter of legal principle how this is being put. Laches might be a defence to an interlocutory injunction but we've passed that stage now".[6]

11 During discussion on the objection, I said that the submissions on the interlocutory injunction raised laches and acquiescence and said that "I assumed that would be the case", meaning that the defence of laches, acquiescence and delay would continue to be raised in the trial by the defendants. I then said as follows "I don't want to say too much but he [referring to senior counsel for the defendant] seems to be investigating factors relating to what he alleges is undue delay."[7]

12 I therefore permitted the question that was objected to on the ground of relevance.

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4 See paragraphs 6(d), 19, and 20.

5 Transcript 1 September 2014 page 14, line 5.

6 Transcript 1 September 2014 page 16, lines 16 to 23.

7 Transcript 1 September 2014 page 17, lines 8 to 14.

At this point, there should have been no doubt that laches, acquiescence and delay were being raised as a defence to the plaintiff's claims.

13 Subsequently, in the submissions of senior counsel for the defendant, the defendant relied upon *Crawley v Short*[8] as authority for the proposition that laches, acquiescence and delay may be relied upon as a defence in an oppression proceeding under the *Corporations Act 2001* (Cth).

14 At the trial on 2 September 2014, the defendant filed closing submissions[9] that made further submissions on laches, acquiescence and delay.[10]

15 I have mentioned the issue of when laches, acquiescence and delay was raised as the plaintiff submits that by the defendant failing to provide any advance warning that the defendant intended to rely on a defence of laches to the oppression claim (as distinct from the injunction), the defendant engaged in conduct which prejudiced the plaintiff's position at trial and ultimately put him to unnecessary litigation and expense.

16 As indicated above, it was made clear from the beginning of the trial on the morning of the first day (if there was any doubt about the matter) that laches, acquiescence and delay was being relied on by the defendant.

17 At the conclusion of the trial, the defendant sought an order for costs against the plaintiff. This order was resisted by the plaintiff. I reserved my decision on costs and gave leave to each of the parties to file written submissions on costs by 4.00 pm on 12 September 2014.

18 The plaintiff and the defendant both filed written submissions on 12 September 2014. The plaintiff also forwarded to the Court a supplementary submission on costs on 13 September 2014 for reasons that will become apparent below.

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8 (2009) 262 ALR 654.

9 Exhibit MFI D 14.

10 Paragraphs [32]-[35].

19 During the trial, the cross-examination of Mr Falkingham was essentially directed to issues related to delay in Mr Falkingham instituting the proceeding. However, the main thrust of the hearing and the submissions were directed to whether or not the plaintiff had made out its claim.

20 In *GT Corporation Pty Ltd v Amare Safety Pty Ltd (No 3)*,[11] I dealt with an application by the losing party that it should be awarded costs on several issues advanced by the plaintiff on which the plaintiff had failed. As it was, I ordered that the defendant should only bear a proportion of the successful plaintiff's costs.

21 In that judgment I summarised the relevant principles on awarding or allowing for costs on separate issues, as follows:

> 1. The award of costs is in the discretion of the Court or Judge: s 24 *Supreme Court Act 1986*.
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> 2. The discretion must be exercised judicially: *Donald Campbell & Co v Pollak* [1927] AC 732; *Cretazzo v Lombardi* (1975) 13 SASR 4.
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> 3. The discretion cannot be exercised arbitrarily or capriciously and it cannot be exercised on grounds unconnected with the litigation: *Cretazzo v Lombardi* [1975] 13 SASR 4; or the circumstances leading up to the litigation: *Oshlack v Richmond City Council* [1998] HCA 11; (1998) 193 CLR 72 per McHugh J at 97.
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> 4. Costs are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings. The order is not made to punish the unsuccessful party: *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534 per Mason CJ at 543, per Toohey J at 562 – 563, per McHugh J at 566 – 567.
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> 5. As a general rule, costs should follow the event, and a successful party should obtain all of the costs of the action even though it failed to establish some of the alternative heads of its claim: *Ritter v Godfrey* (1920) 2 KB 47; *McFadzean v CFMBEU* [2007] VSCA 289.
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> 6. Rule 63.04(1) permits the court, in its discretion, to make an order not only as to a distinct question or issue in the pleading sense, but also to any part of the proceeding: *Woolf v Burmon* (1939) 13 ALJR 431 (HC); *Cretazzo v Lombardi* (1975) 13 SASR 4 at 12
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> 7. The court may, in its discretion, decline to order costs in favour of a successful party, or may order the successful party to pay the costs of the unsuccessful party, where the plaintiff failed to establish discrete

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11 [2008] VSC 296.

heads of claim or failed to establish issues which it pursued in its claim, although ultimately succeeding on the basis of another discrete head of claim: *McFadzean v CFMBEU* [2007] VSCA 289.

8. It is not necessary that the issue concerned was raised unreasonably by the party: *Rosniak v GIO* (1997) 41 NSWLR 608. Although, a relevant consideration may include whether the issue was raised unreasonably: *Mickelberg v Western Australia* [2007] WASC 140 (S) per Newnes J at [43]–[46].

9. The court may, in its discretion, make an order that is a single order, fixing what proportion of a party's costs should be paid by another party, thus obviating cross-orders or particular orders as to particular costs: *Byrns v Davie* [1991] VicRp 93; (1991) 2 VR 568 per Gobbo J at 571; *McFadzean v CFMBEU* [2007] VSCA 289 at [153] [158]; *Nolan v Nolan* [2004] VSCA 134 [6].

10. The caveat referred to by Jacobs J in *Cretazzo v Lombardi* (1975) 13 SASR 4 may have less weight today than when it was decided: *Primcom Pty Ltd v Sqarioto* (Unreported, SCV, Eames J, 24 April 1995); *Mickelberg v Western Australia* [2007] WASC 140 (S) at [30] – [35]; and *Victoria v Master Builders Association of Victoria* (Unreported, SCV CA, 15 December 1994, BC 9408430).

11. Although the quantum of damages recovered compared to that claimed may be a relevant consideration to the court in exercising its discretion, greater emphasis should be given to the failure or loss on discrete claims or issue and the time occupied in relation to them.

22 Applying these principles (which have been accepted by the defendant), in my opinion, the plaintiff succeeded on the main issue that took up most of the time of the hearing. The defendant, however, succeeded on its defence of laches, acquiescence and delay and thus the plaintiff's claim was dismissed.

23 In my opinion, it is appropriate, in the exercise of my discretionary powers, to allow for costs incurred on discrete issues in the trial. I also consider it appropriate, in the current circumstances, to make a single order rather than to seek to award a proportion of costs to each party.

24 Before making that determination it is necessary to mention a further submission that was made by the defendant in its written submissions relating to costs. The defendant has included in its written submissions a claim that:

(a) The defendant's costs of and incidental to the proceeding be paid on a joint and several basis by the plaintiff and Mr Pranesh Lal.

(b) The defendant be granted a charge over the trust account established by Mr Pranesh Lal of Lyttleton's Lawyers for the purposes of funding the proceeding so as to secure its entitlement to costs.

25 Without going through the full extent of the defendant's submissions, I can summarise them by saying that the evidence disclosed that Mr Lal, the solicitor for the plaintiff, had a personal interest in stopping the sale of the Dingley land as his residence backs onto the golf club. There was also evidence that before these proceedings were commenced he was lobbying for the community to oppose the subdivision and sale of the golf club land. Further, the evidence established that Mr Falkingham was supported by a group that were known as the Save Kingswood Group. The evidence also established that the Save Kingswood Group had raised monies which were in a trust account kept by Mr Lal which were used to fund the proceeding.

26 As it is, I do not have to consider this application as I have decided in my discretion that there should be no order as to costs of the proceedings including reserved costs. The matters relied on by the defendant in seeking orders against the trust fund or Mr Lal would not alter my decision not to order costs to either party.

27 In making that decision, I take into account (as discussed above) the fact that the defendant succeeded in resisting the plaintiff's claims but I have also taken into account that the bulk of the time in the proceeding was spent on the issue upon which the plaintiff succeeded.

28 If I am wrong in that decision, then I would not, in any event, entertain the submission of the defendant for an order for costs as against the trust fund or against Mr Lal as such an application has been made without formal notice being given of it to Mr Lal or to the persons interested in the fund.

29 In my view, any such application should be on notice and properly pursued in accordance with the Rules rather than contained in a submission in support of different orders that were sought at the trial.